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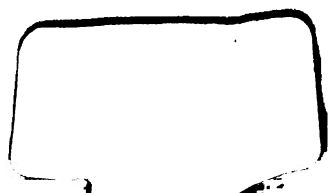
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# NEGLIGENCE

## RULES—DECISIONS—OPINIONS

SECOND EDITION

BY  
EDWARD B. THOMAS  
UNITED STATES JUDGE

IN TWO VOLUMES

VOL. I

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ALBANY, N. Y.

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## PREFACE.

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THIS work had come into such common use that it became a duty to continue its availability by bringing in serviceable matter to the date of its reprinting. In connection with this labor a careful review of decisions has been had, omissions of an important nature supplied, and pertinent statutory changes or additions have been noted. While the original system so well approved by the profession has been continued, some rearrangement and additional subdivision of material has been made for purposes of greater convenience. This will be specially observed in the case of "Master and Servant" and "Municipality." The new work has been done under my supervision, by Mr. Berkeley C. Austin, of New York, who by legal capacity, and several years of experience in connection with other publications, has unusual equipment for the service. He has been aided by Mr. Shelley F. Austin, who has been fitted for such association by participation in similar labors. The result illustrates their fidelity and painstaking. The object sought is to keep in the hands of the profession a work that will furnish immediate and ready resource for those interested in the subject.

EDWARD B. THOMAS.

BROOKLYN, *January 18, 1904.*





# TABLE OF CASES.

[Figures in parenthesis denote page on which case is cited; figures in the right hand column denote page on which case is digested.]

	PAGE
A. G. &c. R. Co. v. Jones, 71 Ala. 487.....	797
A. T. &c. R. Co. v. Shaft, Kan. 527.... (1042)	
A. & P. Tel. Co. v. W. U. T. Co., 4 Daly, 527.....	2395
Abb. v. Northern P. R. Co., 28 Wash. 428.....	2208
Abbett v. Chicago &c. R. Co., 30 Minn. 482.... (761)	
Abel v. Fitch, 20 Conn. 90.....	1166
Abel v. Prest. &c. D. & H. Canal Co., 103 N. Y. 581.....	1403, 1522
Abel v. Prest. &c. D. & H. C. Co., 128 N. Y. 662.....	1195, 1527
Aben v. Ecorse, 113 Mich. 9.....	1837
Abend v. Terre Haute &c. R. Co., 111 Ill. 202.... (689).....	1618, 1728
Albernethy v. Van Buren, 52 Mich. 383.... (2230).....	2359
Abilene v. Wright, 4 Kan. App. 708.... (959)	
Abbott v. Delaware &c. R. Co., 65 N. J. L. 310.....	429
Abbott v. J., G. & K. H. R. Co., 80 N. Y. 27.....	1334
Abbott v. Johnstown &c. H. R. Co., 80 N. Y. 27.....	1335
Abbott v. Mayfield, 8 Kan. App. 387.....	2193
Abbott v. McCadden, 81 Wis. 563.....	1554
Abbott v. Mobile, 119 Ala. 595.....	1869
Abbott v. Tolliver, 71 Wis. 64.....	897
Abraham v. Reynolds, 5 Hurl. & Norm. 142.....	1601
Abrahams v. Los Angeles T. Co., 124 Cal. 411.....	2332
Abram v. Gulf &c. R. Co., 83 Tex. 61.....	557
Abrams v. City of Waycross, 114 Ga. 712.....	2056
Abrams v. Seattle &c. R. Co., 27 Wash. 507.....	1254
Abramowitz v. Citizens' Sav. Bank, 17 Misc. 297.....	163
Achtenhagen v. Watertown, 18 Wis. 331.... (701)	
Ackley v. Kellogg, 8 Cow. 223.... (345)	
Ackerly v. Sullivan, 34 La. Ann. 1156.....	1110
Ackenhausen v. People's Sav. Bank, 110 Mich. 175.....	165, 167
Ackerman v. Emott, 4 Barb. 626.... (48)	
Ackerman v. True, 71 App. Div. 143.....	1082
Ackerstadt v. Chicago &c. R. Co., 194 Ill. 616.....	452
Ackert v. Lansing, 59 N. Y. 646.... (635).....	2116, 2122
Acme Coal Co. v. Kusner, 71 Ill. App. 446.....	1215
Adams v. Atchison &c. R. Co., 46 Kas. 161.....	1048
Adams v. Carlisle, 21 Pickering, 46.... (1104)	
Adams v. Clem, 41 Ga. 67.... (154).....	148, 155
Adams v. Clymer, 1 Marv. (Del.) 80.....	1502, 1750
Adams v. Hall, 2 Vt. 9.... (997)	
Adams v. Iron Cliffs Co., 78 Mich. 271.... (1473).....	1626, 1661
Adams v. McCormick Harvesting Mach. Co., (Mo. App.) 68 S. W. Rep. 1053.....	1683
Adams v. Modesto, 131 Cal. 501.....	1964, 2013
Adams v. Modesto, (Cal.) 61 Pac. Rep. 957.....	2010, 2013
Adams v. Nassau Electric R. Co., 41 App. Div. 334.....	2302
Adams v. Natick, 13 Allen, 429.....	1956
Adams v. New Jersey Steamboat Co., 151 N. Y. 163.....	608, 613
Adams v. Northern P. R. Co., 95 id. 938.....	267
Adams v. Rouzer, 62 Md. 264.....	31
Adams v. Snow, (Wis.) 81 N. W. Rep. 983.....	1623

Adams v. Swift, 172 Mass. 521.....	
Adams v. Washington &c. R. Co., 9 App. D. C. 26.....	508, 681, 7
Adams v. Wilmington Street R. Co., (Del.) 52 Atl. Rep. 264 (837, 1117, 22273) .....	
Adams v. Weisberger, (Neb.) 87 N. W. Rep. 16.....	
Adams Exp. Co. v. Carnahan, (Ind. App.) 63 N. E. Rep. 245.....	
Adams Exp. Co. v. Harris, 120 Ind. 73.....	
Adams Exp. Co. v. Haynes, 42 Ill. 89.....	245, 2
Adams Exp. Co. v. Noch, 2 Duval, 563.... (288)	
Adams Exp. Co. v. Schofield, (Ky.) 64 S. W. Rep. 903.....	
Adams Hotel Co. v. Cobb, (Ind. Terr.) 53 S. W. Rep. 478.....	
Adair v. Brimmer, 74 N. Y. 541.....	
Adair v. Brimmer, 74 N. Y. 566.... (63)	
Adair v. Southern &c. Ins. Co., 107 Ga. 297.....	
Adasken v. Gilbert, 165 Mass. 443.... (1424).....	1785
Addicks v. Christoph, 62 N. J. L. 786.... (1505, 1634).....	
Addington v. Canfield, (Okl.) 66 Pac. Rep. 355.....	991
Adkins v. Monmouth, (Or.) 68 Pac. Rep. 737.....	
Adler v. Corning & Co., 26 Pitts. L. J. (N. S.) 244.....	
Adler v. Pittsburg &c. R. Co., 29 Pitts. L. J. (N. S.) 409.....	
Adolph v. Railway Co., 76 N. Y. 530.....	
Adolph v. The Central Park &c. R. Co., 65 N. Y. 554.....	2270, 2349.
Adsit v. Brady, 4 Hill, 630.....	7
Ætna &c. Co. v. Deming, 123 Ind. 384.....	
Ætna Mills v. Lowell, 11 Gray, 345.....	
Afflick v. Bates, 21 R. I. 281.....	2137,
Agawam Nat. Bank v. Downing, 169 Mass. 297.....	
Agnew v. Supple, 80 Ill. App. 437.....	
Agricultural & M. Ass'n v. State, 71 Md. 86.....	
Agulino v. New York &c. R. Co., 21 R. I. 263.....	493,
Ahearn v. Kings County, 89 Hun, 148.....	
Ahern v. Steele, 115 N. Y. 203, 247.... (89, 1316, 1317, 1318).....	
Ahlhauser v. Butler, 57 Fed. Rep. 121.....	2
Ahlstrand v. Bishop, 88 Ill. App. 424.....	
Aicher v. Denver, 10 Colo. App. 413.....	1
Aiello v. Aaron, 33 Misc. 580.....	
Aiken v. Frankford &c. R. Co., 142 Pa. St. 47.....	
Aiken v. Penn. &c. R. Co., 130 Pa. St. 38.....	
Aiken v. Philadelphia, 9 Pa. Super. Ct. 541.... (1819).....	11
Aiken v. Holyoke Street R. Co., 180 Mass. 8.....	23
Aiken v. R. R. Co., 130 Pa. St. 380.... (687) .....	
Aiken v. Wabash R. Co., 80 Mo. App. 8.....	264, 3
Aikin v. W. U. T. Co., 69 Iowa, 31.... (2392, 2397, 2398, 2399, 2412).....	24
Ainley v. M. R. Co., 47 Hun, 206.....	435, 8
Ainsworth v. Backus, 5 Hun, 414.....	13
Ainsworth v. Larkin, 180 Mass. 397.....	20
Airey v. Pullman &c. Co., 50 La. Ann. 648.....	600, 9
Akers v. New York, 14 Misc. 524.....	1850, 194
Akersloot v. Second Ave. R. Co., 131 N. Y. 599.....	46
Akeson v. Chicago &c. R. Co., 106 Iowa, 54.....	179
Akins v. Georgia &c. R. Co., 111 Ga. 815.....	113
Akridge v. Noble, 114 Ga. 949.....	218
Akron Waterworks Co. v. Brownless, 10 Oh. C. C. 620.....	185
Alabama M. R. Co. v. Marcus, 115 Ala. 389.....	1414, 175
Alabama Midland R. Co. v. Horn, (Ala.) 31 South Rep. 481.....	435
Alabama Midland R. Co. v. McDonald, 112 Ala. 216.....	1732
Alabama Midland R. Co. v. McGill, 121 Ala. 230.....	1023
Alabama Mineral R. Co. v. Jones, 114 Ala. 519.....	872, 1714
Alabama Min. R. Co. v. Jones, 121 Ala. 113.....	1442
Alabama R. Co. v. Arnold, 80 Ala. 600.....	900, 1241
Alabama R. Co. v. Hoffman, 76 Ala. 192.....	2138
Alabama &c. R. Co. v. Anderson, 109 Ala. 299.....	798, 810
Alabama &c. R. Co. v. Arnold, 84 Ala. 159.....	900

## TABLE OF CASES.

vii

	PAGE
Alabama &c. R. Co. v. Barrett, 78 Miss. 432.....	1268
Alabama &c. R. Co. v. Boyd, 124 Ala. 525.....	1092
Alabama &c. R. Co. v. Brichetto, 72 Miss. 891.....	214, 219
Alabama &c. R. Co. v. Burgess, 114 Ala. 587.....	2144
Alabama &c. R. Co. v. Burgess, 116 Ala. 509.....	661, 717, 900, 2137, 2153
Alabama &c. R. Co. v. Chapman, 80 Ala. 615.... (662)	
Alabama &c. R. Co. v. Carroll, 84 Fed. Rep. 772.....	1474, 1729
Alabama &c. R. Co. v. Carter, 77 Miss. 511.....	2155
Alabama &c. R. Co. v. Coggins, 88 Fed. Rep. 455.....	387, 454
Alabama &c. R. Co. v. Crocker, 131 Ala. 584.....	2133
Alabama &c. R. Co. v. Davis, 119 Ala. 572.....	1737
Alabama &c. R. Co. v. Drummond, 73 Miss. 813.....	593
Alabama &c. R. Co. v. Frazier, 93 Ala. 45.....	900
Alabama &c. R. Co. v. Grabfelder, 83 Ala. 200.....	329
Alabama &c. R. Co. v. Hawk, 72 Ala. 112.... (580)	504
Alabama &c. R. Co. v. Hill, 90 Ala. 71.....	2033, 2036
Alabama &c. R. Co. v. Little, 71 Ala. 611.....	243
Alabama &c. R. Co. v. Lowe, 73 Miss. 203.....	772
Alabama &c. R. Co. v. McAlpin, 71 Ala. 545.... (1013)	
Alabama &c. R. Co. v. McAlpine, 75 Ala. 113.....	1015
Alabama &c. R. Co. v. Mt. Vernon Co., 84 Ala. 173.... (352)	
Alabama &c. R. Co. v. Marcus, 128 Ala. 355.....	2048
Alabama &c. R. Co. v. Martin, 14 South Rep. (Ala.) 401.... (654)	
Alabama &c. R. Co. v. Moorer, 116 Ala. 642.....	663, 2110, 2111, 2142, 2144
Alabama &c. R. Co. v. Powers, 71 Ala. 487.... (1013)	
Alabama &c. R. Co. v. Purnell, 69 Miss. 652.....	902
Alabama &c. R. Co. v. Richie, 111 Ala. 297.....	1706
Alabama &c. R. Co. v. Roach, 116 Ala. 360.....	1713
Alabama &c. R. Co. v. Rouch, 110 Ala. 266.....	1674, 1735
Alabama &c. R. Co. v. Sellers, 93 Ala. 9.....	576, 900
Alabama &c. R. Co. v. Shahan, 116 Ala. 302.....	2047
Alabama &c. R. Co. v. Siniard, 123 Ala. 557.....	859, 1094
Alabama &c. R. Co. v. Stacy, 68 Miss. 463.....	428
Alabama &c. R. Co. v. Thomas, 83 Ala. 343.....	243, 352
Alabama &c. R. Co. v. Varbrough, 83 Ala. 238.....	10
Alabama &c. R. Co. v. Williams, 78 Miss. 209.....	952
Alabaster Co. v. Lonergan, 90 Ill. App. 353.....	1159, 1479, 1675
Alamango v. Supervisors of Albany Co., 25 Hun, 551.....	76, 82
Alaska &c. Min. Co. v. Muset, 114 Fed. Rep. 66.....	1453, 1646
Alaska &c. Min. Co. v. Whelan, 168 U. S. 86.....	1646
Albany v. Cunliff, 2 N. Y. 165.....	2001
Albany City Savings Bank v. Burdick, 87 N. Y. 40.... (1081)	
Albee v. Chap. Shoe Man. Co., 62 Hun, 223.....	2061, 2095
Albers v. W. U. Tel. Co., 98 Iowa, 51.....	2410
Albert v. Albany R. Co., 5 App. Div. 544.....	716
Albert v. Bleecker Street R. Co., 2 Daly, (N. Y.) 389.....	2361, 2363
Albert v. N. Y. C. & H. R. R. Co., 80 Hun, 152.....	1552
Albert v. State, 66 Md. 325.....	1318
Albert v. Sweet, 116 N. Y. 364.....	635
Alberti v. N. Y., L. E. & W. R. Co., 118 N. Y. 77.....	1180, 1226, 1236
Alberts v. Bache, 69 Hun, 255.....	908, 1517
Albion v. Hetrick, 90 Ind. 545.... (535)	730
Albion Lumber Co. v. De Nobra, 72 Fed. Rep. 739.....	417, 1101
Albrecht v. Chicago &c. R. Co., 108 Wis. 530.....	1580
Albro v. Agawam Canal Co., 6 Wash. 75.....	1601, 1750
Aldag v. Ott, (Ind. App.) 63 N. E. Rep. 480.....	1321
Alden v. N. Y. R. R. Co., 26 N. Y. 102.....	405
Aldrich v. B. & W. R. Co., 100 Mass. 31.....	23
Aldrich v. Gorham, 77 Me. 287.....	1924
Aldrich v. Tripp, 11 R. I. 141.....	1992
Aldrich v. Wright, 53 N. H. 398.... (989)	
Aldrich &c. Co. v. American Ex. Co., 117 Mich. 32.....	317
Aldrick v. Inhab. of Pelham, 1 Gray, 510.....	2257

	PAGE
Aldritt v. Gillette-Herzog Man. Co., 85 Minn. 206.....	651
Alexander v. Bates, 127 Ala. 328.....	55
Alexander v. Brady, 61 Oh. St. 174.....	1813, 1821
Alexander v. Brogley, 62 N. J. L. 584.....	628
Alexander v. Brogley, 63 N. J. L. 307.....	1084
Alexander v. Buckwalter, 8 Del. Co. Rep. (Pa.) 74.....	174
Alexander v. Green, 7 Hill, 544.... (238)	
Alexander v. Greene, 3 Hill, 9.... (201)	
Alexander v. Mandeville, 33 Ill. App. 589.....	647
Alexander v. Milwaukee, 16 Wis. 247.....	1960
Alexander v. Pennsylvania R. Co., 7 Pa. Super. Ct. 183.....	214
Alexander v. Pennsylvania Water Co., 201 Pa. St. 252.....	1416, 1449, 1746
Alexander v. R. C. & B. R. Co., 128 N. Y. 13.....	535
Alexander v. R. Co., 83 Ky. 590, 598.....	1532, 1733
Alexander v. Rhodes, 104 Ga. 807.....	1330
Alexander v. Sterling, 71 Ill. 366.....	1207
Alexander v. Vicksburg, 68 Miss. 564.....	1987
Alexandria v. Young, 20 Ind. App. 672.....	1178, 1920, 2048
Alexandria &c. Co. v. Irish, 6 Ind. App. 534.....	1143, 1383, 2054
Alford v. Barrett, 16 Wis. 175.....	88
Alger v. Easton, 119 Mass. 77.....	1990
Alger v. Lowell, 3 Allen, 402. e. (704).....	703, 1842, 1955
Alger v. R. Co., 10 Iowa, 268.....	1013, 1017
Allam v. Pennsylvania R. Co., 183 Pa. St. 174.....	252, 319, 322, 335
Allam v. Pennsylvania R. Co., 3 Super. Ct. (Pa.) 335.....	1126
Allan v. Pennsylvania R. Co., 3 Pa. Super. Ct. 335.... (1099)	
Allard v. Hildreth, 173 Mass. 26.....	1542
Allebrand v. Duquene, 11 Pa. Super. Ct. 218.....	1964, 2002
Alleghany v. McClarkan, 14 Pa. St. 83.... (355).....	354
Allegheny v. Zimmerman, 95 Pa. St. 287.....	2267
Allen v. Allen, 53 N. Y. Supp. 800.....	1836
Allen v. Ames &c. R. Co., 106 Iowa, 602.....	922
Allen v. Banks, 7 App. Div. 405.....	1107
Allen v. Barrett, 100 Iowa, 16.....	938
Allen v. B. &c. R. Co., 57 Iowa, 623.....	1437, 1691
Allen v. Boston, 169 Mass. 324.....	839
Allen v. Boston & M. R. Co., (N. H.) 39 Atl. Rep. 978.....	1585
Allen v. Boston &c. R. Co., 87 Me. 326.....	1004
Allen v. Boston &c. R. Co., 94 Me. 402.....	735
Allen v. Boston &c. R. Co., 69 N. H. 271.....	
Allen v. Central R. Co., 42 Iowa, 683.....	93
Allen v. Cook, 21 R. I. 525.....	1897
Allen v. Du Bois, 181 Pa. St. 184.....	2259
Allen v. East Buffalo, 22 Pa. Co. Ct. 346.....	1946
Allen v. Fourth National Bank, 59 N. Y. 12.....	1079
Allen v. Galveston &c. R. Co., 14 Tex. Civ. App. 344.....	1424, 1799
Allen v. Goodwin, 92 Tenn. 385.....	1671
Allen v. Hixson, 111 Ga. 460.....	1397
Allen v. Jakel, 115 Mich. 484.....	1505
Allen v. Lake Shore &c. R. Co., 57 Oh. St. 79.....	365
Allen v. London &c. R. Co., L. R., 6 Q. B. 65.....	33
Allen v. New York &c. R. Co., 92 Hun, 589.....	767
Allen v. Penn. R. Co., 11 Cent. (Pa.) 207.... (758)	
Allen v. P. & C. R. Co., 45 Md. 41.... (958)	
Allen v. Sackrider, 37 N. Y. 341.....	199, 201
Allen v. Sewell, 2 Wend. 338.... (389)	
Allen v. Somers, 73 Conn. 355.....	133
Allen v. Smith, 76 Me. 335.....	1333
Allen v. Smith Iron Co., 160 Mass. 557.....	1743
Allen v. State S. S. Co., 132 N. Y. 91.....	607, 2185
Allen v. Suydam, 17 Wend. 368.... (36)	35, 77
Allen v. United Traction Co., 67 App. Div. 363.....	408
Allen v. Voje, 114 Wis. 1.....	2192

## TABLE OF CASES.

ix

	PAGE
Allen v. Voje, (Wis.) 89 N. W. Rep. 924.....	919
Allen v. West Point Min. &c. Co., (Ala.) 31 South Rep. 462.....	71
Allen v. Williamsburgh Savings Bank, 69 N. Y. 314.....	156, 157, 158, 159
Allen v. Williamsburg Savings Bank, 2 Abb. N. C. 342.....	(104)
Allen v. Wilmington &c. R. Co., 119 N. C. 710.....	568
Allend v. Spokane Falls &c. R. Co., 21 Wash. 324.....	1491
Allender v. C., R. I. &c. R. Co., 43 Iowa, 276.....	564
Allender v. Chicago &c. R. Co., 37 Iowa, 264.....	(384)
Allenger v. McKeown, 30 Misc. 275.....	2046
Alley v. Golf &c. R. Co., (Tex. Civ. App.) 35 S. W. Rep. 735.....	568
Alliance v. Campbell, 3 Oh. Dec. 630.....	1861, 1870
Alliance v. Campbell, 6 Oh. C. D. 762.....	840
Allin v. Whitmore, 171 Mass. 259.....	1200
Alline v. LeMars, 1 Iowa, 654.....	700
Alling v. Boston &c. R. Co., 126 Mass. 121.....	(623)
Allison v. Corn Ex. Ins. Co., 57 N. Y. 87.....	1309
Allison v. Hobbs, 96 Me. 26.....	2029
Allison v. Powers, 179 Pa. St. 531.....	884
Allison v. Richmond, 51 Mo. App. 133.....	2006
Allison v. Southern R. Co., 129 N. C. 336.....	1510, 1659, 1747
Allison v. Village of Middletown, 101 N. Y. 667.....	1888
Allison Man. Co. v. McCormick, 118 Pa. St. 509, 519.....	1411, 1426
Allyn v. Boston &c. R. Co., 105 Mass. 77.....	(792) 729
Alpern v. Churchill, 53 Mich. 607.....	1144, 1263
Alperin v. Earle, 55 Hun, 211.....	1317, 1370
Alsever v. Minneapolis &c. R. Co., (Iowa) 88 N. W. Rep. 841.....	29, 1155
Altamont v. Carter, 97 Ill. App. 196.....	1876
Altee v. S. C. R. Co., 21 S. C. 550.....	1440
Altmeier v. Cincinnati Street R. Co., 4 Oh. N. P. 224.....	(399) 371, 712, 2279, 2286
Althoff v. Wolfe, 22 N. Y. 355.....	2, 339, 523, 938, 1088, 1397
Althouse v. Jamestown, 91 Wis. 46.....	1942, 2053
Alton v. English, 69 Ill. App. 197.....	2255
Alton v. Hope, 68 Ill. 167.....	1966
Alton v. Midland R. Co., 19 C. B. (U. S.) 213.....	372
Alton Paving &c. Co. v. Hudson, 176 Ill. 270.....	1594
Alton Paving &c. Co. v. Hudson, 74 Ill. App. 612.....	919, 1655, 1701
Alton R. &c. Co. v. Cox, 84 Ill. App. 202.....	11
Alton R. &c. Co. v. Foulds, 81 Ill. App. 322.....	1061, 2046
Altoona v. Lotz, 7 Atl. Rep. (Pa.) 240.....	698
Alvord v. Richmond, 3 Oh. N. P. 136.....	1986
Ambrose v. Angus, 61 Ill. App. 304.....	1406, 1629
American &c. Bank v. Gluck, 68 Minn. 129.....	192
American Brewing Asso. v. Talbot, 141 Mo. 674.....	108, 134
American Contract Co. v. Cross, 8 Bush. (Ky.) 472.....	(615)
American Cotton Co. v. Smith, (Tex. Civ. App.) 69 S. W. Rep. 443.....	1673
American Dredging Co. v. Walls, 84 Fed. Rep. 428.....	1559
American Exchange Nat. Bank v. New York Belting &c. Co., 148 N. Y. 698...	184
American Exchange Nat. Bank v. Ulm, 21 Mont. 440.....	192
American Express Co. v. Fletcher, 25 Ind. 492.....	2419
American Express Co. v. Haire, 21 Ind. 4.....	39
American Express Co. v. Schier, 55 Ill. 140.....	(278)
American Express Co. v. Second Nat. Bank, 69 Pa. St. 394.....	252
American Express Co. v. Spellman, 90 Ill. 455.....	(279)
American Grocery Co. v. Staten Island &c. R. Co., 23 Misc. 356.....	(240)
American Ins. Co. v. Ogden, 20 Wend. 287.....	1309
American Ins. Co. v. Ware, 65 Ark. 336.....	1311
American Merchants &c. Ex. Co. v. Phillips, 29 Mich. 515.....	225
American National Bank v. Georgia R. Co., 96 Ga. 665.....	357
American Nat. Bank v. Metropolitan Nat. Bank, 71 Mo. App. 451.....	40
American R. Tel. Co. v. Conn. Tel. Co., 44 Am. R. 237.....	2386
American Roofing Co. v. Memphis &c. Packet Co., 5 Oh. N. P. 146.....	319
American S. Co. v. Chase, 16 Wall. 522; 9 R. I. 419.....	968

	PAGE
American Steel &c. Co. v. Wire Drawers' &c. Unions, 90 Fed. Rep. 608	224
American Tel. Co. v. Daughtry, 89 Ala. 191	239
American Teleph. &c. Co. v. Bower, 20 Ind. App. 32	162
American Telegraph &c. Co. v. Jones, 78 Ill. App. 372	224
American Tin-Plate Co. v. Guy, 25 Ind. App. 588	95
American Tobacco Co. v. Strickling, 88 Md. 500	144
American Trust &c. Co. v. Austin, 25 Misc. 454	3
Ames v. Armstrong, 106 Mass. 18.... (63)	
Ames v. Belden, 17 Barb. 513	20
Ames v. Quigley, 75 Ill. App. 446	156
Amey v. Winchester, 68 N. H. 447	149, 15
Ammerman v. Coal, 187 Pa. St. 326	184
Amory v. Wabash R. Co., (Mich.) 90 N. W. Rep. 22	61
Amory Man. Co. v. Gulf &c. R. Co., 89 Tex. 419	25
Amos v. Mobile &c. R. Co., 63 Miss. 509	95
Anacostia &c. R. Co. v. Klein, 8 App. D. C. 75	47
Anchor Mill Co. v. Burlington &c. R. Co., 102 Iowa, 262	31
Anderburg v. Chicago &c. R. Co., 98 Ill. App. 207.... (1683)	149
Anderson v. Albion, (Neb.) 89 N. W. Rep. 794	181
Anderson v. Alton Nat. Bank, 59 Ill. App. 587	3
Anderson v. Atchison &c. R. Co., (Mo. App.) 67 S. W. Rep. 707	21
Anderson v. Berlin Mills Co., 88 Fed. Rep. 944	149
Anderson v. Boyer, 156 N. Y. 93	637, 139
Anderson v. Brooklyn &c. R. Co., 32 App. Div. 266	1101, 114
Anderson v. Buckton, 1 Stra. 192.... (1005)	
Anderson v. Cape Fear Steamboat Co., 64 N. C. 399.... (1251, 1259)	
Anderson v. Chicago &c. R. Co., 85 Minn. 337	209
Anderson &c. Co. v. Hair, (Ky.) 44 S. W. Rep. 658	212
Anderson v. Daly Min. Co., 16 Utah, 28.... (1424, 1506)	1218, 162
Anderson v. Detroit Citizens' Street R. Co., 116 Mich. 368	229
Anderson v. Dickie, 26 How. Pr. 105	2232, 223
Anderson v. East, 117 Ind. 126	185
Anderson v. Foreman, 1 Wright, (Ohio) 598.... (104)	11
Anderson v. Foster, 112 Ga. 270	202
Anderson v. Hayes, 101 Wis. 538.... (1343)	134
Anderson v. H. C. Ackley Co., 47 Minn. 128	157
Anderson v. Hopkins, 91 Fed. Rep. 77.... (2048)	210
Anderson v. Illinois Central R. Co., 109 Iowa, 524	175
Anderson v. Inland Teleg. &c. Co., 19 Wash. 575	106
Anderson v. Jersey City &c. Light Co., 63 N. J. L. 387	106
Anderson v. Jersey City Electric Light Co., 64 N. J. L. 664	700, 106
Anderson v. Man. R. Co., 1 Misc. 504	93
Anderson v. Metropolitan Street R. Co., 30 Misc. 104.... (659, 729)	2286, 231
Anderson v. Michigan C. R. Co., 107 Mich. 591	163
Anderson v. Miller, 96 Tenn. 35	89
Anderson v. Minnesota &c. R. Co., 39 Minn. 523	168
Anderson v. Nelson Lumber Co., 67 Minn. 79.... (1682, 1721)	180
Anderson v. Northern P. R. Co., 19 Wash. 340	701, 210
Anderson v. Oregon &c. R. Co., (Wash.) 68 Pac. Rep. 863	163
Anderson v. Roberts, 147 Mo. 486	8
Anderson v. Rodgers, 53 Kan. 542	3
Anderson v. St. Cloud, 79 Minn. 88	1833, 183
Anderson v. Smith, 7 Ill. App. 354	98
Anderson v. Standard Gaslight Co., 17 Misc. 625.... (1382)	138
Anderson v. Steinreich, 32 Misc. 680.... (1569)	1322, 139
Anderson v. Taft, 20 R. I. 362	112
Anderson v. Union &c. R. Co., 81 Mo. App. 116.... (712)	
Anderson v. Union &c. R. Co., 8 Colo. App. 521.... (1109)	216
Anderson v. Union Terminal R. Co., 2 Mo. App. Rep. 688	215
Anderson v. Union Traction Co., 7 Pa. Dist. 41	56
Anderson v. Walter, 34 Mich. 113	17
Anderson v. W. U. T. Co., 84 Tex. 17	2415, 242
Anderson v. Wilmington, 2 Penn. (Del.) 28	1920, 195



## TABLE OF CASES.

xi

	PAGE
Andre v. Winslow &c. El. Co., 117 Mich. 560.....	1667
Andrews Bros. v. Burns, 22 Oh. C. C. 437.....	1604
Andrews v. Capitol &c. R. Co., 2 Mackey, (D. C.) 137.... (580)	
Andrews v. Chicago &c. R. Co., 96 Wis. 348.....	1707, 1777
Andrews v. Hartford &c. R. Co., 34 Conn. 57.....	1369
Andrews v. Tamarack Min. Co., 114 Mich. 375.....	1560
Andrews v. Toledo &c. R. Co., 8 Oh. C. D. 584.....	1442
Andrist v. Union Pac. R. Co., 30 Fed. Rep. 354.....	511
Andrus v. Bradley, 102 Fed. Rep. 54.....	182, 1085
Angel v. Cunard St. Co., 55 Fed. Rep. 1005.....	256
Angell v. Lewis, 26 R. I. 391.....	2349
Angell v. West Bay City, 117 Mich. 685.....	2013
Angevine v. Knox-Goodrich, (Cal.) 31 Pac. Rep. 529.....	1355
Angle v. N. Y. Mutual Life Ins. Co., 92 U. S. 330.... (176)	
Angle v. R. Co., 9 Iowa, 487.... (337, 345)	
Angus v. Radin, 8 Am. Dec. 626.... (1005)	
Anna v. Boren, 77 Ill. App. 408.....	1862
Annapolis &c. R. Co. v. Gantt, 39 Md. 115.... (1256, 1258, 1268, 1269)	
Ann Arbor R. Co. v. Fox, 92 Fed. Rep. 494.....	1264
Ann Arbor R. Co. v. King, 12 Oh. C. D. 379.....	2134
Annas v. Milwaukee R. Co., 67 Wis. 46.....	258, 1181
Annett v. Foster, 1 Daly, 507.....	1399
Anniston &c. R. Co. v. Ledbetter, 92 Ala. 328.....	329
Anniston Transfer Co. v. Gurley, 107 Ala. 600.....	314
Anon v. Anon, 89 Ala. 291.....	2032
Ansell v. Waterhouse, 1 Chitty R. 1.... (209)	
Ansteth v. Buffalo R. Co., 9 Misc. 419.... (2151)	27
Anthony v. Adams, 1 Misc. 284.....	1990
Anthony v. Leeret, 105 N. Y. 591.... (1406, 1584)	1446, 1682
Anthony v. Louisville &c. R. Co., 27 Fed. Rep. 724.....	413
Antonio v. Borter, 24 Tex. Civ. App. 444.... (855)	
Appel v. Buffalo, N. Y. & P. R. Co., 111 N. Y. 560.....	1430, 1549, 1597
Appleby v. E. C. Savings Bank, 62 N. Y. 12.....	157
Appleby v. Percy, L. R. 9 Com. P. 647.... (983)	
Appleton v. Water Commissioners, 2 Hill, 432.....	80
Appleton v. Welch, 20 Misc. 343.....	92, 99
Apsey v. Detroit R. Co., 83 Mich. 432.... (706)	
Arboun v. Anderson, 1 Q. B. 498-504.... (184)	
Arcade Hotel Co. v. Wiatt, 44 Oh. St. 32.....	148
Archer v. Blalock, 97 Ga. 719.....	1343
Archer v. Johnson City, (Tenn.) 64 S. W. Rep. 474.....	1866
Archer v. Mt. Vernon, 57 App. Div. 32.....	1865, 1871
Archer v. N. Y., N. H. & H. R. Co., 106 N. Y. 589.....	534, 782, 1236, 1237
Archer v. Sinclair, 49 Miss. 343.... (134)	
Archer v. Terre Haute &c. R. Co., 102 Ill. 493.....	1335
Arctic Fire Insurance Co. v. Austin, 69 N. Y. 470.....	202
Arctic Ins. Co. v. Austin, 54 Barb. 559.... (202)	
Ardesco Oil Co. v. Gilson, 63 Pa. St. 146.....	1421, 1470, 1640
Arent v. Squire, 1 Daly, 347.... (109)	
Arizona Lumber Co. v. Mooney, (Ariz.) 42 Pac. Rep. 952.....	1405, 1447, 1502
Arizona &c. R. Co. v. Nevitt, (Ariz.) 68 Pac. Rep. 500.....	2161
Arkadelphia v. Windham, 49 Ark. 139.....	1960
Arkansas Const. Co. v. Eugene, 20 Tex. Civ. App. 601.....	905
Arkansas C. R. Co. v. Jackson, (Ark.) 67 S. W. Rep. 757.....	1597
Arkansas M. R. Co. v. Griffith, 63 Ark. 491.....	380, 1113
Arkansas R. P. Co. v. Hobbs, 105 Tenn. 29.....	1240
Arkansas &c. R. Co. v. Saunders, 69 Ark. 619.... (1020)	
Arkerson v. Dunnson, 117 Mass. 407.....	1424, 1456
Armando v. Armstrong, 37 App. Div. 160.....	1363
Armbright v. Zion, 108 Iowa, 338.....	682
Armbruster v. Auburn Gaslight Co., 18 App. Div. 447.....	1381
Armil v. Chicago &c. R. Co., 70 Iowa, 130.....	1146
Armour v. Czischki, 59 Ill. App. 17.....	934, 1447

Armour v. Greene County State Bank, 112 Fed. Rep. 631.....	
Armour v. Hahn, 111 U. S. 313.....	
Armour v. M. C. R. Co., 65 N. Y. 111.... (1082)	
Armour v. Michigan Central R. Co., 65 N. Y. 111.... (7)	
Armour v. Ryan, 61 Ill. App. 314.....	
Arms v. Ayer, 192 Ill. 601.....	
Arms v. Knoxville, 32 Ill. App. 604.....	
Armstrong v. Meadbury, 67 Mich. 250.....	
Armstrong v. Metropolitan Street R. Co., 36 App. Div. 525.....	
Armstrong v. Montgomery Street R. Co., 123 Ala. 233.....	
Armstrong v. N. Y. C. & H. R. R. Co., 66 Barb. 437.... (448)	
Arndt v. Cullman, 132 Ala. 540.....	
Arnold v. Eastman &c. Heater Co., 176 Mass. 135.....	121
Arnold v. Halenbake, 5 Wend. 33.....	
Arnold v. Ill. Cent. R. Co., 83 Ill. 273.... (245)	
Arnold v. Louisville &c. R. Co., (Ky.) 58 S. W. Rep. 370.....	
Arnold v. Norton, 25 Conn. 92.....	
Arnold v. Penn. R. Co., 115 Pa. St. 135.....	
Arnold v. Prest. &c. D. & H. Co., 125 N. Y. 15.....	
Arnold v. St. Louis, 152 Mo. 173.....	
Arnold v. Walton, (Ky.) 56 S. W. Rep. 17.....	
Aron v. Wausau, 98 Wis. 502.....	
Aronson v. Pennsylvania R. Co., 23 Misc. 666.....	329, 1099,
Arrowsmith v. Nashville &c. R. Co., 57 Fed. R. 165.....	
Arrowwood v. So. Carolina &c. R. Co., 126 N. C. 629.. 661, 797, 1207, 1239, 2148	
Artenbury v. Southern R. Co., 103 Tenn. 266.... (742)	
Arthur v. Charleston, 51 W. Va. 132.....	1871,
Arthur v. Cohoes, 55 Hun, 36.....	
Arthur v. Palatine Ins. Co., 35 Or. 27.....	
Arthur v. St. Paul &c. R. Co., 38 Minn. 95.....	
Arthur v. Village of Glens Falls, 66 Hun, 136.....	
Artz v. Chicago &c. R. Co., 34 Iowa, 153.....	
Artz v. Chicago &c. R. Co., 34 Iowa, 276.... (753)	
Artz v. Chicago &c. R. Co., 44 Iowa, 284.... (768)	
Artz v. Lit, 198 Pa. St. 519.....	
Arzaga v. Villalba, 85 Cal. 191.... (827)	
Asbestine Tiling Co. v. Hepp, 39 Fed. Rep. 324.....	2
Asbury v. Charlotte Electric R. &c. Co., 125 N. C. 568.....	475,
Ashborn v. Waterbury, 70 Conn. 551.....	1953, 2
Ashenfelter v. Employer's &c. Corp., 87 Fed. Rep. 682.....	1
Ashford v. Choop, 81 Mo. App. 539.....	2
Ashland Coal &c. Co. v. Wallace, 101 Ky. 626... 1404, 1407, 1566, 1678, 1706, 18	
Ashley v. City of Port Huron, 35 Mich. 295.....	14
Ashley v. Hart, 147 Mass. 573.....	1037, 16
Ashley Wire Co. v. McFadden, 66 Ill. App. 26.....	1206, 16
Ashley Wire Co. v. Mercier, 61 Ill. App. 485.....	16
Ashman v. Railroad Co., 90 Mich. 567.....	14
Ashmore v. Penn. Transf. Co., 4 Dutch. (N. J.) 180.....	251, 2
Ashtabula Rapid-Transit Co. v. Dagenbach, 11 Oh. C. D. 307.....	9
Aslen v. Charlotte, 35 App. Div. 625.....	916, 18
Assumption v. Campbell, 95 Ill. App. 521.....	20
Atchison v. Acheson, 9 Kan. App. 33.....	1235, 18
Atchison v. Atchison, 9 Kan. App. 248.....	120
Atchison County v. Sullivan, 7 Kan. App. 152.....	1834, 1835, 183
Atchison &c. R. Co. v. Aderhold, 58 Kan. 293.....	111
Atchison &c. R. Co. v. Alsdurf, 68 Ill. App. 149.... (1118, 1122)	
Atchison &c. R. Co. v. Ayres, 56 Kan. 176.... (1112)	
Atchison &c. R. Co. v. Bales, 16 Kan. 262.... (1268)	
Atchison &c. R. Co. v. Bartlett, 2 Kan. App. 167.....	102
Atchison &c. R. Co. v. Billings, 7 Kan. App. 399.....	84
Atchison &c. R. Co. v. Briggs, 2 Kan. App. 154.....	889
Atchison &c. R. Co. v. Brown, 26 Kan. 443.....	31, 549, 870
Atchison &c. R. Co. v. Bryan, (Tex. Civ. App.) 37 S. W. Rep. 235.....	275

# TABLE OF CASES.

xiii

	PAGE
Atchison &c. R. Co. v. Bump, 60 Ill. App. 444.....	380, 2165
Atchison &c. R. Co. v. Butler, 56 Kan. 433.....	1442
Atchison &c. R. Co. v. Cahill, 11 Colo. App. 245.....	1037, 1092, 1162
Atchison &c. R. Co. v. Carey, 58 Kan. 815.....	1420
Atchison &c. R. Co. v. Carter, 60 Kan. 65.....	1443
Atchison &c. R. Co. v. Chamberlain, 4 Okla. 542.....	904
Atchison &c. R. Co. v. Chance, 57 Kan. 40.....	838, 1219
Atchison &c. R. Co. v. Click, (Tex. Civ. App.) 32 S. W. Rep. 226.....	861, 915
Atchison &c. R. Co. v. Conlon, 9 Kan. App. 116.....	1021
Atchison &c. R. Co. v. Consolidated Cattle Co., 59 Kan. 111.....	1155
Atchison &c. R. Co. v. Cross, 58 Kan. 424.....	771, 797, 878
Atchison &c. R. Co. v. Cuniffe, (Tex. Civ. App.) 57 S. W. Rep. 692.....	350, 927
Atchison &c. R. Co. v. Cupello, 61 Ill. App. 432.....	1026
Atchison &c. R. Co. v. Dennis, 38 Kan. 424.....	1259
Atchison &c. R. Co. v. Dickerson, 4 Kan. App. 345.....	553, 592
Atchison &c. R. Co. v. Dill, 48 Kan. 321.....	247
Atchison &c. R. Co. v. Ditmars, 3 Kan. App. 459.....	224
Atchison &c. R. Co. v. Dwelle, 44 Kan. 394.... (552)	
Atchison &c. R. Co. v. Elder, 57 Kan. 312.....	1101
Atchison &c. R. Co. v. Hamilton, 6 Kan. App. 447.... (1257)	
Atchison &c. R. Co. v. Hardy, 94 Fed. Rep. 294.....	722, 771
Atchison &c. R. Co. v. Hays, 8 Kan. App. 545.... (1254)	
Atchison &c. R. Co. v. Henry, 55 Kan. 715.....	526
Atchison &c. R. Co. v. Henry, 57 Kan. 154.....	659, 818, 1747
Atchison &c. R. Co. v. Henry, 60 Kan. 322.....	818
Atchison &c. R. Co. v. Hill, 57 Kan. 139.... (1111)	
Atchison &c. R. Co. v. Holland, 60 Kan. 209.....	755
Atchison &c. R. Co. v. Holt, 29 Kan. 149.....	1466
Atchison &c. R. Co. v. Home Ins. Co., 59 Kan. 432.....	1308
Atchison &c. R. Co. v. Hoque, 50 Kan. 40.....	553, 935
Atchison &c. R. Co. v. Huitt, 1 Kan. App. 788.....	889, 1254, 1258
Atchison &c. R. Co. v. Ireton, 63 Kan. 888.... (1254)	
Atchison &c. R. Co. v. Johns, 36 Kan. 769.... (1178).....	384, 427
Atchison &c. R. Co. v. Johnson, 3 Okla. 41.....	421, 487, 516
Atchison &c. R. Co. v. Judah, 10 Kan. App. 577.....	951
Atchison &c. R. Co. v. Kingscott, 65 Kan. 131.... (1470, 1488)	
Atchison &c. R. Co. v. Lamoreux, 5 Kan. App. 813.... (901).....	581
Atchison &c. R. Co. v. Lannigan, 56 Kan. 109.... (1672).....	1580
Atchison &c. R. Co. v. Long, 5 Kan. App. 644.....	849
Atchison &c. R. Co. v. Lundley, 42 Kan. 714.....	374
Atchison &c. R. Co. v. McCandless, 33 Kan. 366.... (487, 504).....	1711
Atchison &c. R. Co. v. McFarland, 2 Kan. App. 662.....	1109, 2160
Atchison &c. R. Co. v. McGinnis, 46 Kan. 109.....	849
Atchison &c. R. Co. v. McKee, 37 Kan. 592.....	1405, 1620, 1632, 1639
Atchison &c. R. Co. v. Mason, 4 Kan. App. 391.....	283
Atchison &c. R. Co. v. Mendoza, 60 S. W. Rep. 327.... (2161).....	2138, 2141
Atchison &c. R. Co. v. Meyers, 76 Fed. Rep. 443.....	1499
Atchison &c. R. Co. v. Moore, 29 Kan. 452.... (1615, 1632).....	1614
Atchison &c. R. Co. v. Morrow, 4 Kan. App. 199.... (740)	
Atchison &c. R. Co. v. Neet, 7 Kan. App. 495.....	1300, 2029
Atchison &c. R. Co. v. Osborn, 58 Kan. 768.....	1162
Atchison &c. R. Co. v. Penfold, 57 Kan. 148.....	1473
Atchison &c. R. Co. v. Plunkett, 61 Kan. 297.... (1732).....	923, 1948
Atchison &c. R. Co. v. Powers, 58 Kan. 544.... (755)	
Atchison &c. R. Co. v. Reesman, 60 Fed. Rep. 370.....	1735
Atchison &c. R. Co. v. Roemer, 59 Ill. App. 93.....	817
Atchison &c. R. Co. v. Rowe, 56 Kan. 411.....	856
Atchison &c. R. Co. v. Schroeder, 56 Kan. 731.... (1542).....	1371
Atchison &c. R. Co. v. Scrafford, 2 Kan. App. 73.....	1246
Atchison &c. R. Co. v. Shaw, 56 Kan. 519.....	762, 1169
Atchison &c. R. Co. v. Shean, 18 Colo. 368.... (453)	
Atchison &c. R. Co. v. Slattery, 57 Kan. 499.... (1735).....	1443, 1695
Atchison &c. R. Co. v. Stanford, 12 Kan. 354.... (1259, 1268).....	1258

Atchison &c. R. Co. v. Stewart, 55 Kan. 667.....	
Atchison &c. R. Co. v. Swarts, 58 Kan. 235.... (1677)	
Atchison &c. R. Co. v. Taylor, 60 Kan. 758.... (1479)	
Atchison &c. R. Co. v. Thul, 29 Kan. 466.....	
Atchison &c. R. Co. v. Tindall, 57 Kan. 719.... (1742)	
Atchison &c. R. Co. v. Tunnell, 58 Kan. 815.....	
Atchison &c. R. Co. v. Van Belle, (Tex. Civ. App.) 64 S. W. Rep. 397.... (935, 1747).....	
Atchison &c. R. Co. v. Vincent, 56 Kan. 344.....	1743,
Atchison &c. R. Co. v. Washburn, 5 Neb. 117.....	
Atchison &c. R. Co. v. Weber, 33 Kan. 543.....	364
Atchison &c. R. Co. v. Wells, 56 Kan. 222.....	
Atchison &c. R. Co. v. Whitbeck, 57 Kan. 729.....	
Atchison &c. R. Co. v. Willey, 60 Kan. 819.... (752)	
Atchison &c. R. Co. v. Winston, 56 Kan. 456.... (1403)	
Atchison &c. R. Co. v. Yates, 21 Kan. 613.....	
Atherton, T. &c. R. Co. v. Betts, 10 Col. 431.....	1010,
Atherton Water Co. v. Price, 9 Kan. App. 884.... (951)	
Atha &c. I. Co. v. Costello, 63 N. J. L. 27.... (1682)	
Atherton v. Bancroft, 114 Mich. 241.... (2013)	
Atherton v. British America Assur. Co., 91 Me. 289.... (1311)	
Atherton's Estate, 8 Kulp, 150.....	
Atken v. Wells River, 70 Vt. 309.....	
Atkins v. Field, 89 Me. 281.....	
Atkins v. Lackawanna T. Co., 79 Ill. App. 10.....	
Atkins v. M. R. Co., 57 Hun, 102.....	
Atkinson v. Abraham, 45 Hun, 238.... (1317, 1318)	
Atkinson v. Chicago &c. R. Co., 93 Wis. 362.....	
Atkinson v. Goodrich &c. Co., 60 Wis. 141.....	1119, 1
Atkinson v. Southern R. Co., 114 Ga. 146.... (560)	
Atkyn v. Wabash &c. R. Co., 41 Fed. Rep. 193.... (1532)	
Atlanta v. Holliday, 96 Ga. 546.....	10
Atlanta Consol. S. R. Co. v. Foster, 108 Ga. 223.....	1
Atlanta Cotton Factory Co. v. Speer, 69 Ga. 137.....	1
Atlanta &c. Oil Mills v. Coffey, 80 Ga. 145.... (2114)	
Atlanta &c. R. Co. v. Bagwell, 107 Ga. 157.....	11
Atlanta &c. R. Co. v. Bates, 103 Ga. 333.... (440).....	385, 439, 451, 11
Atlanta &c. R. Co. v. Campbell, 56 Ga. 586.... (699)	
Atlanta &c. R. Co. v. Hudson, 62 Ga. 679.... (1019)	
Atlanta &c. R. Co. v. Newton, 85 Ga. 517.... (852)	
Atlanta &c. R. Co. v. Ray, 70 Ga. 678.....	699, 1403, 1405, 1406, 1451, 17
Atlanta &c. R. Co. v. Venable, 67 Ga. 697.....	8
Atlanta &c. Street R. Co. v. Arnold, 100 Ga. 566.....	8
Atlanta &c. Street R. Co. v. Owings, 97 Ga. 663.....	100
Atlantic Ave. R. Co., 4 Misc. 291.....	229
Atlantic &c. R. Co. v. Dunn, 19 Oh. St. 162, 590.....	90
Atlantic &c. R. Co. v. Ironmonger, 95 Va. 625.... (731, 844)	
Atlantic &c. R. Co. v. Rennard, 62 N. J. L. 773.... (2272)	
Atlantic &c. R. Co. v. Rieger, Va. 418.... (738, 739, 761, 791)	
Atlantic City R. Co. v. Goodin, 62 N. J. L. 394.....	45
Atlantic City R. Co. v. Van Dyke, 72 Fed. Rep. 458.....	122
Atlantic Coast Electric R. Co. v. Rennard, 62 N. J. L. 773.....	227
Atlantic Transport Co. v. Coneys, 82 Fed. Rep. 177.....	65
Atlas Engine Works v. Randall, 100 Ind. 293.... (1590)	1750
Atlas Nat. Bank v. Holm, 71 Fed. Rep. 489.....	190
Atrops v. Costello, 8 Wash. 149.... (878)	
Attaway v. Cartersville, 68 Ga. 740.....	30
Attigen v. Edison Telephone Co., 6 Q. B. Div. 244.... (2386)	
Attix v. Minnesota Sandstone Co., 85 Minn. 142.....	1452, 1702
Attorney-General v. Bay Co. Bridge Comm., 115 Mich. 622.....	1832
Attorney-General v. Leed's Corporation, L. R. (5 Ch. App. Cas.) 583.... (1902)	
Atwater v. Lowe, 39 Hun, 150.....	1331
Atwood v. Bangor &c. R. Co., 91 Me. 309.... (661)	

## TABLE OF CASES.

XV

	PAGE
Atwood v. Chicago &c. R. Co., 72 Fed. Rep. 447.... (1402)	
Atwood v. Metropolitan Street R. Co., 25 Misc. 758.....	408
Atz v. Newark &c. Man. Co., 59 N. J. L. 41.... (1467)	
Auberle v. McKeesport, 179 Pa. St. 321.....	1835, 1840
Auburn v. National Tube Works Co., 14 Pa. Super. Ct. 568.....	1585
Auchamp v. Saginaw &c. R. Co., 50 Mich. 163.....	2073
Auchmuty v. Ham, 1 Den. 495.....	633, 979, 983, 992, 996, 997
Auerbach v. N. Y. C. R. Co., 89 N. Y. 281.... (356)	
Aufdenberg v. St. Louis &c. R. Co., 132 Mo. 565.....	516
Augusta v. Little, (Ga.) 41 S. E. Rep. 238.....	1813
Augusta v. Lombard, 99 Ga. 282.....	1996
Augusta v. Lombard, 101 Ga. 724.....	1370
Augusta v. Owens, 111 Ga. 464.....	837, 1497, 1643, 1673, 1996
Augusta Factory v. Barnes, 72 Ga. 216.....	1738
Augusta Factory v. Davis, 87 Ga. 648.....	876
Augusta R. Co. v. Renz, 55 Ga. 126.... (511)	
Augusta &c. R. Co. v. Dorsey, 68 Ga. 228.....	1241
Augusta &c. R. Co. v. Glover, (Ga.) 18 S. E. Rep. 406.....	949
Augusta &c. R. Co. v. McElmurry, 24 Ga. 75.... (659)	
Augusta &c. R. Co. v. McDade, 105 Ga. 134.....	877, 1091, 1094
Auld v. Manhattan Life Ins. Co., 34 App. Div. 491.....	1072, 1132, 1672
Auld v. Walton, 12 La. Ann. 129.....	1165
Ault Wooden-Ware Co. v. Barker, (Ind. App.) 58 N. E. Rep. 265.....	1402
Aurelius v. Lake Erie &c. R. Co., 19 Ind. App. 584.... (755)	
Aurelius v. Lake Erie &c. R. Co., 19 Ind. App. 584.... (755)	784
Aurora v. Dale, 90 Ill. 46.....	697
Aurora v. Gillett, 56 Ill. 132.....	1966
Aurora v. Hillman, 90 Ill. 61.... (704)	
Aurora v. Pulfer, 56 Ill. App. 270.... (699)	
Aurora v. Reed, 57 Ill. 30.....	1966
Aurora v. Scott, 185 Ill. 539.....	1948
Aurora v. Seidelman, 34 Ill. App. 215.....	708
Aurora Gas Light Co. v. Bishop, 81 Ill. App. 493.....	1383, 2067
Ausley v. American Tobacco Co., 130 N. C. 34.....	1559
Austin v. Bartlett, 67 App. Div. 312.....	848, 930
Austin v. Boston &c. R. Co., 164 Mass. 282.....	1550
Austin v. Daniels, 4 Den. 300.... (68)	
Austin v. Fitchburg R. Co., 172 Mass. 484.....	1134, 1586
Austin v. Hall, (Tex. Civ. App.) 58 S. W. Rep. 479.....	1983
Austin v. Hudson R. Co., 25 N. Y. 334.....	2098
Austin v. L. I. R. Co., 69 Hun, 67.....	760
Austin v. N. J. Steamboat Co., 43 N. Y. 75.....	665, 686
Austin v. R. Co., 2 Q. B. 442.....	417
Austin v. R. Co., 16 Q. B. 600.....	283
Austin v. Wilson, 58 Mass. 273.....	849
Austin Man. Co. v. Johnson, 89 Fed. Rep. 677.....	1456, 1630
Austin Dam &c. R. Co. v. Goldstein, 18 Tex. Civ. App. 704.....	2326, 2331
Austin R. Co. v. McSween, (Tex. Civ. App.) 32 S. W. Rep. 376.....	2144
Austin &c. R. Co. v. Flanagan, (Tex. Civ. App.) 40 S. W. Rep. 1043.....	1145
Austrian v. United Traction Co., 19 Pa. Super. Ct. 329.....	478
Avenson v. Kinnaird, 6 East, 188.... (1148)	
Averill v. Santa Fé Receivers, 72 Mo. App. 243.... (1013)	
Avery & Son v. Meek, (Ky.) 45 S. W. Rep. 355.....	1567
Avery v. Maxwell, 4 N. H. 36.... (1012)	
Avery v. N. Y. C. & H. R. R. Co., 121 N. Y. 32.....	544, 545, 551, 1212
Avilla v. Nash, 117 Mass. 318.....	1076
Avinger v. So. Car. R. Co., 29 S. C. 265.....	904
Avondale Marble Co. v. Wiggins, 12 Pa. Super. Ct. 577.....	629
Axlebrood v. Rosen, 21 Misc. 352.....	1105
Aycock v. Wilmington &c. R. Co., 6 Jones L. 231.... (1025)	
Ayer v. Ashmead, 31 Conn. 447.....	2208
Ayer v. Fontaine, 58 Ga. 433.....	2408
Ayer v. Norwich, 39 Conn. 376.....	1913, 1914, 1915
Ayer v. W. U. T. Co., 79 Me. 493.....	2399, 2423

Ayers v. Russell <i>et al.</i> , 50 Hun, 282.....	218
Ayers v. The Delaware, Lackawanna & Western Railroad Company, 77 Hun 414.....	414
Ayres v. Boston &c. R. Co., 68 N. H. 208.....	
Ayres v. Delaware &c. R. Co., 4 App. Div. 511.....	
Ayres v. Hammondsport, 130 N. Y. 665.....	
Ayres v. Norfolk &c. Co., (Va.) 27 S. E. Rep. 582..... (753)	
Ayres v. Pittsburg &c. R. Co., 201 Pa. St. 124..... (810)	
Ayres v. Richmond &c. Co., 84 Va. 679.....	1644
Ayres v. Rochester R. Co., 156 N. Y. 104.....	
Aydelott v. Breeding, (Ky.) 64 S. W. Rep. 916.....	
Ayrault v. Pacific Bank, 47 N. Y. 570.....	
B. P. &c. Co. v. Thomas, 60 Ind. 108.... (1030)	
B. & M. R. Co. v. Rose, 11 Neb. 177.....	
B. & M. R. Co. v. Wendt, 12 Neb. 76.....	
B. & O. R. Co. v. McKensh, 81 Va. 71.... (688)	
B. & O. R. Co. v. State &c., 33 Md. 542.....	
B. & O. R. Co. v. State &c., 36 Md. 366.... (785)	
B. &c. R. Co. v. Crockett, 19 Neb. 138.....	
Babbage v. Powers, 130 N. Y. 281.....	1098, 2227,
Babbitt v. Bumpus, 73 Mich. 331.....	
Babbitt v. Safety Fund Nat. Bank, 169 Mass. 361.....	
Babcock v. The Fitchburg Railroad Co., 140 N. Y. 308.....	1250, 1251,
Babcock v. Gifford, 29 Hun, 186.....	
Babcock v. L. S. & M. S. R. Co., 49 N. Y. 191.... (342).....	345, 347
Babcock v. Los Angeles T. Co., 128 Cal. 173.....	495,
Babcock v. Mayor, 56 Hun, 196.....	
Babcock v. Old Colony R. Co., 150 Mass. 467.....	
Babcock v. Thompson, 3 Pick. 446.....	
Baber v. The Broadway & Seventh Avenue Railroad Co., 10 Misc. 109.....	
Bach v. Iowa C. R. Co., 112 Iowa, 241.....	1
Bachelder v. Heagan, 18 Me. 32.....	1
Bachman v. Philadelphia &c. R. Co., 185 Pa. St. 95.....	1
Bachrach v. Nassau Electric R. Co., 35 App. Div. 633.....	
Backhaus v. Chicago &c. R. Co., 92 Wis. 393.....	
Backus v. Ames, 79 Minn. 145.....	1
Bacon v. Antigo, 103 Wis. 10.....	2
Bacon v. Boston, 3 Cush. 174.....	2
Bacon v. Casco Bay &c. Co., 90 Me. 46.....	428, 1
Bacon v. Charlton, 7 Cush. 581.... (1176).....	11
Bacon v. Consolidated T. Co., 30 Pittsb. Leg. J. (N. S.) (Pa.) 431.....	23
Bacon v. R. Co., 143 Pa. St. 14.....	4
Badali v. Smith, (Tex. Civ. App.) 37 S. W. Rep. 642.....	9
Baddeley v. Shea, 114 Cal. 1.....	21
Bader v. Southern P. R. Co., 52 La. Ann. 1060.....	9
Bading v. Milwaukee Electric R. &c. Co., 105 Wis. 480.....	9
Bagley Elevator Co. v. American Exp. Co., 63 Minn. 142.....	1
Bagley v. Bowe, 105 N. Y. 171.... (673)	
Bagley v. Consolidated Gas Co., 5 App. Div. 432.....	161
Bagley v. St. Louis, 149 Mo. 122.....	194
Bahel v. Manning, 112 Mich. 24.....	126
Bahn v. N. Y. C. & H. R. R. Co., 80 Hun, 116.....	174
Bahrenburgh v. B. C. &c. R. Co., 56 N. Y. 652.....	2278, 229
Baier v. Camden &c. R. Co., (N. J. L.) 52 Atl. Rep. 215.....	229
Bailey v. Berkey, 81 Fed. Rep. 737.....	8
Bailey v. Bodinham, 16 C. B. [N. S.] 295.... (36)	
Bailey v. C. N. &c. R. Co., 14 Ky. L. R. 226.....	48
Bailey v. Cambridge, 174 Mass. 188.....	189
Bailey v. Centerville, 108 Iowa, 20.....	937, 1206, 1868, 187
Bailey v. Centerville, 115 Iowa, 271.....	1877
Bailey v. Citizens' R. Co., 152 Mo. 449.....	1107
Bailey v. Delaware &c. Co., 27 App. Div. 305.....	1467

## TABLE OF CASES.

xvii

	PAGE
Bailey v. Fulton County, 111 Ga. 313.....	1984
Bailey v. Jourdan, 18 App. Div. 387.... (783).....	728
Bailey v. Market Street Cable R. Co., 110 Cal. 320.....	2314
Bailey v. R., W. & O. R. Co., 139 N. Y. 302.....	1406, 1475, 1476
Bailey v. R., W. & O. R. Co., 55 Hun, 509.....	931, 1227
Bailey v. Rome, W. & O. R. Co., 49 Hun, 377.....	1483
Bailey v. Tacoma Traction Co., 16 Wash. 48.....	512
Bailey v. The Mayor, 3 Hill, 538.....	79, 80
Bailey v. Trumbull, 31 Conn. 581.... (1131).....	2257
Bain v. Athens Foundry & Works, 75 Ga. 718.....	2073
Baine v. City of Rochester, 80 N. Y. 532.....	2010
Baird v. Citizens' R. Co., 146 Mo. 265.....	683, 2291
Baird v. Daly, 57 N. Y. 236.....	202, 968
Baird v. Daly, 68 N. Y. 547.....	1139, 1141
Baird v. Daly, 4 Lansing, 426.....	202
Baird v. New York & C. R. Co., 16 App. Div. 490.....	1125
Baird v. Reilly, 92 Fed. Rep. 884.....	1124, 1173, 1452, 1466, 1488
Baird v. Shipman, 132 Ill. 20.... (996).....	
Baird v. Vaughn, (Tenn.) 15 S. W. Rep. 734.....	1011
Baird v. Williamson, 15 C. B. (U. S.) 376.....	2072
Bajus v. Syracuse, B., N. Y. R. Co., 103 N. Y. 312.....	1409, 1457
Baker v. Allegheny & C. R. Co., 95 Pa. St. 211.....	1466, 1486, 1510, 1543
Baker v. Allen, 66 Ark. 271.....	1332, 2083
Baker v. Anglim, 74 Minn. 246.....	1328
Baker v. Barber & C. Pav. Co., 92 Fed. Rep. 117.....	1705
Baker v. Bolton, 1 Camp. 493.... (943).....	
Baker v. Borello, 136 Cal. 160.....	897
Baker v. Born, 17 Ind. App. 422.....	100, 133
Baker v. Eighth Ave. R. Co., 62 Hun, 39.....	2300
Baker v. Fehr, 1 Ont. (Pa.) 70.... (700).....	
Baker v. Grand Rapids, 111 Mich. 447.....	1122, 1920, 1948
Baker v. Hagey, 177 Pa. St. 128.....	861
Baker v. Haldeman, 24 Mo. 219.....	2024
Baker v. Hancock, (Ind. App.) 63 N. E. Rep. 323.....	2190
Baker v. Irish, 172 Pa. St. 528.....	1126
Baker v. Kansas City & C. R. Co., 147 Mo. 140.....	752, 772, 788
Baker v. M. R. Co., 118 N. Y. 533.....	459, 836
Baker v. Maryland Coal Co., 84 Md. 19.....	682
Baker v. Michigan & C. R. Co., 118 Mich. 431.....	1315
Baker v. Mims, 14 Tex. Civ. App. 413.....	891
Baker v. New York & C. R. Co., 28 App. Div. 316.....	1690
Baker v. Pendergast, 32 Oh. St. 494.... (810).....	
Baker v. Pennsylvania, 182 Pa. St. 336.....	752
Baker v. Pennsylvania R. Co., 15 Lanc. L. Rev. (Pa.) 35.....	758
Baker v. Perry, 67 Iowa, 146.....	1236
Baker v. Portland, 58 Me. 199.....	2346
Baker v. Railroad, 118 N. C. 1015.... (661).....	
Baker v. Railway Co., 62 Hun, 39.....	2230, 2231
Baker v. Tibbets, 164 Mass. 412.....	2068
Bakie v. Chandless, 3 Camp. 17.....	2174
Baleh v. Carling, 102 Ga. 586.....	1329
Baleh v. Haas, 73 Fed. Rep. 974.....	1671
Baldom v. R. Co., 21 Iowa, 102.... (1013).....	
Baldwin v. Barney, 12 R. I. 392.....	2377, 2384
Baldwin v. Casella, L. R. 7 Exch. 325.... (983).....	
Baldwin v. Chicago & C. R. Co., 50 Iowa, 680.....	1473, 1474
Baldwin v. Curth, 17 Oh. C. C. 174.....	1365
Baldwin v. Ensign, 49 Conn. 113.....	2363
Baldwin v. Fair Haven & C. R. Co., 68 Conn. 567.....	456
Baldwin v. German Ins. Co., 105 Iowa, 379.....	1313
Baldwin v. Grand Trunk R. Co., (Mich.) 87 N. W. Rep. 380.....	386
Baldwin v. Great Northern R. Co., 81 Minn. 247.....	213
Baldwin v. L. & G. W. Steam Co., 11 Hun, 496.... (270).....	



	PA
Baldwin v. R. Co., 50 Iowa, 680.....	14
Baldwin v. R. Co., 75 Iowa, 297.....	14
Baldwin v. St. Louis &c. R. Co., 63 Iowa, 210.... (768)	
Baldwin v. St. Louis &c. R. Co., 75 Iowa, 297.....	16
Baldwin v. Springfield, 141 Mo. 205.....	1824, 1825, 18
Baldwin v. U. S. Tel. Co., 45 N. Y. 744.....	24
..... 665, 2390, 2396, 2398, 2429, 2439, 2441, 2445,	24
Baldwin v. U. S. T. Co., 54 Barb. 505.....	24
Baldwin v. Western Union Teleg. Co., (Tex. Civ. App.) 33 S. W. Rep. 890..	2410, 24
Balhoff v. Michigan C. R. Co., 106 Mich. 606.....	1438, 1629, 17
Balker v. Hagey, 177 Pa. St. 128.....	20
Ball v. Middlesboro Town &c. Co., (Ky.) 68 S. W. Rep. 6.....	21
Ball v. Nye, 99 Mass. 582-584.....	20
Balla v. Metropolitan Street R. Co., 27 Misc. 775.....	23
Ballard v. Chicago &c. R. Co., 70 Mo. App. 108.....	6
Ballard v. Hitchcock &c. Co., 51 Hun, 188.....	1415, 1419, 1420, 14
Balle v. Detroit Leather Co., 73 Mich. 158.....	15
Ballou v. Chicago &c. R. Co., 54 Wis. 257.....	1474, 1543, 15
Ballou v. Farnum, 9 Allen, 47.... (93).....	
Ballou v. New York, 111 N. Y. 496.....	22
Ballou v. Prescott, 64 Me. 305.....	2187, 21
Balser v. Chicago &c. R. Co., 7 Oh. N. P. 482.....	773, 7
Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338.....	2278, 230
Baltimore Elevator Co. v. Neal, 65 Md. 438.....	16
Baltimore v. Kean, 65 Md. 394.....	17
Baltimore v. Lobe, 90 Md. 310.....	667, 11
Baltimore v. Merryman, 86 Md. 584.....	190
Baltimore v. Rose, 65 Md. 485.....	11
Baltimore v. St. Agnes Hospital, 48 Md. 419.....	196
Baltimore v. Schnitker, 84 Md. 34.....	190
Baltimore R. Co. v. State, 30 Md. 47.... (708)	
Baltimore R. Co. v. State, 54 Md. 648.... (751)	
Baltimore T. Co. v. Heims, 84 Md. 515.....	231
Baltimore Trust &c. Co. v. Atlantic T. Co., 69 Fed. Rep. 358.....	160
Baltimore &c. Co. v. Neal, 65 Md. 438.....	151
Baltimore &c. R. Co. v. Adams, 10 App. D. C. 97.... (732)	
Baltimore &c. R. Co. v. Alsop, 176 Ill. 471.....	144
Baltimore &c. R. Co. v. Alsop, 71 Ill. App. 54.....	787, 170
Baltimore &c. R. Co. v. Amos, 20 Ind. App. 378.....	1487, 1585, 167
Baltimore &c. R. Co. v. Anderson, 75 Fed. Rep. 811.....	66
Baltimore &c. R. Co. v. Andrews, 50 Fed. Rep. 728.....	160
Baltimore &c. R. Co. v. Baer, 90 Md. 97.....	851, 92
Baltimore &c. R. Co. v. Barger, 80 Mo. 23.... (29)	
Baltimore &c. R. Co. v. Baugh, 149 U. S. 368.....	164
Baltimore &c. R. Co. v. Bradford, 20 Ind. App. 348.....	785, 2138, 215
Baltimore &c. S. Co. v. Brady, 32 Md. 333.....	24
Baltimore &c. R. Co. v. Burris, Ill. Fed. Rep. 882.....	168
Baltimore &c. R. Co. v. Campbell, 36 Oh. St. 647.... (349)	
Baltimore &c. R. Co. v. Cassell, 66 Md. 419.....	1216, 236
Baltimore &c. R. Co. v. Charvat, 94 Md. 569.....	2166, 216
Baltimore &c. R. Co. v. Clifford, 99 Ill. App. 381.....	1406, 168
Baltimore &c. R. Co. v. Conoyer, 149 Ind. 524.... (792)	
Baltimore &c. R. Co. v. Cooney, 87 Md. 261.....	233
Baltimore &c. R. Co. v. Countryman, 16 Ind. App. 139.....	88
Baltimore &c. R. Co. v. Cox, 66 Oh. St. 276.....	214
Baltimore &c. R. Co. v. Crawford, 65 Ill. App. 113.....	28
Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232.....	1053, 2140, 234
Baltimore &c. R. Co. v. Cumberland, 12 App. D. C. 598.... (711)	
Baltimore &c. R. Co. v. Dietz, 61 Ill. App. 161.....	214
Baltimore &c. R. Co. v. Elliot, 9 App. D. C. 341.....	1206, 174
Baltimore &c. R. Co. v. Evarts, 112 Ind. 533.....	104
Baltimore &c. R. Co. v. Faith, 71 Ill. App. 59.....	74

## TABLE OF CASES.

xix

	PAGE
Baltimore &c. R. Co. v. Ferryman, 95 Ill. App. 199.....	1254
Baltimore &c. R. Co. v. Few, 94 Va. 82.... (742)	
Baltimore &c. R. Co. v. Fitzpatrick, 35 Md. 32.....	766
Baltimore &c. R. Co. v. Glenn, 66 Oh. St. 395.....	847
Baltimore &c. Road v. Grimes, 71 Md. 573.....	857
Baltimore &c. R. Co. v. Hausman, (Ky.) 54 S. W. Rep. 841.....	920, 1101
Baltimore &c. R. Co. v. Hackensack, 87 Md. 224.....	2090
Baltimore &c. R. Co. v. Hebb, 88 Md. 132.....	1134
Baltimore &c. R. Co. v. Hellenenthal, 88 Fed. Rep. 116.....	2153
Baltimore &c. R. Co. v. Henthorne, 73 Fed. Rep. 634.....	842, 1513, 1521, 1635
Baltimore &c. R. Co. v. Irwin, 97 Ill. App. 337.....	889
Baltimore &c. R. Co. v. Jones, (Ind.) 62 N. E. Rep. 994.....	1797
Baltimore &c. R. Co. v. Kean, 3 Cent. R. (Md.) 716.... (809)	
Baltimore &c. R. Co. v. Keck, 185 Ill. 400.....	758
Baltimore &c. R. Co. v. Keck, 84 Ill. App. 159.....	771, 815, 818, 851, 935, 2055
Baltimore &c. R. Co. v. Keedy, 75 Md. 320.....	236
Baltimore &c. R. Co. v. Kemp, 61 Md. 74.... (848).....	896
Baltimore &c. R. Co. v. Kirby, 91 Md. 313.....	1122
Baltimore &c. R. Co. v. Lanborn, 12 Md. 257.... (1001).....	1012, 1017, 1024
Baltimore &c. R. Co. v. Leapley, 65 Md. 571.....	486
Baltimore &c. R. Co. v. Leonhardt, 66 Md. 70.... (511)	
Baltimore &c. R. Co. v. Little, 149 Ind. 167.....	1797, 1801
Baltimore &c. R. Co. v. McCamey, 12 Oh. C. C. 543.....	372, 957
Baltimore &c. R. Co. v. McLaughlin, 73 Fed. Rep. 519.....	266, 2208
Baltimore &c. R. Co. v. McPeck, 16 Oh. C. C. 87.... (755)	
Baltimore &c. R. Co. v. Mahone, 63 Md. 135.....	884
Baltimore &c. R. Co. v. Mulligan, 45 Minn. 486.....	1015, 1017, 1018
Baltimore &c. R. Co. v. Musgrave, 24 Ind. App. 295.... (792).....	769
Baltimore &c. R. Co. v. Neal, 65 Md. 438.....	1642
Baltimore &c. R. Co. v. Norris, 17 Ind. App. 189.....	370, 419, 549, 567
Baltimore &c. R. Co. v. Nugent, 86 Md. 349.....	397, 410
Baltimore &c. R. Co. v. Owings, 65 Md. 502.... (768)	
Baltimore &c. R. Co. v. Perryman, 95 Ill. App. 199.... (889)	
Baltimore &c. R. Co. v. Pierce, 89 Md. 495, 504.....	29
Baltimore &c. R. Co. v. Pletz, 61 Ill. App. 161.....	717
Baltimore &c. R. Co. v. Ragsdale, 14 Ind. App. 406.....	240, 246
Baltimore &c. R. Co. v. Railroad Co., 3 Oh. S. & C. P. Dec. 687.....	2138, 2158
Baltimore &c. R. Co. v. Railway Co., 3 Oh. N. P. 310.....	381
Baltimore &c. R. Co. v. Rawan, 104 Ind. 88.....	1439
Baltimore &c. R. Co. v. Read, (Ind.) 62 N. E. Rep. 488.....	1797
Baltimore &c. R. Co. v. Rose, 65 Md. 485.....	1241
Baltimore &c. R. Co. v. Schwindling, 101 Pa. St. 258.....	2135
Baltimore &c. R. Co. v. Shipley, 39 Md. 251.....	1258, 1260
Baltimore &c. R. Co. v. Sims, (Ind. App.) 63 N. E. Rep. 485.....	539
Baltimore &c. R. Co. v. Slanker, 77 Ill. App. 567.....	464
Baltimore &c. R. Co. v. Spaulding, 21 Ind. App. 323.....	1468, 1542
Baltimore &c. R. Co. v. State, 60 Md. 449.....	452
Baltimore &c. R. Co. v. State, 62 Md. 479.... (815)	
Baltimore &c. R. Co. v. State, 63 Md. 135.... (439).....	1097
Baltimore &c. R. Co. v. State, 71 Md. 573.....	884
Baltimore &c. R. Co. v. Stolz, 18 Oh. C. C. 93.... (761).....	751
Baltimore &c. R. Co. v. Stricker, 51 Md. 47.....	1438, 1440
Baltimore &c. R. Co. v. Talmage, 15 Ind. App. 203.....	752
Baltimore &c. R. Co. v. Tanner, 90 Md. 315.....	1222, 1235
Baltimore &c. R. Co. v. Then, 159 Ill. 535.....	873, 924, 2055
Baltimore &c. R. Co. v. Tripp, 175 Ill. 251.....	1142, 1252
Baltimore &c. R. Co. v. Voigt, 176 U. S. 498.....	266, 372
Baltimore &c. R. Co. v. Weedon, 78 Fed. Rep. 584.....	823
Baltimore &c. R. Co. v. Welsch, 17 Ind. App. 505.....	1548, 1585, 1684
Baltimore &c. R. Co. v. Wetmore, 65 Ill. App. 292.... (792)	
Baltimore &c. R. Co. v. Wheeler, 63 Ill. App. 193.....	787, 798
Baltimore &c. R. Co. v. Wilkinson, 30 Md. 224.... (478).....	504
Baltimore &c. R. Co. v. Wood, 47 Oh. St. 431.... (1045).....	1040

Baltimore &c. R. Co. v. Woodruff, 4 Md. 242.....	1072, 1250,
Baltimore &c. R. Co. v. Young, 146 Ind. 374.....	2048,
Baltimore &c. Turnpike Road v. Green, 86 Md. 161.....	
Baltzeger v. Carolina Midland R. Co., 54 S. C. 242.....	
Bamberg v. South Carolina R. Co., 9 S. C. 61.....	
Bamford v. Pittsburg &c. T. Co., 194 Pa. St. 17.....	(855)
Bancroft v. Boston &c. R. Co., 97 Mass. 275.....	(792)
Bancroft v. San Diego, 120 Cal. 432.....	
Banion v. Missouri &c. R. Co., (Kan.) 69 Pac. Rep. 353.....	
Bank of Batavia v. N. Y., L. E. & W. R. Co., 33 Hun, 589.....	
Bank of Billings v. Wade, 73 Mo. App. 558.....	
Bank of Brit. N. Am. v. Merchants' &c. Bank, 13 Weekly Dig. 374.....	
Bank of California v. W. U. T. Co., 52 Cal. 280.....	
Bank of Cleburne v. Carper, (Tex. Civ. App.) 67 S. W. Rep. 188.....	
Bank of Commerce v. Union Bank, 3 N. Y. 237.....	(1079)
Bank of Commonwealth v. Mayor, 43 N. Y. 184.....	
Bank of Kentucky v. Adams Express Co., 93 U. S. 174.....	255,
Bank of Kentucky v. Haggan, 1 A. K. Marsh, 306.....	(82)
Bank of Maywood v. McAllister, 56 Neb. 188.....	
Bank of Monongahela Valley v. Weston, 159 N. Y. 201.....	186,
Bank of N. O. v. W. U. T. Co., 27 La. Ann. 49.....	
Bank of Orange v. Brown, 3 Wend. 158.....	(389)
Bank of Palo Alto v. Pac. Postal Teleg. Co., 103 Fed. Rep. 841.....	2
Bank of Paris v. Pearson, 66 Ark. 310.....	
Bank of Pittsburg v. Neal, 22 How. 108.....	(184)
Bank of Washington v. Triplett, 1 Peters, 25.....	
Bank of Wayne v. Fulton, (Tenn.) 49 S. W. Rep. 297.....	
Bank v. Baker, 26 Atl. Rep. (Md.) 867.....	(23)
Bank v. Bank, 3 Kern, (N. Y.) 304.....	(355)
Bank v. Brown, 9 Wend. 85.....	(613)
Bank v. C. Trans. Co., 18 Vt. 140; 23 Vt. 209.....	(345)
Bank v. Clark, 52 Mo. 593.....	(173)
Bank v. Gorham, 79 Pa. St. 108.....	(124)
Bank v. McClelland, 9 Colo. 608.....	(182)
Bank v. Mayor, 43 N. Y. 184.....	16
Bank v. Stanley, 46 Mo. App. 440.....	(172)
Banks v. Effingham, 63 Ill. App. 221.....	17
Banks v. Georgia R. &c. Co., 112 Ga. 655.....	15
Banks v. Hatton, 1 Nott. & M. (S. C.) 221.....	(828)
Banks v. Highland &c. R. Co., 136 Mass. 485.....	2246, 23
Banks v. R. Co., 40 Mo. App. 458.....	16
Banks v. Wilks, 3 Sandf. 99.....	(158)
Banks &c. v. Huggins, 3 Ala. 206.....	
Bannister v. Lake Shore &c. R. Co., 113 Mich. 530.....	(751)
Bannon v. Eldridge, 100 Mass. 457.....	(208)
Bannon v. Sanden, 68 Ill. App. 164.....	1477, 174
Banzhaf v. Ludwig, 28 Misc. 496.....	1424, 178
Barabasz v. Kabat, 86 Md. 23.....	1
Barber v. Abendroth, 102 N. Y. 406.....	1319, 133
Barber v. Manchester, 72 Conn. 675.....	211
Barber v. Merriam, 11 Allen, 322.....	117
Barber v. New Scotland, 88 Hun, 522.....	198
Barber v. Roxbury, 17 Allen, 318.....	193
Barbo v. Bassett, 35 Minn. 485.....	169
Barbour County v. Horn, 48 Ala. 566.....	(863)
Barbour v. Martin, 62 Me. 536.....	219
Barbour v. Miles, 14 Oh. C. C. 628.....	114
Barce v. Shenandoah, 106 Iowa. 426.....	1879
Barclay v. Boston, 173 Mass. 310.....	2029
Barclay v. Hartman, 2 Marv. (Del.) 351.....	973, 977, 1166
Bard v. N. Y. &c. R. Co., 10 Dalv. 520.....	1332
Bard v. Pennsylvania Traction Co., 176 Pa. St. 97.....	511
Barden v. Boston &c. R. Co., 121 Mass. 426.....	(509) 605

## TABLE OF CASES.

xxi

	PAGE
Bardwell v. Jamaica, 15 Vt. 438.... (898)	
Bardwell v. Mobile &c. R. Co., 63 Miss. 574.....	492
Barfield v. Macon County, 109 Ga. 386.....	1964
Barfield v. Southern R. Co., 108 Ga. 744.....	2167
Barg v. Bousfield, 65 Minn. 355.....651, 910, 1401, 1505,	1752
Barger v. Hickory, 130 N. C. 550.....	1812
Bark v. Foster, (Ky.) 69 S. W. Rep. 1096.....	2190
Barker v. Central Park &c. R. Co., 151 N. Y. 237.....	545
Barker v. Coffin, 31 Barb. 556.....	571
Barker v. Cunard S. Co., 91 Hun, 495.....407, 1193	
Barker v. Hudson R. Co., 4 Daly, 276.....	2270
Barker v. N. Y. C. R. Co., 24 N. Y. 599.....	566
Barker v. Ohio River R. Co., 51 W. Va. 423.... (1221)	413
Barker v. Savage, 45 N. Y. 191.....2288, 2308, 2331,	2368
Barkley v. Chicago &c. R. Co., 37 Ill. App. 293.....	380
Barkley v. New York &c. R. Co., 35 App. Div. 167, 228.....	451, 2158, 2181
Barkman v. Pennsylvania R. Co., 89 Fed. Rep. 453.....	341
Barkow v. Chicago &c. R. Co., 30 Minn. 18.... (1036)	
Barks v. Jefferson County, 119 Ala. 600.....	1830
Barksdale v. Laurens, 58 S. C. 413.....1092, 1999	
Barksdull v. New Orleans R. Co., 23 La. Ann. 180.....	661, 715
Barley v. Chicago &c. R. Co., 4 Biss. 430.....	958
Barlow v. Jersey City &c. R. Co., (N. J. L.) 51 Atl. Rep. 463.....	381
Barlow v. McDonald, 39 Hun, 407.....	116
Barnum v. Spencer, (Md.) 49 N. E. Rep. 9.....	1344
Barnard v. Poor, 21 Pick, 378.... (902)	
Barnard v. Schrafft, 168 Mass. 211.....	1698
Barnard v. Shirley, 151 Ind. 160.....	2096
Barnes v. Beirne, 38 La. Ann. 280.....	2078
Barnes v. Chapin, 4 Allen, 444.....	2364
Barnes v. District of Columbia, 91 U. S. 540.....	80, 1970
Barnes v. Keene, 132 N. Y. 13.....841, 847, 869, 1180	
Barnes v. Marcus, 96 Iowa, 675.....697, 1878, 1881, 1891	
Barnes v. Masterson, 38 App. Div. 612.....	2099
Barnes v. Snowden, 119 Pa. St. 53.... (701)	
Barnes v. W. U. T. Co., 24 Nev. 125.....2417, 2419, 2461	
Barnes v. Ward, 9 M. G. & S. 392.....	2255
Barnett v. Chicago &c. R. Co., 75 Mo. App. 446.....	903
Barney v. Lowell, 98 Mass. 570.....	1989
Barney v. Pinkham, (Ore.) 45 N. W. Rep. 694.....	2189
Barney Dumping Boat Co. v. New York, 40 Fed. Rep. 50.....	1992
Barney Dumping &c. Co. v. Clark, 112 Fed. Rep. 921.....	1582
Barnhart v. Chicago &c. R. Co., 97 Iowa, 654.....	1029
Barnie v. Connor, (Iowa) 81 N. W. Rep. 452.....	1666
Barnum v. Chicago &c. R. Co., 30 Minn. 451.....	2049
Barnum v. Merchants' &c. Fire Ins. Co., 97 N. Y. 88.....	1120
Barnum v. Tarpenning, 75 Mich. 557.....978, 1011, 2361	
Barnum v. Vandusen, 16 Conn. 200.....994, 1000, 1005	
Baron v. Reading Iron Co., (Pa. St.) 51 Atl. Rep. 979.....	1147, 1108
Barowski v. Schultz, 112 Wis. 415.....	2132
Barr v. Iams, 29 Pitts. L. J. N. S. (Pa.) 365.....	2178
Barr v. Southern R. Co., 105 Tenn. 544.... (766)	
Barren v. East Boston Ferry Co., 11 Allen, 312.... (1095)	
Barrett v. Lake, 68 App. Div. 601.....	2121
Barrett v. Malden &c. R. Co., 3 Allen, 101.... (994)	
Barrett v. New York &c. R. Co., 45 App. Div. 225.....	910, 2151
Barrett v. S. P. &c. R. Co., 91 Cal. 296.....	2133
Barrett v. Smith, 128 N. Y. 607.....2230, 2356	
Barrett v. Third Ave. R. Co., 45 N. Y. 628.....534, 2201, 2204	
Barrett v. W. U. T. Co., 42 Mo. App. 542.....	2417
Barrett v. Walworth, 64 Hun, 526.....	1914
Barrickman v. Marion Oil Co., 45 W. Va. 634.....1382, 1383	
Barringer v. N. Y. Central &c. R. Co., 18 Hun, 398.... (725)	

Barringer v. D. & H. C. Co., 19 Hun, 216.....	1481
Barroll v. Forman, 88 Md. 188.....	
Barrott v. Pullman's Palace Car Co., 51 Fed. Rep. 796.....	
Barrow S. S. Co. v. Kane, 88 Fed. Rep. 197.....	52
Barry v. Boston &c. R. Co., 172 Mass. 109.....	
Barry v. Hannibal &c. R. Co., 98 Mo. 62.....	
Barry v. Louisville &c. R. Co., 128 Ind. 484.....	
Barry v. McGhee, 100 Ga. 759.....	
Barry v. N. Y. C. & H. R. R. Co., 92 N. Y. 289.....	795,
Barry v. New York Biscuit Co., 177 Mass. 449.....	
Barry v. Sugar Notch 191 Pa. St. 345.....	
Barry v. Terkildsen, 72 Cal. 254.....	2233,
Barry v. Union Traction Co., 194 Pa. St. 576.....	
Barstow v. Old Colony R. Co., 143 Mass. 535.....	
Barter v. Wheeler, 49 N. H. 9.....	91, 94, 341
Barth v. Kansas City Elev. R. Co., 142 Mo. 535.....	370, 434
Bartholomeo v. McKnight, (Mass.) 59 N. E. Rep. 804.....	
Bartholomew v. N. Y. C. & H. R. R. Co., 102 N. Y. 716.....	
Bartholomew v. R. Co., 53 Ill. 227..... (622)	
Bartlett v. Clarksburg, 45 W. Va. 393.....	1292, 1910, 1983, 2002,
Bartlett v. Columbus, 101 Ga. 300.....	
Bartlett v. Crosier, 15 Johns. 250..... (77)	
Bartlett v. Crosier, 17 Johns. 440..... (77)	76, 79,
Bartlett v. Gas Co., 117 Mass. 533.....	
Bartlett v. Pittsburg &c. R. Co., 94 Ind. 281.....	
Bartlett v. Roach, 68 Ill. 174.....	
Bartlett v. W. U. T. Co., 62 Me. 209.....	2390, 2391, 2395, 2408, 2430,
Bartley v. Metropolitan S. R. Co., 148 Mo. 124.....	1091, 1098, 1104, 1
Bartnik v. Erie R. Co., 36 App. Div. 246.....	
Barton v. Barbour, 104 U. S. 126..... (93)	
Barton v. N. Y. Cent. R. Co., 1 T. & C. 297.....	1
Barton v. St. Louis &c. R. Co., 52 Mo. 253.....	
Barton v. Shull, 62 Neb. 570.....	
Barton v. Syracuse, 36 N. Y. 54.....	77, 1097, 1900, 2
Bartram v. Sharon, 71 Conn. 686.....	1
Bascomb v. Manning, 52 N. H. 132..... (1080)	
Basnight v. Atlantic & C. R. Co., 111 N. C. 592.....	
Bastian v. Keystone Gas Co., 27 App. Div. 584.....	1381, 2
Baston v. Rabun, (Ga.) 41 S. E. Rep. 568.....	
Bass v. C. & N. W. R. Co., 36 Wis. 450..... (367)	
Bass v. Chicago &c. R. Co., 28 Ill. 9.....	1257, 1
Bass v. Chicago &c. R. Co., 36 Wis. 450.....	545, 596, 1
Bass v. Concord Street R. Co., 70 N. H. 170.....	
Bass v. Norfolk &c. R. Co., (Va.) 40 S. E. Rep. 100.....	2284, 2
Bass v. Reitdorf, 25 Ind. App. 650.....	21
Bass v. West, 110 Ga. 698.....	21
Bassett v. Fish, 75 N. Y. 303.....	76, 79, 692, 11
Bassett v. Lederer, 1 Hun, 274.....	1
Batchelor v. Union Stock Yards &c. Co., 88 Ill. App. 395.....	1214, 1
Bateman v. N. Y. C. & H. R. R. Co., 47 Hun, 429.....	4
Bateman v. New York &c. R. Co., 67 App. Div. 241.....	536, 1
Bateman v. Peninsular R. Co., 20 Wash. 133.....	10
Batterson v. Vogel, 8 Mo. App. 24..... (153)	
Bates v. Houston, 14 Tex. Civ. App. 287.....	19
Bates v. Nashville &c. R. Co., 15 S. W. (Tenn.) 1069.....	21
Bates v. Old Colony R. Co., 147 Mass. 255..... (266)	
Bates v. Westborough, 151 Mass. 174.....	19
Bath v. Blake, 97 Ill. App. 35.....	16
Batson v. Donovan, 4 Barn. & Ald. 21..... (268)	3
Battishill v. Humphrey, (Mich.) 7 W. 806.....	661, 706, 726, 1143, 24
Battle v. Cushman, (Tex. Civ. App.) 33 S. W. Rep. 1037.....	1
Batty v. Duxbury, 14 Vt. 155.....	19
Baucum v. R. Co., 21 Iowa, 102.....	10

## TABLE OF CASES.

xxiii

	PAGE
Baucus v. Stover, 89 N. Y. 11.... (64)	
Bauer v. Lyons, 23 App. Div. 204.....	976
Bauer v. Richter, 103 Wis. 412.... (886)	
Bauer v. St. Louis &c. R. Co., 46 Ark. 388.... (809)	
Baughman v. E. E. &c. R. Co., 14 Ky. L. R. 775.....	247
Baughman v. Shenango &c. R. Co., 92 Pa. St. 335.....	819
Bauler v. N. Y. & H. R. Co., 59 N. Y. 356.....	1114, 1120, 1514, 1529
Baumann v. Metropolitan Street R. Co., 21 Misc. 658.....	2330
Baumeister v. Markham, 101 Ky. 122.....	648, 1162, 2256
Baumler v. Narragansett Brewing Co., 23 R. I. 430.....	1496, 1747
Bauscher v. St. Paul, 72 Minn. 539.....	2013, 2020
Baustian v. Young, 152 Mo. 317.....	1238
Baxendale v. Bennett, 3 Q. B. Div. 525.... (172)	
Baxter v. Satilla Man. Co., 114 Ga. 720.....	1467
Baxter v. Cedar Rapids, 103 Iowa, 599.....	1194, 1865, 1872, 1875
Baxter v. Chicago &c. R. Co., 104 Wis. 307.....	670, 1239, 1418
Baxter v. Dominion Tel. Co., 37 U. C. Q. B. 470.....	2399, 2431
Baxter v. Knox, (Ky.) 44 S. W. Rep. 972.....	1235
Baxter v. Louisville &c. R. Co., 165 Ill. 78.... (240)	
Baxter v. Roberts, 44 Cal. 178.....	1497, 1510
Baxter v. Second Ave. R. Co., 30 How. Pr. 219.....	2368
Baxter v. Troy & Boston R. Co., 41 N. Y. 502.....	790, 791
Baxter v. Warner, 6 Hun, 585.....	2230, 2250
Bay Shore R. Co. v. Harris, 67 Ala. 6.....	863
Bayer v. Chicago &c. R. Co., 68 Ill. App. 219.....	647
Baylies v. Diamond Street Omnibus Co., 173 Pa. St. 378.....	1156
Baylis v. Diamond Street Omnibus Co., 173 Pa. St. 378.....	2349
Baylor v. Baltimore &c. R. Co., 9 W. Va. 270.....	1002
Baylor v. D., L. &c. R. Co., 40 N. J. L. 23.....	1439, 1440
Baynes v. Chastian, 68 Ind. 376.....	1045
Bays v. Warren Featherbone Co., (Mich.) 91 N. W. Rep. 164.....	1699
Beach v. Bay State Co., 10 Abb. 71.... (944)	
Beach v. Bennett, (Colo. App.) 66 Pac. Rep. 567.....	189
Beach v. Crain, 2 N. Y. 86.....	2337
Beach v. Moser, 4 Kan. App. 66.....	39
Beach v. Parmeter, 23 Pa. St. 196.....	2346
Beach v. Raritan & Delaware Bay R. Co., 37 N. Y. 457.....	114, 827
Beach v. Scranton, 5 Lack. L. News, 25.....	1813, 1965
Beacham v. Proprietors &c., 68 N. H. 382.....	2377
Beal v. Atchison &c. R. Co., 62 Kan. 250.....	1754
Beal v. Lowell &c. R. Co., 157 Mass. 444.....	509
Bealafeld v. Varona, 188 Pa. St. 627.....	1817
Beale v. Barnett, (Ky.) 64 S. W. Rep. 838.....	53
Beale v. Posey, 72 Ala. 323.....	146
Beall v. Folmar, (Ala.) 26 South. Rep. 1.... (1199)	
Beall v. General Electric Co., 16 Misc. 611.....	188
Beall v. Seattle, 28 Wash. 593.....	1862, 1871
Beaman v. Martha Washington Min. Co., 23 Utah, 139.....	881, 1218
Bean v. Maine Water Co., 92 Me. 469.....	2246
Bean v. Oceanic Steam Nav. Co., 24 Fed. Rep. 124.....	1428
Bear v. Allentown, 148 Pa. St. 80.....	1905
Beard v. American Car Co., 72 Mo. App. 583.....	1683
Beard v. Connecticut &c. R. Co., 48 Vt. 101.... (431)	
Beard v. Guild, 107 Iowa, 476.....	1146
Beard v. St. Louis &c. R. Co., 79 Iowa, 527.....	349
Beard v. Skelvin, 13 Ill. App. 54.... (1181)	
Beardslee v. Columbia, 188 Pa. St. 496.....	1208, 1238
Beardslee v. Columbia, 5 Lack. Leg. N. 290.....	731, 1849
Beardslee v. Richardson, 11 Wend. 25.... (102)	
Beardsley v. Wildman, 41 Conn. 515.... (1797)	
Beasley v. W. U. T. Co., 39 Fed. Rep. 181.....	2391, 2410, 2413, 2415
Beasley v. Linchan Transfer Co., 148 Mo. 413.....	1405
Beath v. Rapid R. Co., 119 Mich. 512.....	855, 1156, 1178

	PAGE
Beatrice v. Reid, 59 N. W. Rep. (Neb.) 770.....	655
Beattie v. Citizens' &c. R. Co., 1 Cent. (Pa.) 633.....	497
Beattie v. Detroit, (Mich.) 88 N. W. Rep. 71.....	1934
Beattyville &c. R. Co. v. Maloney, (Ky.) 49 S. W. Rep. 545.....	1021
Beauchamp v. Saginaw M. Co., 50 Mich. 163.... (896)	
Beaufort v. Houtz, 133 U. S. 320.....	1002
Beaumont Pasture Co. v. Sabine &c. R. Co., (Tex. Civ. App.) 41 S. W. Rep. 190.... (739)	
Beaupre v. Pacific &c. T. Co., 21 Minn. 155.....2441, 2447, 2448, 2452	
Beaver v. Eagle Grove, 116 Iowa, 485.....	1872
Becht v. Corbin, 92 N. Y. 658.....656, 730, 747	
Bechtold v. Read, (N. J. Eq.) 32 Atl. Rep. 694.....	67
Beck v. Buffalo, 50 App. Div. 621.....	1886, 1897
Beck v. Carter, 68 N. Y. 283.....635, 1318, 1346, 1906, 2108, 2115, 2250	
Beck v. Dyson, 4 Camp. 198.... (673)	
Beck v. East &c. Co., 6 Robt. (N. Y.) 82.... (730).....	724
Beck v. Ferd. Heim Brewing Co., 167 Mo. 195.....	2261
Beck v. German Klinik, 17 Iowa, 696.....	2198
Beck v. Hood, 185 Pa. St. 32.....	2238
Becker v. Albany &c. R. Co., 35 App. Div. 46.....	923
Becker v. Bullowa, 36 Misc. 524.....	1332
Becker v. Detroit Citizen's Street R. Co., 121 Mich. 580.....683, 2272, 2319	
Becker v. Great Eastern R. Co., L. R., 5 Q. B. 241.... (623)	
Becker v. Haynes, 29 Fed. Rep. 441.... (153)	
Becker v. Janinski, 27 Abb. N. C. 45.....2185, 2192, 2195, 2196	
Becker v. Koch, 104 N. Y. 394.....	1198
Becker v. W. U. T. Co., 11 Neb. 87.....2398, 2399, 2412, 2413	
Becker v. Warner, 90 Hun, 187.....152, 679	
Beckerle v. Wyman, 12 Mo. App. 354.....2346, 2349	
Beckley v. Riverside Land Co., (Va.) 23 S. E. Rep. 778.....	630
Beckwith v. Frisbie, 32 Vt. 559.....	201
Beckwith v. Oatman, 43 Hun, 265.....1378, 2185	
Beckwith v. N. Y. C. & H. R. R. Co., 54 Hun, 446.....	759
Beckwith v. Shoredike, 4 Burr. 2092.....	1006
Bedell v. Berkley, 76 Mich. 435.....	2108
Bedell v. Herring, 77 Cal. 572.....	171
Bedell v. Long Island R. Co., 44 N. Y. 367.....1257, 1258, 1272	
Bedell v. Sea Cliff, 18 App. Div. 261.....	1965
Bedford v. Neal, 143 Ind. 425.....	1877
Bedford v. Tupper, 30 Hun, 174.....	83
Bedford v. Woody, 23 Ind. App. 401.....959, 1877, 2050	
Bedford Belt R. Co. v. Brown, 142 Ind. 659.....1561, 1717	
Bedford Quarries Co. v. Thomas, (Ind. App.) 63 N. E. Rep. 880.....	1723
Beebe v. Ayres, 28 Barb. 275.... (569)	
Beecher v. Long Island R. Co., 161 N. Y. 222.....	438
Beecher v. Long Island R. Co., 35 App. Div. 292.... (451)	
Beecher v. Long Island R. Co., 53 App. Div. 324.....872, 924	
Beedy v. Pacey, 22 Wash. 94.....	321
Beekman v. New York, 18 Misc. 509.....	1887
Beekman &c. v. Van Dolsen, 63 Hun, 487.....	1360
Beem v. Tama &c. T. Co., 104 Iowa, 563.....	2286
Beemis v. Central Vermont R. Co., 58 Vt. 636.....	1218
Beemis v. Hoseley, 16 Gray, 63.....	2206
Beems v. Chicago &c. R. Co., 58 Iowa, 150.....1181, 1706	
Beer v. Clarion, 17 Pa. Super. Ct. 537.....	1840
Beers v. Shannon, 73 N. Y. 292.....	2041
Beeson v. Green Mountain &c. Mining Co., 57 Cal. 20.....883, 1405, 1489	
Beetz v. City of Brooklyn, 10 App. Div. 382.....675, 1916, 2238	
Begeard v. Consolidated T. Co., 64 N. J. L. 316.....	2296
Beger v. Louisville &c. R. Co., 114 Ala. 424.....	1092
Begly v. Pennsylvania R. Co., 201 Pa. St. 84.....	457
Behr v. Erie R. Co., 69 App. Div. 416.....	591
Behrens v. R. Co., 6 H. & N. 366.... (283)	



	PAGE
Behsmann v. Waldo, 74 N. Y. Supp. 929.....	1724
Beilfus v. N. Y., L. E. & W. R. Co., 29 Hun, 556.....	1668
Beique v. Hoamer, 169 Mass. 541.....	1492, 1785
Beisegal v. N. Y. & C. R. Co., 14 Abb. Pr. (N. S.) 29.....	2379
Beisiegel v. Delaware & C. R. Co., 34 N. Y. 622.... (790).....	673, 791
Beisiegel v. N. Y. C. & H. R. R. Co., 40 N. Y. 9.....	791, 806
Belch v. New York & C. R. Co., 90 Hun, 477.....	735
Belcher v. Missouri & C. R. Co., 92 Tex. 593.....	214, 1094, 1099
Belden v. Pullman Palace Car Co., (Tex. Civ. App.) 43 S. W. Rep. 22.....	601
Beldin v. Black Hills & St. Pierre R. Co., 52 Am. & Eng. R. R. Cases, 624 .... (961)	
Belfast & C. R. Co. v. Keys, 9 H. L. Cas. 556.... (617)	
Belford v. Canadian Shipping Co., 35 Hun, 347.....	1400
Belger v. Dinsmore, 51 N. Y. 166.....	199, 274
Belk v. State, 125 Ill. 584.....	689
Bell v. Chicago & C. R. Co., 64 Iowa, 321.....	1037
Bell v. Clarion, 113 Iowa, 126.....	1882
Bell v. Clarion, 115 Iowa, 357.....	1876
Bell v. Clarion, (Iowa) 84 N. W. Rep. 962.....	1111
Bell v. Consolidated Gas & C. Co., 36 App. Div. 242.....	1121
Bell v. Drew, 4 E. D. Smith, 59.... (619)	
Bell v. Globe Lumber Co., 107 La. 725.....	930, 1519, 1607, 1681
Bell v. Hannibal & C. R. Co., 72 Mo. 50.....	2141
Bell v. Joselyn, 3 Gray, 309.....	1767, 1769
Bell v. Leslie, 24 Mo. App. 661.....	995
Bell v. Litt, 12 App. Div. 626.....	2035
Bell v. N. Y. C. & H. R. R. Co., 29 Hun, 561.....	2341
Bell v. N. Y. & C. R. Co., 168 Mass. 443.....	1551
Bell v. Pistorius, 18 Oh. C. C. 73.....	2359
Bell v. Railway Co., 29 Hun, 561.....	2229, 2366
Bell v. Refuge Oil-Mill Co., (Miss.) 27 South Rep. 382.....	1413
Bell v. Southern R. Co., (Miss.) 30 South. Rep. 821.....	2168
Bell v. Wayne, 123 Mich. 386.....	1848, 1849
Bell v. Western & C. R. Co., 70 Ga. 566.....	699
Bell & C. Distilling Co. v. Riggs, (Ky.) 45 S. W. Rep. 99.....	2036
Bellefontaine R. Co. v. Hunter, 33 Ind. 335.... (784)	
Bellefontaine & C. R. Co. v. Reed, 33 Ind. 476.... (1041)	
Bellefontaine & C. R. Co. v. Schruyhart, 10 Oh. St. 116.... (1024)	
Bellefontaine & C. R. Co. v. Snyder, 18 Oh. St. 399.... (714)	
Belle of Nelson & C. Co. v. Riggs, (Ky.) 45 S. W. Rep. 99.....	1215
Belles v. Kelner, 67 N. J. L. 255.....	2363
Belleville v. Hoffman, 74 Ill. App. 503.....	1924
Belleville Stone Co. v. Comben, 61 N. J. L. 353.....	1123, 1134
Belleville Stone Co. v. Mooney, 60 N. J. L. 323.....	1681
Belleville & C. Works v. Bender, 69 Ill App. 189.....	1408
Bellinger v. Craigen, 31 Barb. 534.....	2188
Bellinger v. Railway Co., 23 N. Y. 47.....	2060
Bellman v. N. Y. C. & H. R. R. Co., 42 Hun, 130.....	1395
Bellmore v. Third Ave. R. Co., 46 App. Div. 557.....	1229
Bello v. Metropolitan Street R. Co., 2 App. Div. 313.....	2300
Bellows v. Penn. & C. R. Co., 157 Pa. St. 51.....	1492
Bellows v. Sackett, 15 Barb. 96.....	1346
Belmont v. Hoge, 35 N. Y. 67.... (183)	
Belt Electric Line Co. v. Allen, (Ky.) 44 S. W. Rep. 89.....	2037
Belton v. Baxter, 54 N. Y. 245.....	673, 2313, 2368,
Belton v. Baylor Female College, (Tex. Civ. App.) 33 S. W. Rep. 680.....	2370
Belton v. Lockett, (Tex. Civ. App.) 57 S. W. Rep. 687.....	841
Beltz v. City of Yonkers, 74 Hun, 83.....	1873
Beltz v. Yonkers, 148 N. Y. 67.....	1864
Belvidere v. Crichton, 81 Ill. App. 595.....	930, 1872
Belvidere Gaslight Co. v. Jackson, 81 Ill. App. 424.....	1383
Belvin v. Richmond, 13 Va. L. J. 39.....	1910
Bembe v. Commissioners & C., 94 Mo. 32.....	2245

	PAGE
Bemis v. Conn. &c. R. Co., 42 Vt. 375.... (1015).....	1019, 1021, 1022, 1024, 1025
Bemiss v. New Orleans &c. R. Co., 47 La. Ann. 1671.....	390
Bemmerly v. Woodward, 124 Cal. 568.....	58
Bence v. New York &c. R. Co., 181 Mass. 221.....	1494, 1552
Benda v. Keil, 31 Misc. Rep. 812.....	1541
Bender v. St. Louis &c. R. Co., 137 Mo. 240.....	1407, 1425, 1474
Bendetson v. French, 46 N. Y. 266.....	135, 151
Benedict v. Cowden, 49 N. Y. 396.....	174
Benedict v. Minneapolis &c. R. Co., (Minn.) 90 N. W. Rep. 360.....	510
Benedict v. Port Huron, 124 Mich. 600.....	658, 1119, 1144, 1839
Benedict v. Potts, 88 Md. 52.....	1104, 1109
Benedict v. State of New York, 120 N. Y. 228.....	2222
Benedict v. Union Agricultural Soc. (Vt.) 52 Atl. Rep. 110.....	657, 1127
Benfield v. Vacuum Oil Co., 75 Hun, 209.....	1491
Benford &c. R. Co. v. Rainbolt, 99 Ind. 551.....	2055
Bengiveinga v. Brooklyn Heights R. Co., 48 App. Div. 515.....	2322
Bengston v. Chicago R. Co., 47 Minn. 486.....	1554
Benham v. Taylor, 66 Mo. App. 308.....	1567
Benignia v. Pennsylvania R. Co., 197 Pa. St. 384.....	1591
Benjamin v. Levy, 39 Minn. 11.....	275
Benjamin v. Metropolitan Street R. Co., 133 Mo. 274.....	651, 2256
Benkring v. Chesapeake R. Co., 37 W. Va. 502.....	1611
Benn v. Null, 65 Iowa, 407.....	1597
Benner v. Atlantic Dredging Co., 134 N. Y. 156.....	640
Benner &c. Co. v. Busson, 58 Ill. App. 17.....	369, 496
Bennett v. Backus Lumber Co., 77 Minn. 198.....	930
Bennett v. Brooklyn &c. R. Co., 1 App. Div. 205.....	916
Bennett v. Butterfield, 112 Mich. 96.....	1077
Bennett v. C. & N. R. Co., 19 Wis. 145.... (1014)	
Bennett v. Detroit Citizens' Street R. Co., 123 Mich. 692.....	2287, 2316
Bennett v. Dutton, 10 N. H. 481.... (608)	
Bennett v. Filyaw, 1 Fla. 403.....	200, 337
Bennett v. Long Island R. Co., 163 N. Y. 1.....	1434
Bennett v. Long Island R. Co., 21 App. Div. 25.....	1672
Bennett v. Louisville &c. R. Co., 102 U. S. 577.....	2114
Bennett v. Lovell, 12 R. I. 166.....	1915, 2368
Bennett v. Mallard, 33 Misc. 112.....	974
Bennett v. Marion, 102 Iowa, 425.....	849
Bennett v. Miller, 5 Term. R. 273.....	141
Bennett v. Missouri &c. R. Co., 11 Tex. Civ. App. 423.....	1264
Bennett v. N. J. R. Co., 36 N. J. 225.....	535, 2028
Bennett v. N. Y. &c. R. Co., 40 N. Y. S. R. 948.... (730)	
Bennett v. O'Brien, 37 Ill. 250.....	117
Bennett v. R. Co., 102 U. S. 577, 580.... (384)	
Bennett v. Transportation Co., 36 N. J. L. 225.... (730)	
Bennett v. Whitney, 94 N. Y. 302.....	76, 80, 2041
Benoit v. Railroad Co., 77 Hun, 576.....	2361
Benoit v. Troy &c. R. Co., 154 N. Y. 223.....	976
Benson v. Chicago &c. R. Co., 75 Minn. 163.....	1798
Benson v. Goodwin, 147 Mass. 237.....	1625
Benson v. Madison, 101 Wis. 312.....	2019
Benthin v. New York &c. R. Co., 24 App. Div. 303.....	1437
Bentley v. Phelps, 27 Barb. 524.....	79
Benton v. Chicago &c. R. Co., 56 Iowa, 496.... (721)	
Benton v. Drum, (D. C.) 26 Wash. L. Rep. 146.....	870, 878
Benton v. North Carolina R. Co., 122 N. C. 1007.....	1315
Benton v. Philadelphia, 198 Pa. St. 396.....	874
Bentou v. Philadelphia, 198 Pa. St. 396.....	1951
Benwk v. Valley City Desk Co., 128 Mich. 562.....	1216
Benzing v. Steinway & Sons, 101 N. Y. 547.....	1487, 1600, 1663
Beopple v. Illinois C. R. Co., 104 Tenn. 420.....	793
Berard v. Boston &c. R. Co., 177 Mass. 179.....	867
Berdan v. Brownlee, 12 Oh. C. C. 269.....	2247
Berea Stone Co. v. Kraft, 31 Oh. St. 291.....	1660

	PAGE
Berg v. Great Northern R. Co., 70 Minn. 272.....	691, 1247
Berg v. Parsons, 156 N. Y. 109.....	637
Berg v. Parsons, 84 Hun, 60.... (631)	
Berg v. Parsons, 90 Hun, 267.....	1121
Bergen County T. Co. v. Bliss, 62 N. J. L. 410.....	1219
Bergen County Traction Co. v. Demarest, 62 N. J. L. 755.... (1101)	
Bergen County T. Co. v. Heitman, 61 N. J. L. 682.....	2291
Berger v. New York, 65 App. Div. 394.....	1892
Berger v. St. Paul &c. R. Co., 39 Minn. 78.....	1505, 1699
Bergin v. Southern &c. Teleg. Co., 70 Conn. 54; s. c., 39 L. R. A. 192....	1060
Bergman v. Hendrickson, 106 Wis. 434.....	15
Bergman v. St. Louis &c. R. Co., 4 West. (Mo.) 594.....	785
Bergold v. Nassau Electric R. Co., 30 App. Div. 438.....	729
Bergstrom v. Staples, 82 Mich. 654.....	1614
Bering Man. Co. v. Peterson, (Tex. Civ. App.) 67 S. W. Rep. 133.....	861, 1408
Berkeley v. Chesapeake &c. R. Co., 43 W. Va. 11.... (791)	
Berkery v. Erie R. Co., 55 App. Div. 489.....	784
Berkshire Woolen Co. v. Proctor, 61 Mass. 417.... (142).....	135, 137, 147
Berlick v. Ashland Sulphite &c. Co., 93 Wis. 437.....	1729
Berlin Mills Co. v. Croteau, 88 Fed. Rep. 860.....	2109, 2131
Birmingham v. Wilcox, 120 Cal. 467.....	66
Bernard v. Woonsocket Bobbin Co., 23 R. I. 581.....	2258
Bernardi v. N. Y. C. & H. R. R. Co., 78 Hun, 454.....	1488
Bernhard v. Reeves, 33 Pac. Rep. 424.....	1355
Bernhard v. Rensselaer &c. R. Co., 1 Abb. Ct. App. Dec. 131.... (673)....	678
Bern-tein v. Sweeney, 1 J. & S. (N. Y.) 271.....	149, 152
Berrigan v. N. Y., L. E. & W. R. Co., 131 N. Y. 582.....	1526
Berrigan v. N. Y. &c. R. Co., 59 Hun, 627.....	1736
Berry v. Atlantic Storage Co., 50 App. Div. 590.....	1477
Berry v. Atlantic White-Lead &c. Co., 30 App. Div. 205.....	1592
Berry v. Cooper, 28 Ga. 543.....	245
Berry v. Lake Erie &c. R. Co., 70 Fed. Rep. 193.....	715, 1095, 2058
Berry v. Louisville &c. R. Co., (Ky.) 60 S. W. Rep. 699.....	427, 491
Berry v. Penn. R. Co., 48 N. J. L. 141.....	810
Berry v. St. Louis &c. R. Co., 65 Mo. 172.... (1045)	
Berry v. West Virginia &c. R. Co., 44 W. Va. 538.....	258, 291, 336
Bertha Zinc Co. v. Martin, 93 Va. 791.....	1408, 1508, 1723
Berthold v. O'Reilly, 8 Hun, 16.....	2383
Bertie v. Flagg, (Mass.) 37 N. E. Rep. 572.....	1355
Bertsch v. Metropolitan Street R. Co., 68 App. Div. 228.....	917, 2313
Besel v. N. Y. C. R. Co., 70 N. Y. 171.....	1526
Bess v. Atchison &c. R. Co., 62 Kan. 299.....	770
Bess v. Chesapeake &c. R. Co., 35 W. Va. 492.....	33
Bessemer Land &c. Co. v. Campbell, 121 Ala. 50.....	872, 1453, 1489, 2048
Bessemer Land &c. Co. v. Dubose, 125 Ala. 442.....	1509
Bessex v. Chicago &c. R. Co., 45 Wis. 477.....	658, 1439, 1466, 1470, 1693
Bessey v. Newichanwanick Co., 94 Me. 61.....	1504, 1539
Betham v. Philadelphia, 196 Pa. St. 302.....	1986, 2002
Bethea v. R. Co., 26 S. C. 91.... (555)	
Bethel v. Cincinnati Street R. Co., 15 Oh. C. C. 381.....	2284, 2286, 2336
Bether v. Raleigh &c. R. Co., 106 N. C. 279.... (1013)	
Bethlehem Iron Co. v. Weiss, 100 Fed. Rep. 45.....	1586
Betterly v. Scranton, 5 Jack. L. News, 179.....	1905
Betts v. Farmers' &c. Trust Co., 21 Wis. 80.....	258
Betts v. Lehigh Valley R. Co., 191 Pa. St. 575.....	752
Betty v. Denver, 115 Mich. 228.....	1216
Bettys v. Denver, 115 Mich. 228.....	1837
Betz v. Winter, 195 Pa. St. 346.....	1753
Beunk v. Valley City Desk Co., 128 Mich. 562.....	1163, 1221
Bevier v. Delaware & H. Canal Co., 13 Hun, 254.....	888, 1244, 1256, 1257, 1285
Bevier v. Kraft, 31 Oh. St. 287.....	1682
Bevine v. Fond du Lac, 113 Wis. 61.....	2237
Beyer v. Consolidated Gas Co., 44 App. Div. 158.....	1381

	PA
Beyer v. Louisville &c. R. Co., 114 Ala. 424.....	5
Bias v. Chesapeake &c. R. Co., 46 W. Va. 349.....	661, 7
Bibb Man. Co. v. Taylor, 95 Ga. 615.....	15
Bichert v. Reed, 20 App. Div. 635.....	15
Bicker v. R. Co., 132 Pa. St. 1.....	21
Biddenberg v. Charles &c. Co., 108 Mo. 394.....	9
Biddiscomb v. Cameron, 35 App. Div. 561.....	1407, 14
Bidleman v. State of New York, 110 N. Y. 232.....	22
Bidwell v. Town of Murray, 40 Hun, 190.....	19
Bieber v. St. Paul, (Minn.) 91 N. W. Rep. 30.....	1857, 18
Biederman v. Dry Dock &c. R. Co., 54 App. Div. 291.....	2303, 23
Biegler v. Merchant Co., 164 Ill. 197.....	1
Biehl v. Robinson, 72 App. Div. 19.....	6
Bieling v. City of Brooklyn and another, 120 N. Y. 98.....	18
Bien v. Unger, 64 N. J. L. 596.....	1091, 14
Bier v. Railroad Co., 132 Ind. 78.....	16
Bierbach v. Goodyear &c. Co., 14 Fed. Rep. 826.....	2346, 23
Bierbauer v. N. Y. C. & H. R. R. Co., 15 Hun, 559.....	9
Bigelow v. Brooks, 119 Mich. 208.....	1831, 18
Bigelow v. Chicago &c. R. Co., 104 Wis. 109.....	277, 3
Bigelow v. Danielson, 102 Wis. 470.....	17
Bigelow v. Reed, 51 Me. 325.....	361, 23
Biggs v. Consolidated Barb-Wire Co., 60 Kan. 217.....	21
Big Goose &c. Ditch Co. v. Morrow, 8 Wyo. 537.....	210
Billinger v. Craigen, 31 Barb. 534.....	218
Billings v. Dressler, 5 Oh. N. P. 114.....	199
Billman v. Indianapolis &c. R. Co., 76 Ind. 166.... (793)	
Bills v. Kaukauna, 94 Wis. 310.....	193
Binder v. C. P. &c. R. Co., 16 Oh. C. C. 262.....	156
Binford v. Johnson, 82 Ind. 426.....	137
Bingham v. Caroline &c. R. Co., (N. C.) 41 S. E. Rep. 807.....	140
Binion v. Georgia &c. R. Co., 115 Ga. 340.....	172
Binks v. S. G. & R. D. Co., 3 B. & S. 244.....	225
Binney v. Carney, 20 App. Div. 621.....	134
Binsse v. Paige, 1 Keyes, 87.... (54)	
Bird v. Everard, 4 Misc. (N. Y.) 104.....	99, 212
Bird v. Holbrook, 4 Bing. 628.... (987)	
Bird v. Long Island R. Co., 11 App. Div. 134.....	1431, 170
Bird v. Southern R. Co., 99 Tenn. 719.....	254, 34
Bird v. Sparks, 100 Ga. 616.....	172
Birdsall v. Russell, 29 N. Y. 249.... (183)	
Birely's Estate, 7 Pa. Dist. 395.....	6
Birge v. Gardiner, 19 Cow. 506.....	213
Birkel v. Chandler, 23 Wash. 241.....	84
Birkett v. Knickerbocker Ice Co., 110 N. Y. 504.... 716, 778, 848, 2229, 2230,	2368
Birkett v. Williams, 30 Ill. App. 451.....	100
Birkhead v. Chesapeake &c. R. Co., 95 Va. 648.....	205
Birmingham Railway & Electric Co. v. Baker, 126 Ala. 135.....	729, 2307, 2314
Birmingham R. &c. Co. v. Brannon, (Ala.) 31 South. Rep. 523.....	478
Birmingham R. &c. Co. v. City Stable Co., 119 Ala. 615.....	2282
Birmingham R. &c. Co. v. Clay, 108 Ala. 233.....	476
Birmingham R. &c. Co. v. James, 121 Ala. 120.....	485, 495
Birmingham R. &c. Co. v. Pinckard, 124 Ala. 372.....	2288
Birmingham v. Chesapeake &c. R. Co., 98 Va. 548.....	1373
Birmingham v. Lewis, 92 Ala. 352.....	856
Birmingham v. Rochester City & Brighton R. Co., 137 N. Y. 13.... 1128, 2229,	2338
Birmingham v. Rochester &c. R. Co., 59 Hun, 583.....	2338
Birmingham v. Starr, 112 Ala. 98.....	1814, 1875, 1877, 1880
Birmingham &c. R. Co. v. Baird, 130 Ala. 334.....	525, 917
Birmingham &c. R. Co. v. Bowers, 110 Ala. 328.....	2142
Birmingham &c. Co. v. Wildman, 119 Ala. 547.....	471
Birnbaum v. Crowinshield, 137 Mass. 177.....	1359
Birnbaum v. Lord, 7 Misc. 493.....	1110

## TABLE OF CASES.

xxix

	PAGE
Birney v. N. Y. & Wash. T. Co., 18 Md. 341.....	2389, 2399, 2415, 2416
Birngruber v. Eastchester, 54 App. Div. 80.....	1857, 1881
Bisailon v. Blood, 64 N. H. 565.....	714
Bischoff v. St. Paul &c. Asso., 82 Minn. 105.....	1725
Bishof v. Leahy, 54 App. Div. 619.....	2265
Bishop v. Belle City Street R. Co., 92 Wis. 139.....	2280, 2290
Bishop v. New York, 21 Misc. 598.....	
Bishop v. Seamen's Bank of Sav., 33 App. Div. 181.....	162
Bishop v. Southern R. Co., 63 S. C. 532.....	785
Bishop v. The Village of Goshen, 120 N. Y. 237.....	1888
Bishop v. Union &c. R. Co., 14 R. I. 314.....	2159
Bishop v. Webber, 139 Mass. 411.....	1379
Biskal v. Chandler, 26 Wash. 241.....	2208
Bissell v. N. Y. C. R. R. Co., 25 N. Y. 442.....	221, 261, 340, 354, 355, 388
Bissell v. Starzinger, 112 Iowa, 266.....	672
Bis-ell v. Torrey, 60 N. Y. 635.....	204, 633
Bitting v. Maxatawny Twp., 177 Pa. St. 213.....	1833, 1848
Bittner v. Crosstown Street R. Co., 153 N. Y. 76.....	2280, 2290
Bixoy v. Dunlap, 56 N. H. 456.... (903)	
Ebjjian v. Woonsocket Rubber Co., 164 Mass. 214.....	1498, 1751
Bork v. Illinois C. R. Co., 85 Ill. App. 269.... (805)	
Biornson v. Saccone, 88 Ill. App. 6.....	647, 2078
Black v. Brooklyn City R. Co., 108 N. Y. 640.... (455)	478
Black v. Chicago &c. R. Co., 30 Neb. 197.....	233
Black v. Lewiston, Idaho Sup. Ct. 13.....	2377
Black v. Maitland, 11 App. Div. 188.....	1353
Black v. Manistee, 107 Mich. 60.....	1898
Black v. Staten Island Electric R. Co., 40 App. Div. 238.....	2329
Blackburn v. Southern R. Co., 34 Ore. 215.... (761)	
Blackman v. London &c. R. Co., 17 W. B. 769.... (605)	
Blackman v. Simmons, 3 Car. & P. 138.... (987)	
Blackman v. Thompson-Houston Electric Co., 102 Ga. 64.....	1447, 1655
Blackman v. West Jersey &c. R. Co., (N. J. L.) 52 Atl. Rep. 370.....	1160
Blackstock v. N. Y. & Erie R. R. Co., 20 id. 48.... (212)	216
Blackwell v. Hill, 76 Mo. App. 46.....	804
Blackwell v. Kansas City, 76 Mo. App. 46.....	1866
Blachinska v. Howard Mission &c., 130 N. Y. 497.....	843
Blaine v. R. Co., 9 W. Va. 253.... (1013)	1019
Blair v. Bartlett, 75 N. Y. 150.... (1080)	
Blair v. Chicago &c. R. Co., 89 Mo. 334.....	846
Blair v. Erie R. Co., 66 N. Y. 313.....	372, 373, 424
Blair v. Grand Rapids &c. R. Co., 60 Mich. 124.....	4, 482
Blair v. Granger, (R. I.) 51 Atl. Rep. 1042.....	1827
Blair v. Northern &c. R. Co., 53 Minn. 160.... (249)	
Blaise v. Schroeder, (Iowa) 74 N. W. Rep. 1114.....	2083
Blake v. Ferris, 5 N. Y. 48.....	2, 631, 634, 1335
Blake v. Fox, 17 N. Y. Supp. 508.....	1328
Blake v. Midland R. Co., 18 Q. B. 93.... (885)	
Blake v. Pontiac, 49 Ill. App. 543.....	1986
Blake v. Railroad Co., 70 Me. 60.....	1479, 1513, 1613, 1669
Blakeley v. Laurens County, 55 S. C. 422.....	1835, 1849
Blakeley v. Troy, 18 Hun. 167.....	1892
Blakemore v. Bristol and Exeter R. Col., 8 El. & B. 1035.....	1380
Blake-lee v. Consolidated Street R. Co., 112 Mich. 63.....	2327, 2332
Blake v. Brookline Gas &c. Co., 167 Mass. 150.....	1384
Blakney v. Seattle Electric Co., (Wash.) 68 Pac. Rep. 1037.....	498
Blanchard v. N. J. S. Co., 59 N. Y. 292.....	826
Blanchette v. Holyoke Street R. Co., 175 Mass. 51.....	542, 1126
Bland v. Roxborough &c. R. Co., 13 Pa. Super. Ct. 93.....	677
Bland v. Shreveport Belt R. Co., 48 La. Ann. 1057.....	1585
Bland v. Southern Pac. R. Co., 65 Cal. 626.....	584
Blaney v. Electric T. Co., 184 Pa. St. 524.....	2314
Blank v. Illinois C. R. Co., 182 Ill. 332.....	262

	PAGE
Blank v. Illinois C. R. Co., 80 Ill. App. 475.... (266)	
Blankenship v. Chesapeake & C. R. Co., 94 Va. 449.....	2151
Blankenship v. Galveston & C. R. Co., 15 Tex. Civ. App. 82.....	2147, 2157
Blankenship v. Kenawha & C. R. Co., 43 W. Va. 125.....	1019
Blann v. Cochern, 20 Ala. 320.....	2208
Blann v. Crocheron, 19 Ala. 647.....	2026
Blate v. Third Ave. R. Co., 44 App. Div. 163.....	936, 2305, 2329
Blauuncoup Coal Co. v. Cooper, 12 Ill. App. 373.....	1722
Blaustein v. Guindon and another, 83 Hun, 5.....	2231, 2239, 2242
Blazenic v. Iowa & C. Coal Co., 102 Iowa, 706.....	1629, 1678
Bleecker v. Johnston, 69 N. Y. 301.... (1202)	
Bleecker v. Satsop R. Co., 4 Wasm. 77.....	205
Blenkerin v. Gas Co., 2 Post. & Fin. 437.....	1385
Blevins v. Atchison & C. R. Co., 3 Okla. 512.....	443
Bligh v. Biddeford & C. R. Co., 94 Me. 499.....	943, 951
Bliss v. Bergen & C. T. Co., 64 N. J. L. 601.....	683
Bliss v. South Hadley, 145 Mass. 91.....	719
Blitch v. Central R., 76 Ga. 333.... (491)	
Block v. Milwaukee St. R. Co., 89 Wis. 371.....	1064, 1065
Block v. Swift & C. Co., 161 Ill. 107.....	1397
Blodgett v. Abbot, 72 Wis. 516.....	237
Blodgett v. Bartlett, 50 Ga. 353.... (472)	
Blom v. Yellowstone Park Association, 86 Minn. 237.....	1558
Blomquist v. Great Northern R. Co., 65 Minn. 69.....	1798
Blondel v. St. Paul City R. Co., 66 Minn. 284.....	510
Blood v. Spaulding, 57 Vt. 422.....	1333
Bloom v. National & C. Loan Co., 152 N. Y. 114.....	823
Bloomfield & C. Co. v. Calkins, 62 N. Y. 388.....	2226
Bloomington v. Costello, 65 Ill. App. 407.....	1964, 1967
Bloomington v. Mueller, 71 Ill. App. 268.....	1872
Bloomington v. Murnin, 36 Ill. App. 647.....	1907
Bloomington v. Perdue, 99 Ill. 329.....	1215
Bloor v. Town of Delafield, 69 Wis. 273.... (659)	
Bloss v. Plymale, 3 W. Va. 393.....	2026
Blossom v. Dodd, 43 N. Y. 264.... (280).....	278, 291, 292, 296
Blossom v. Griffin, 13 N. Y. 569.... (207).....	208, 323
Blot v. Boiceau, 3 Comst. 78.... (77)	
Blout v. Western & C. Tel. Co., 126 Ala. 105.....	857
Blower v. R. R., L. R. 7 C. P. 662.... (230)	
Bloyd v. St. Louis & C. R. Co., 58 Ark. 66.....	1643
Blue v. Aberdeen & C. R. Co., 117 N. C. 644.....	1252
Blue Springs Min. Co. v. McIlvren, 97 Tenn. 225.....	194
Bluffton v. McAfee, (Ind. App.) 53 N. E. Rep. 1058.....	2255
Blum v. Monahan, 36 Misc. 179.....	1099
Blumantle v. R. Co., 127 Mass. 322.... (617)	
Blume v. New Orleans, 104 La. 345.....	1863
Blumenthal v. Brainerd, 38 Vt. 402.....	91, 96, 201, 336
Blumenthal v. Prescott, 70 App. Div. 560.....	1321, 1324
Blumrich v. Highland Park, (Mich.) 91 N. W. 129.....	2015
Blunt v. Aikin, 15 Wend. 522.....	2232
Blunt v. Barrett, 124 N. Y. 117.... (109)	
Bly v. Nashua Street R. Co., 67 N. H. 474.....	2283
Bly v. Whitehall, 120 N. Y. 506.....	1906
Blyth v. Fladgate, 1 Chan. 337.....	2180
Board of Commissioners v. Coffman, 18 Oh. C. C. 254.....	2049
Board of Com'rs & C. v. Vickers, 62 Kan. 25.....	1813
Board & C. v. Moore, (Ky.) 66 S. W. Rep. 417.....	934
Boardman v. Brown, 44 Hun. 336.....	1460
Boardman v. Merrimack Ins. Co., 8 Cush. 586.....	2346
Boatwright v. Chester & C. R. Co., 4 Pa. Super. Ct. 279.....	2290
Boatwright v. Railroad Co., 25 S. C. 128.....	1661
Boaz v. Cent. R. Co., 87 Ga. 463.....	304
Bochl v. Chicago & C. R. Co., 44 Minn. 191.....	225

## TABLE OF CASES.

xxx1

	PAGE
Bodah v. Deer Creek, 99 Wis. 509.....	1936, 1954
Bodell v. Brazil Block Coal Co., 25 Ind. App. 654.....	1784
Bodie v. Charleston &c. R. Co., 61 S. C. 463.....	684, 1777, 2050
Bodkin v. W. U. T. Co., 31 Fed. Rep. 134.....	2453
Bodwell v. Bragg, 29 Iowa, 232.....	152
Bodwell v. Nashua Man. Co., 70 N. H. 390.....	1573, 1621
Boehm v. Duluth &c. R. Co., 91 Wis. 592.....	579, 866
Boehm v. Mace, (C. P.) 28 Abb. New Cases, 138.....	1073
Boehmer v. Pittsburg &c. T. Co., 194 Pa. St. 313.....	2330
Boelter v. Ross Lumber Co., 103 Wis. 324.....	1540, 1597, 1630, 1633, 2039
Boemer v. Central Lead Co., 69 Mo. App. 601.....	1594
Boer v. Brooklyn Wharf & Warehouse Co., 51 App. Div. 289.....	2115
Boesen v. Chicago Electric Transit Co., 31 Chic. Leg. News, (Ill.) 371.....	2275
Boess v. Claussen &c. Co., 12 App. Div. 366.....	1460, 1484, 1732
Boetcher v. Detroit Citizens' Street R. Co., (Mich.) 91 N. W. Rep. 125.....	2327
Boetgen v. New York &c. R. Co., 36 App. Div. 460.....	2311
Bogard v. Louisville &c. R. Co., 100 Ind. 491.....	1513
Bogart v. Delaware & Lack. R. Co., 74 Hun. 412.....	1483
Boggers v. Southern R. Co., 64 S. C. 104.....	2139, 2161
Boggeas v. Chesapeake &c. R. Co., 37 W. Va. 297.....	405, 585
Boggs v. Missouri &c. R. Co., 156 Mo. 389.....	1033
Bohammon v. Southern R. Co., (Ky.) 65 S. W. Rep. 169.....	581
Bohan v. Milwaukee &c. R. Co., 59 Wis. 30..... (755)	
Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18.....	1960, 2061, 2092
Bohn v. Chicago &c. R. Co., 106 Mo. 429.....	1586
Bohn v. Havemeyer, 114 N. Y. 296.....	1554
Bohrer v. Dienhart Harness Co., 19 Ind. App. 489.....	2100
Boikens v. New Orleans &c. R. Co., 48 La. Ann. 831.....	465
Boland v. Combination Bridge Co., 94 Fed. Rep. 888.....	2103, 2376
Boland v. Louisville & N. R. Co., 106 Ala. 641.....	1587
Boland v. Missouri R. Co., 36 Mo. 484..... (714)	711
Boldt v. N. Y. Cent. R. Co., 18 N. Y. 432.....	1601
Bolin v. Chicago &c. R. Co., 108 Wis. 333.....	422, 660, 2152
Bolk v. Board of Education, 7 Oh. N. P. 164.....	1980
Bolton v. Vellines, 94 Va. 393.....	88
Boltz v. Sullivan, 101 Wis. 608.....	1941, 1953
Bomar v. Maxwell, 9 Humph. (Tenn.) 621..... (613)	
Bomboy v. N. Y. C. & H. R. R. Co., 47 Hun.....	749
Bomer v. Moxwell, 9 Humph. 621..... (619)	
Bon v. R. Co., 56 Iowa, 664..... (472)	482, 493
Bonaparte v. Wiseman, 89 Md. 12.....	649, 2100
Bonart v. Lee, (Tex. Civ. App.) 46 S. W. Rep. 906.....	1217
Bonée v. Dubuque &c. S. Co., 53 Iowa, 278.....	1111
Bond v. Evansville &c. R. Co., 100 Ind. 301.....	1041, 1046
Bond v. Lake Shore &c. R. Co., 117 Mich. 652..... (761)	751
Bond v. N. Y. C. &c. R. Co., 69 Hun, 476.....	804
Bond v. Smith, 113 N. Y. 378.....	748, 2116
Bond Hill v. Atchison &c. R. Co., 16 Oh. C. C. 470.....	934
Boner v. Meyer, 11 York Leg. Reg. 58..... (669)	628
Boniglio v. Lake Shore &c. R. Co., 125 Mich. 476.....	249
Bonham v. Citizens' &c. Co., 158 Ind. 106.....	2283, 2296
Bonifire v. Relyea, 3 Abb. Pr. (N. S.) 259.....	1399
Bonnell v. Delaware &c. R. Co., 39 N. J. L. 189..... (763)	
Bonnell v. Jewett, 24 Hun, 524.....	1368
Bonner v. Beam, 80 Tex. 152.....	1730
Bonner v. Eddy, 79 Tex. 540.....	14
Bonner v. DeMondosa, (Tex. Civ. App.) 4 Wills, 392.....	611
Bonner v. Pittsburg Bridge Co., 183 Pa. St. 195, 278.....	1419
Bonner v. Pittsburg Bridge, 5 Pa. Super. Ct. 281.....	1411
Bonner v. Wingate, 78 Tex. 333.....	411
Bonnet v. Galveston &c. R. Co., 89 Tex. 72.....	1518, 1752
Bonnot v. Newman, 108 Iowa, 158.....	1083
Bonte v. Postel, (Ky.) 58 S. W. Rep. 536.....	2085

	PAGE
Book v. Chicago &c. R. Co., 75 Mo. App. 604.....	593
Bookrum v. Galveston &c. R. Co., (Tex. Civ. App.) 57 S. W. Rep. 919.....	1469, 1587, 1687
Boom v. Reed, 69 Hun, 426.....	2187
Boomer v. Wilbur, 176 Mass. 482.....	650
Boone v. Citizens' Savings Ins. &c., 84 N. Y. 83.....	158
Boone v. East Norwegian, 192 Pa. St. 206.....	1848
Boor v. Lowery, 103 Ind. 468.....	2195
Booth v. Boston & A. R. Co., 73 N. Y. 38.....	1488, 1515
Booth v. Hodgson, 6 T. R. 405.....	2378
Booth v. Kansas City &c. Air Line, 76 Mo. App. 518.....	1568
Booth v. Merriam, 155 Mass. 521.....	1328
Booth v. Missouri &c. R. Co., (Tex. Civ. App.) 37 S. W. Rep. 168.....	301
Booth v. Mister, 7 Carr. & Payne, 66.... (2)	
Booth v. R., W. & O. T. R. Co., 140 N. Y. 267.....	2070, 2099, 2101
Booth v. Railway Co., 145 N. Y. 267.....	2058, 2059
Booth v. Spuyten Duyvel Rolling Mill Co., 60 N. Y. 487.... (829)	
Boothby v. Boston &c. R. Co., 90 Me. 313.....	739, 767
Boothby v. Grand Trunk R. Co., 66 N. H. 342.....	429
Boothby v. Lacasse, 94 Me. 392.... (1214)	
Borchsenius v. Chicago &c. R. Co., 96 Wis. 448.....	2089
Borek v. Michigan Bolt &c. Works, 111 Mich. 129.....	1752, 1779
Borden v. D., L. & W. R. Co., 131 N. Y. 671.....	1107, 1115
Borden v. Daisy Roller Mill Co., 98 Wis. 407.....	1450, 1704
Borgeson v. United States Projectile Co., 2 App. Div. 57.....	928
Borgess Invest. Co. v. Vette, 142 Mo. 560.....	192
Bormann v. Milwaukee, 93 Wis. 522.....	1598
Born v. Philadelphia &c. R. Co., 198 Pa. St. 409.... (752)	
Born v. Spokane, 27 Wash. 719.....	2010
Bornscher v. Consolidated T. Co., 198 Pa. St. 332.....	2317
Borough of Lansdowne v. Hoffman, 8 Del. Co. R. (Pa.) 149.....	1826
Borschall v. Detroit R. Co., 115 Mich. 473.....	2314
Borst v. Lake Shore & Mich. S. R. Co., 4 Hun, 349.....	806
Borst v. Sharon, 24 App. Div. 599.....	2015
Borup v. Nininger, 5 Minn. 523.... (35)	
Bosco v. Delaware &c. R. Co., 91 Hun, 320.....	783
Bosqui v. Sutro R. Co., 131 Cal. 390.....	393, 1103
Bossert v. Nassau Electric R. Co., 40 App. Div. 144.....	2329
Bossu v. New Orleans &c. R. Co., 49 La. Ann. 1593.....	909
Boston v. Coon, 175 Mass. 283.....	1301, 2256, 2261
Boston Excelsior Co. v. Bangor &c. R. Co., 93 Me. 52.....	1268
Boston Woven-Hose Co. v. Kendall, 178 Mass. 232.....	1301
Boston &c. Co. v. Bangor, 93 Me. 52.....	1263
Boston &c. Co. v. Metropolitan Street R. Co., 14 Misc. 25.....	2330
Boston &c. R. Co. v. Chipman, 146 Mass. 107.....	574
Boston &c. R. Co. v. Graves, 80 Fed. Rep. 589.....	1375
Boston &c. R. Co. v. Proctor, 83 Mass. 267.....	571, 572
Boston &c. R. Co. v. Sargent, 70 N. H. 299.....	1301
Boston &c. Smelting Co. v. Reed, 23 Colo. 523.....	71
Bostwick v. Barlow, 14 Hun, 177.....	1944
Bostwick v. Baltimore & Ohio R. R. Co., 45 N. Y. 712.... (311) ..	279, 280, 1099
Bostwick v. Champion, 11 Wend. 571.... (354)	
Boswell v. Barnhart, 96 Ga. 521.....	1643
Boswell v. Wakeley, 149 Ind. 64.....	1879
Bosworth v. Rogers, 82 Fed. Rep. 975.....	1603, 1629
Bosworth v. Standard Oil Co., 92 Hun, 485.....	932
Bosworth v. Swansey, 10 Metc. 363.....	2376, 2377
Bosworth v. Walker, 83 Fed. Rep. 58.....	585
Bothell v. Seattle, 17 Wash. 263.....	1877
Botsford v. R. Co., 33 Mich. 256.....	1685
Bott v. Pratt, 33 Minn. 325.....	2361
Bouck v. Jackson Sawmill Co., (Ky.) 49 S. W. Rep. 472.....	1538
Bouga v. Weare, 109 Mich. 520.....	1949



## TABLE OF CASES.

xxxiii

	PAGE
Boulder v. Weger, (Colo. App.) 66 Pac. Rep. 1070.....	1869
Boulton v. Columbia, 71 Mo. App. 519.....	1878
Bouker v. Long Island R. Co., 89 Hun, 202.....	212
Bourgo v. White, 159 Mass. 216.....	1077
Bouser v. Wellington, 126 Mass. 391.....	2369
Bouwmeester v. G. R. & C. R. Co., 67 Mich. 87.....	2161
Bowden v. Rockland, 96 Me. 129.....	1988
Bowe v. Brooklyn Heights R. Co., 75 N. Y. Supp. 893.....	545
Bowe v. Hunking, 135 Mass. 380.....	1328
Bowell v. De Wald, 2 Ind. App. 303.....	141
Bowen v. Boston & C. R. Co., 179 Mass. 524.....	1263
Bowen v. Flanagan, 84 Va. 313.....	2361
Bowen v. Flint & C. R. Co., 110 Mich. 445.....	1134
Bowen v. Gainesville & C. R. Co., 95 Ga. 688.... (784)	
Bowen v. Needles Nat. Bank, 87 Fed. Rep. 430.....	182
Bowen v. New York Cent. R. Co., 18 N. Y. 408.....	388, 543
Bowen v. New York, 108 N. Y. 166.....	2220
Bowen v. New York & C. R. Co., 89 Hun, 594.....	763
Bowen v. Southern R. Co., 58 S. C. 222.....	667
Bower v. B. & S. W. R. Co., 42 Iowa, 546.....	1335
Bowers v. Horen, 93 Mich. 400.....	990
Bowers v. Pittsburg & C. R. Co., 158 Pa. St. 302.....	555
Bowes v. Hopkins, 84 Fed. Rep. 787.....	1539, 1592
Bowes v. New York & C. R. Co., 181 Mass. 89.....	1587, 1707
Bowie v. Greenville St. R. Co., 69 Miss. 196.....	515
Bowler v. O'Connell, 172 Mass. 189.....	2344
Bowles v. Abrahams, 65 Mo. App. 10.....	1005
Bowles v. Indiana & C. R. Co., 27 Ind. App. 672.....	1398, 1563
Bowles v. Rome, W. & O. R. Co., 46 Hun, 324.....	923
Bowling Green Stone Co. v. Capshaw, (Ky.) 64 S. W. Rep. 507.....	911, 1599
Bowlsby v. Speer, 2 Vroom. 351.....	1962
Bowman v. California & C. Nav. Co., 63 Cal. 181.....	514
Bowman v. Chicago & C. R. Co., 85 Mo. 533.... (1040)	
Bowman v. Omaha, 59 Neb. 84.....	1920
Bowman v. R. Co., 37 Barb. 37.... (1044)	
Bowman v. Tailman, 27 How. Pr. (N. Y.) 212.....	2173
Bowman v. Tallman, 27 How. Pr. (N. Y.) 375.....	2179
Bowman v. Troy & C. R. Co., 37 Barb. 516.... (1037)	1040
Bowman v. White, 110 Cal. 23.....	1432
Bowman v. Woods, 1 Greene, (Iowa) 441.....	2190, 2194, 2195
Bowring v. Wabash R. Co., 77 Mo. App. 250.....	288
Bowser v. Toledo, 12 Oh. C. C. 631.....	1821
Bowsher v. Chicago & C. R. Co., 113 Iowa, 16.... (959)	
Box v. Chicago & C. R. Co., 107 Iowa, 660.....	1546
Boxberger v. Kansas City, 68 Mo. App. 412.....	1872
Boyce v. Fitzpatrick, 80 Ind. 526.....	1689
Boyce v. H. R. R. Co., 61 Barb. 611.... (571)	
Boyce v. Manhattan R. Co., 118 N. Y. 314.... (433)	
Boyce v. Shawangunk, 40 App. Div. 593.....	922, 1837, 1838
Boyce v. Snow, 187 Ill. 181.....	1343
Boyce v. Wabash R. Co., 63 Iowa, 70.... (962)	966
Boyd v. Blumenthal, (Del.) 52 Atl. Rep. 330.... (657)	
	837, 1404, 1549, 1596, 1717, 1728, 1750
Boyd v. Brazil & C. Coal Co., 25 Ind. App. 157.....	950, 1784
Boyd v. Brotherson, 10 Wend. 93.... (176)	
Boyd v. Cross, 19 Tex. Civ. App. 426.... (785)	
Boyd v. Derry, 68 N. H. 272.....	1999, 2015
Boyd v. Ferris, 10 Hum. (Tenn.) 406.... (87)	
Boyd v. Harris, 176 Pa. St. 484.....	1693
Boyd v. Indian Head Mills, 131 Ala. 356.....	1627, 1695
Boyd v. Mutual Fire Assn., (Wis.) 90 N. W. Rep. 1086.....	76
Boyd v. Phila. Ins. Patrol, 113 Pa. St. 269.....	2030
Boyd v. Portland & C. Electric Co., 37 Or. 567.....	1064

	PAGE
Boyd v. Spencer, 103 Ga. 828.....	546, 109
Boyd v. Springfield, 62 Mo. App. 456.....	193
Boyden v. Fitchburg R. Co., 70 Vt. 125.....	879, 91
Boye v. Albert Lea, 74 Minn. 230.....	1990, 200
Boyer v. Northern P. Coal Co., (Wash.) 68 Pac. Rep. 348.....	154
Boyer v. Robinson, 26 Wash. 117.....	203
Boykin v. Bank of Fayetteville, 118 N. C. 566.....	4
Boylan v. Everett, 172 Mass. 453.....	91
Boyland v. New York, 1 Sandf. (N. Y.) 27.....	200
Boyle v. Degnon-McLean Const. Co., 47 App. Div. 311.....	680, 696, 141
Boyle v. Hazelton, 171 Pa. St. 167.....	193
Boyle v. Illinois C. R. Co., 88 Ill. App. 255.....	203
Boyle v. Mahanoy City, 187 Pa. St. 1.....	183
Boyle v. N. Y. & C. R. Co., 115 N. Y. 636.....	101
Boyle v. Saginaw, 124 Mich. 348.....	187
Boyle v. Southern R. Co., 36 Misc. 289.....	961, 2045, 205
Boynton v. Hardin, (Kan. App.) 58 Pac. Rep. 1007.....	116
Boynton v. Somersworth, N. H. 321.... (898)	
Brabbitts v. Chicago & C. R. Co., 38 Wis. 289.....	1405, 1466, 1572, 163
Brabow v. Seattle, (Wash.) 69 Pac. Rep. 365.....	182
Brachfeld v. Third Ave. R. Co., 29 Misc. 586.....	227
Brachfeld v. Third Ave. R. Co., 30 Misc. 425.....	83
Bracket v. McNair, 14 T. R. 170.... (824)	
Bradbury v. Benton, 69 Me. 194.....	86
Bradbury v. Kingston Coal Co., 157 Pa. St. 231.....	141
Bradenburg v. St. Louis & C. R. Co., 44 Mo. App. 224.... (1044)	
Bradford Glycerine Co. v. Kezer, 113 Fed. Rep. 894.....	123
Bradford Glycerine Co. v. St. Mary's & C. Co., 60 Oh. St. 560.....	207
Bradford v. Downs, 126 Pa. St. 622.....	87
Bradford v. S. C. R. Co., 7 Richardson, (S. C.) 201.... (354)	
Bradley Livery Co. v. Snook, (N. J. L.) 50 Atl. Rep. 358.....	141
Bradley v. Andrews, 51 Vt. 530.....	226
Bradley v. Boston & C. R. Co., 2 Cush. 539.....	784, 801
Bradley v. Buffalo, New York & Erie R. Co., 34 N. Y. 427.....	1039, 1050
Bradley v. Chicago & C. R. Co., 138 Mo. 293.....	1594, 1634, 1701
Bradley v. Chicago & C. R. Co., 94 Wis. 44.....	216, 824
Bradley v. Cunningham, 61 Conn. 485.... (115)	
Bradley v. Grand Trunk R. Co., 107 Mich. 243.....	424
Bradley v. Hartford & C. Co., 19 Fed. Rep. 246.....	88, 1141
Bradley v. Iowa & C. R. Co., 111 Iowa, 562.....	886
Bradley v. Myers, Pa. C. P., 10 Lanc. L. Rev. 137.....	976
Bradley v. N. Y. C. R. Co., 62 N. Y. 99.....	1425, 1574
Bradley v. N. Y. & C. R. Co., 34 N. Y. 432.... (1040)	
Bradley v. Ohio River R. Co., 126 N. C. 735.... (732)	
..... 752, 786, 796, 798, 814, 1123	
Bradley v. Second Ave. R. Co., 34 App. Div. 284.....	392, 507
Bradley v. Second & C. R. Co., 8 Daly, 289.....	703
Bradner v. Mullen, 27 Misc. 479.....	140
Bradshaw v. Chicago & C. R. Co., 58 Kan. 618.....	1485, 1675
Bradstreet v. Everson, 72 Pa. St. 124.....	37, 42, 2180
Brady v. Ball, 14 Ind. 317.....	997, 1000
Brady v. Chicago & C. R. Co., 59 Neb. 233.....	667, 677
Brady v. Chicago & C. R. Co., 114 Fed. Rep. 100.....	5, 536, 1402, 1603
Brady v. Consolidated Gas Co., 85 Md. 637.....	1092
Brady v. Consolidated T. Co., 63 N. J. L. 25.....	2302
Brady v. Manhattan R. Co., 127 N. Y. 46.....	1139
Brady v. Metropolitan Street R. Co., 33 Misc. 793.....	470
Brady v. Mount Morris Bank, 65 App. Div. 212.....	38
Brady v. New York & C. R. Co., 20 R. I. 338.....	1679, 1717
Brady v. Norcross, 172 Mass. 331.....	1108
Brady v. Prettyman, 193 Pa. St. 628.....	2109
Brady v. Rensselaer & C. R. Co., 1 Hum. 378.... (1041)	
..... 1037, 1039, 1040, 1043, 1053	

## TABLE OF CASES.

XXXV

	PAGE
Brady v. Shepard, 42 App. Div. 24.....	2252
Brady v. Valentine, 3 Misc. 20.....	1341
Bradgon v. Perkins-Campbell Co., 87 Fed. Rep. 109.....	1380
Bragg v. Rutland, 70 Vt. 606.....	2000
Brague v. Northern R. Co., 192 Pa. St. 242.....	2139
Braham v. Nassau &c. R. Co., 72 App. Div. 456.....	1060
Brainard v. Nassau Electric R. Co., 44 App. Div. 613.....	513
Brainard v. Van Dyke, 71 Vt. 359.....	1506
Brainerd v. Butte, (Tex. Civ. App.) 44 S. W. Rep. 575.....	195
Braisted v. Brooklyn &c. R. Co., 46 App. Div. 204.....	642
Braithwaite v. Coleman, 4 Nev. & Man. 654.... (1201)	
Braker v. The H. G. Johnson, 48 Fed. Rep. 696.....	307
Braman v. Farmers' &c. T. Co., 114 Fed. Rep. 18.....	95
Brancato v. Kors, 36 Misc. 776.....	1328, 1359
Branch R. Co. v. Lea, 20 Kan. 353.... (1040)	
Branch v. International &c. R. Co., 92 Tex. 288.....	21
Branch v. International &c. R. Co., 40 S. W. Rep. 208.....	1124
Branch v. Wilmington &c. R. Co., 88 N. C. 573.....	251
Brand v. The New Jersey Steamboat Co., 10 Misc. 128.....	329
Brand v. Railroad Co., 8 Barb. 368.... (527)	
Brand v. Weir, 27 Misc. 212.....	314, 936
Brandenburg v. Zeigler, 62 S. C. 18.....	2084
Brandy v. Detroit &c. R. Co., 107 Mich. 100.....	755
Brann v. Railway Co., 53 Iowa, 595.....	1405, 1466
Brannen v. Kokomo &c. Co., 115 Ind. 115.....	729, 730
Branner v. Stormont, 9 Kan. 51.....	2190
Brannigan v. Union Gold Min. Co., 93 Fed. Rep. 164.....	965
Brannock v. Elmore, 21 S. W. (Mo.) 451.....	638
Branson v. Labrot, 81 Ky. 638.....	2114
Branstrator v. Keokuk &c. R. Co., 108 Iowa, 377.....	1581
Brashears v. W. U. T. Co., 45 Mo. App. 433.....	2412, 2414, 2421
Brasington v. South Bound R. Co., 62 S. C. 325.....	904, 2050
Brass v. Maitland, 6 E. & B. 470.... (231)	
Brassell v. N. Y. C. & H. R. R. Co., 84 N. Y. 241.....	448
Bratfish v. Mason, 120 Mich. 323.....	1835
Braun v. Conrad Seipp Brew. Co., 72 Ill. App. 232.....	1704, 2047
Braun v. Northern P. R. Co., 79 Minn. 404.....	549
Braun v. Webb, 32 Misc. 243.....	599
Bray v. Barnard, 109 N. C. 44.....	76, 87
Bray v. Mayne, 1 Cowen, 1.... (111)	
Brazen v. Clark, 5 Pick. 96.... (67)	
Brazil &c. Co. v. Cain, 98 Md. 282.....	1750
Breary v. T. Co., 5 Pa. Dist. Rep. 95.....	2282, 2287, 2298
Breasted v. Farmers' L. & F. Co., 4 Seld. 299.....	1709
Breckinridge &c. Syndicate v. Murphy, (Ky.) 38 S. W. Rep. 700.....	1560
Breckinridge v. White, (Mo. App.) 67 S. W. Rep. 715.....	1084
Breen v. Hyde, (Mich.) 89 N. W. Rep. 732.....	2085
Breen v. N. Y. C. & H. R. R. Co., 109 N. Y. 297.....	541, 1100
Breece v. U. S. T. Co., 48 N. Y. 132.....	2389, 2390, 2391, 2396, 2399, 2413, 2415, 2429
Brehmer v. Lyman, 71 Vt. 98.....	2109
Breissenmeister v. Supreme Lodge, 81 Mich. 525.....	1189
Brekme v. Dinsmore, 25 Md. 328.....	247
Brekmel v. Hosler, (Ind. App.) 37 N. E. Rep. 580.....	2189
Bremiller v. Buffalo &c. R. Co., 90 Hun. 226.... (751)	
Bremker v. Cummings, (Ind.) 33 N. E. Rep. 732.....	1317
Brendle v. Spencer, 125 N. C. 474.....	2146
Brennan v. Albany &c. Bridge Co., 61 App. Div. 279.....	1839
Brennan v. Berlin Iron B. Co., 74 Conn. 382.....	1602, 1641, 1660
Brennan v. Delaware &c. R. Co., 83 Fed. Rep. 124.....	2157
Brennan v. Ellis, 70 Hun. 472.....	1318, 1321
Brennan v. Friendship, 29 Wis. 902.....	698
Brennan v. Gordon, 118 N. Y. 489.....	1500
Brennan v. Mollie Gibson &c. Co., 44 Fed. Rep. 795.....	950

	PAGE
Brennan v. Richardson, 38 App. Div. 463.....	234
Brennan v. Santa Fé Receivers, 72 Mo. App. 107.....	41
Brenninger v. Pennsylvania R. Co., 9 Pa. Super. Ct. 461....(764)	
Brent v. Kimball, 60 Ill. 211.....	973, 98
Brentner v. Chicago &c. R. Co., 58 Iowa, 625....(1036)	
Bresky v. Third Ave. R. Co., 16 App. Div. 83.....	227
Bresnahan v. Lonsdale, (R. I.) 51 Atl. Rep. 624.....	177
Bresnahan v. Michigan &c. R. Co., 49 Mich. 410....(810)	
Bresnehan v. Gove, 71 N. H. 236.....	236
Bretherton v. Wood, 3 Brod. & Bing. 54....(389)	
Breuck v. Holyoke, 167 Mass. 258.....	190
Brevig v. Chicago &c. R. Co., 64 Minn. 168.....	42
Brewer v. Flint R. Co., 56 Mich. 620.....	168
Brewer v. N. Y., L. E. & W. R. R. Co., 124 N. Y. 59.....	261, 266, 37
Brewer v. New York, 31 App. Div. 244.....	195
Brewer v. Railroad Co., 56 Mich. 620.....	170
Brewer v. Tennessee Coal &c. Co., 97 Tenn. 615.....	1548, 158
Brewster v. Mattison, 10 Daly, 336.....	107
Brewster v. Western Union Teleg. Co., 65 Ark. 537.....	1112, 245
Brice v. Bauer, 108 N. Y. 428.....	976, 979, 116
Brick v. R. Co., 98 N. Y. 211.....	163
Brickell v. N. Y. C. & H. R. R. Co., 120 N. Y. 290.....	72
Brickner v. N. Y. C. R. Co., 49 N. Y. 672.....	151
Brickner v. N. Y. C. R. Co., 2 Lansing, 506.....	1451
Bridge v. Oshkosh, 67 Wis. 195.....	117
Bridgeman v. Missouri Valley, 88 N. W. Rep. 1069.....	193
Bridger v. Ashville &c. R. Co., 27 S. C. 456....(860)	
Bridges v. Supervisors, 92 N. Y. 570.....	222
Bridges v. Tennessee Coal &c. R. Co., 109 Ala. 287.....	675, 1544
Briegel v. Philadelphia, 135 Pa. St. 451.....	1903
Briegel v. Southern Pac. Co., 98 Fed. Rep. 958.....	1671
Briel v. Buffalo, 144 N. Y. 163.....	1925
Briel v. Buffalo, 90 Hun, 93.....	1945
Brig Collinberg, 1 Black, 156....(230)	
Briggs v. Boston &c. R. Co., 6 Allen, 246....(345)	
Briggs v. Dearborn, 99 Mass. 50....(102)	
Briggs v. Ewart, 51 Mo. 245....(172)	
Briggs v. N. Y. C. & H. R. R. Co., 72 N. Y. 26.....	938, 1167, 1264
Briggs v. N. Y. C. & H. R. R. Co., 30 Hun, 291.....	2241
Briggs v. Todd, 28 Misc. 208.....	152
Briggs v. Walker, 102 Ky. 359.....	46
Bright v. Miller, (Mo. App.) 68 S. W. Rep. 1061.....	1084
Bright v. Murphy, 105 La. 795.....	84
Brigneli v. Chicago &c. R. Co., 4 Daly, (N. Y.) 182....(413)	
Brill v. Flagler, 23 Wend. 354.....	988
Brincker v. Michigan C. R. Co., 121 Mich. 283.....	769, 791, 804
Brinckerhoff v. Bostwick, 88 N. Y. 52.....	69
Brinckerhoff v. Bostwick, 99 N. Y. 185.....	69
Brinckerhoff v. Farias, 52 App. Div. 256.....	49
Brink v. Columbus, 8 Oh. S. & C. P. 671.....	1831
Brink v. Dunmore, 174 Pa. St. 395.....	2006
Brink v. Erie R. Co., 47 App. Div. 483.....	810
Brink v. Wabash R. Co., 160 Mo. 87.....	870
Brinkley Car &c. Co. v. Cooper, 70 Ark. 331.....	2110
Brinkley &c. Man. Co., 68 Ark. 316.....	1562
Brinkley v. Wilmington &c. R. Co., 126 N. C. 88.....	1030
Brinkman v. Bender, 92 Ind. 234.....	2055
Brink's Exp. Co. v. O'Donnell, 88 Ill. App. 459.....	50
Brink's &c. Exp. Co. v. Kinnare, 168 Ill. 643.....	1169, 1219
Brintnall v. Saratoga &c. R. Co., 32 Vt. 665.....	342, 345, 351
Briscoe v. Alfrey, 61 Ark, 196.....	1005
Briscoe v. Southern R. Co., 103 Ga. 224.....	736, 2156
Bristol Bank &c. Co. v. Jonesboro &c. Co., 101 Tenn. 545.....	194

## TABLE OF CASES.

xxxvii

	PAGE
Bristol &c. R. Co. v. Collins, 7 H. L. Cas. 794....(341).....	358
Brittain v. West End Street R. Co., 168 Mass. 10.....	1804
Britton v. Grand Rapids R. Co., 90 Mich. 159....(840)	
Britton v. Railroad Co., (Mich.) 51 N. W. Rep. 276.....	2051
Britton v. St. Louis, (Mo.) 25 S. W. Rep. 366.....	2052
Broek v. Copeland, 1 Esp. 302....(985).....	986, 987
Broek v. Gale, 14 Fla. 423.....	614
Brockett v. Fair Haven &c. R. Co., 73 Conn. 428.....	2054
Brockway v. American Exp. Co., 168 Mass. 257.....	200, 225
Brockway v. Patterson, 72 Mich. 122.....	884
Broderick v. Detroit &c. Co., 56 Mich. 261.....	1600, 1645
Broderick v. St. Paul City R. Co., 74 Minn. 163.....	1591
Brodeur v. Valley Falls Co., 16 R. I. 448.....	1622
Brodie v. Carolina &c. R. Co., 46 S. C. 203.....	444
Brogan v. Hanan, 55 App. Div. 92.....	1359
Broker v. McBride, 16 Tex. Civ. App. 348.....	2083
Bromberg v. Friend, 67 N. Y. Supp. 698.....	2122
Bronner v. Walter, 15 App. Div. 295.....	1325
Bronson v. Fitzhugh, 1 Hill, 185.....	2201
Bronson v. Oakea, 76 Fed. Rep. 734.....	413, 503
Brook v. Railway Co., 108 Pa. St. 529....(1082)	
Brooke v. Grand Trunk R. Co., 15 Mich. 332....(351).....	342
Brooke v. Pickwick, 4 Bing. 218....(268)	
Brooklyn v. Nassau Electric R. Co., 38 App. Div. 365.....	2277
Brooks v. American Exp. Co., 14 Hun. 364.....	312
Brooks v. Boston &c. R. Co., 135 Mass. 21.....	487
Brooks v. Brooks, (Ky.) 53 S. W. Rep. 645.....	983, 988
Brooks v. Hart, 14 N. H. 307.....	2346, 2347
Brooks v. Kings County El. R. Co., 4 Misc. 288.....	1203
Brooks v. Lincoln &c. R. Co., 22 Neb. 816.....	2320
Brooks v. Mississippi &c. Oil Co., 76 Miss. 874.....	1802
Brooks v. N. Y. C. &c. R. Co., 13 Barb. 594....(1043)	
Brooks v. Northern R. Co., 47 Fed. Rep. 687.....	1548
Brooks v. Pennsylvania R. Co., 2 Pa. Super. Ct. 581.....	1038
Brooks v. Schwerin, 54 N. Y. 343....(842)	843
Brooks v. Sioux City, 114 Iowa, 641.....	1235
Brooks v. W. U. T. Co., 53 Ark. 224.....	2437
Brookston v. Westcott Exp. Co., 29 Misc. 634.....	314
Brosin v. Kansas City &c. R. Co., 114 Ala. 398.....	2164
Brosnan v. Sweetser, 127 Ind. 1.....	959, 2125
Brossman v. Railroad Co., 113 Pa. St. 490.....	1553
Brothers v. Rutland R. Co., 71 Vt. 48.....	2049, 2051, 2055
Brotherton v. Manhattan Beach Imp. Co., 48 Neb. 563.....	667
Broughel v. Southern New England Tel. Co., 72 Conn. 617.....	950, 1538
Browell v. Irwin, 25 Ind. App. 395.....	2028
Brownell v. R. Co., 47 Mo. 239....(1148)	
Browning v. Goodrich Transp. Co., 78 Wis. 391.....	359
Brown Hotel Co. v. Burekhardt, 13 Colo. App. 59.....	153
Brown Oil Can Co. v. Green, 22 Oh. C. C. 518.....	1573, 1721
Brown Stone Co. v. Kraft, 31 Oh. St. 287.....	1446
Brown &c. Co. v. Pennsylvania Co., 63 Minn. 546.....	301
Brown v. Ann Arbor R. Co., 118 Mich. 205.....	1463
Brown v. Atchison &c. R. Co., 31 Kan. 1.....	1688
Brown v. Barnes, 151 Pa. St. 562.....	493
Brown v. Benson, 101 Ga. 753.....	1133
Brown v. Binghamton R. Co., 50 N. Y. S. C. 106.....	2335
Brown v. Boston Ice Co., 178 Mass. 108.....	23
Brown v. Buffalo &c. R. Co., 22 N. Y. 191.....	944, 1166
Brown v. Buffalo &c. R. Co., 4 App. Div. 465.....	1254, 1287
Brown v. Butler, 66 Ill. App. 86.....	924
Brown v. Carpenter, 26 Vt. 638....(991)	977, 982
Brown v. Cayuga & Senaquehanna R. Co., 12 N. Y. 486.....	2086, 2232, 2258
Brown v. Central R. Co., 34 N. Y. 404.....	1025

	PAGE
Brown v. Chattanooga Electric R. Co., 101 Tenn. 252.....	170
Brown v. Chicago &c. R. Co., 64 Iowa, 652.....	87
Brown v. Chicago &c. R. Co., 59 Kan. 70.....	1429, 159
Brown v. Chicago &c. R. Co., 102 Wis. 137.....	738, 752, 774, 779, 137
Brown v. C. M. &c. R. Co., 54 Wis. 342.... (896)	
Brown v. Christopher & Tenth Sts. R. Co., 34 Hun, 471.....	52
Brown v. Collins, 53 N. H. 442.....	236
Brown v. Concord &c. R. Co., 68 N. H. 518.....	172
Brown v. Congress &c. R. Co., 49 Mich. 153.....	47
Brown v. Cook, 9 Johns. 361.... (106)	
Brown v. East R. Co., 11 Cush. 97.....	283, 29
Brown v. Edgington, 2 M. & G. 279.....	137
Brown v. Edison &c. Ill. Co., 90 Md. 400.....	106
Brown v. European &c. R. Co., 58 Ma. 384.... (705).....	72
Brown v. First National Bank, 112 Fed. Rep. 901.....	11
Brown v. Gilchrist, 80 Mich. 56.....	1473, 164
Brown v. Giles, 1 C. & P. 118.... (1006)	
Brown v. Green, 1 Penn. (Del.) 535.... (851)	
Brown v. Guyandotte, 34 W. Va. 290.....	185
Brown v. Hannibal &c. R. Co., 66 Mo. 588.....	584
Brown v. Hannibal &c. R. Co., 50 Mo. 461.... (766)	
Brown v. Hannibal &c. R. Co., 23 Mo. App. 209.....	84
Brown v. Hershey Land &c. Co., 65 Mo. App. 162.....	1408, 1456
Brown v. Hoffelmeyer, 74 Mo. App. 385.....	192
Brown v. Illinois C. R. Co., 100 Ky. 525.... (240)	
Brown v. Illius, 27 Conn. 84.....	1382, 1385
Brown v. Insurance Co., 89 Tex. 591.....	1314
Brown v. Kistler, 190 Pa. St. 499.....	2084
Brown v. Levy, (Tex. Civ. App.) 69 S. W. Rep. 255.....	629
Brown v. Levy, (Ky.) 55 S. W. Rep. 1079.....	1572
Brown v. Louisburg, 126 N. C. 701.....	1863, 2207
Brown v. Louisville &c. R. Co., 36 Ill. App. 140.....	359
Brown v. Louisville &c. R. Co., 103 Ky. 211.....	581
Brown v. Louisville &c. R. Co., (Ky.) 53 S. W. Rep. 1041.....	396, 1155
Brown v. Louisville &c. R. Co., (Ky.) 65 S. W. Rep. 588.....	1707
Brown v. Louisville &c. R. Co., 111 Ala. 275.....	1531, 1732
Brown v. Lynn, 31 Pa. St. 510.... (809)	
Brown v. Marshall, 47 Mich. 576.....	2185
Brown v. Maxwell, 6 Hill, 592.....	1600
Brown v. Memphis &c. R. Co., 5 Fed. Rep. 499.....	365
Brown v. Merrimack River Sav. Bank, 67 N. H. 549.....	165
Brown v. Milwaukee &c. R. Co., 22 Min. 165.... (736).....	784
Brown v. Milwaukee &c. R. Co., 21 Wis. 39.... (1037)	
Brown v. Minn. R. Co., 31 Minn. 553.....	1608, 1610, 1611, 1614, 1620
Brown v. Missouri &c. R. Co., 13 Mo. App. 462.....	1258
Brown v. Mt. Holley, 69 Vt. 364.....	1946
Brown v. N. Y. C. R. Co., 32 N. Y. 597.....	723, 724, 797, 834
Brown v. New York, 32 Misc. 571.....	1982
Brown v. N. Y. Gas. Co., Anth. N. P. 351.... (1384)	
Brown v. New York &c. R. Co., 42 App. Div. 548.....	1690
Brown v. New York &c. R. Co., (Mass.) 63 N. E. Rep. 941.....	492
Brown v. Orangeburg County, 55 S. C. 45.....	1911
Brown v. Owosso, 126 Mich. 91.....	1873, 2016, 2019
Brown v. Palatine Ins. Co., 89 Tex. 590.....	1313
Brown v. Pettit, 178 Pa. St. 17.....	193
Brown v. Penn. R. Co., 15 Phila. R. 321.... (819)	
Brown v. Pine Creek R. Co., 183 Pa. St. 38.....	2090
Brown v. Pittsburg &c. T. Co., 14 Pa. Super. Ct. 594.....	2317
Brown v. Postal Tel. Co., 111 N. C. 187.....	2409
Brown v. R. Co., 69 Iowa, 161.....	1494
Brown v. R. Co., 66 Mo. 538.... (1179)	
Brown v. R. Co., 89 Mo. 152.... (903)	
Brown v. R. Co., 21 Wis. 39.... (1040)	

	PAGE
Brown v. R., W. & O. R. Co., 45 Hun, 439.....	1186
Brown v. Railway Co., 27 Minn. 162.....	1405, 1620, 1669
Brown v. Railway Co., 80 Wis. 162.... (494)	
Brown v. Rapid R. Co., (Mich.) 90 N. W. Rep. 290.....	562
Brown v. Ream, 15 Ind. App. 51.....	1199
Brown v. S. & S. R. Co., 12 N. Y. 486.....	1346
Brown v. Schellenburg, 19 Pa. Super. Ct. 286.....	2354
Brown v. Schintz, 98 Ill. App. 452.....	178
Brown v. Seattle City R. Co., 16 Wash. 465.....	402, 498
Brown v. Smith, 86 Ga. 274.....	4
Brown v. Spoffard, 17 Alb. L. J. 31.... (182)	
Brown v. Southern R. Co., 126 N. C. 458.....	1510
Brown v. Sullivan, 71 Tex. 470.... (847)	
Brown v. Swanton, 69 Vt. 53.....	1136, 1941
Brown v. Syracuse, 77 Hun, 411.....	1811
Brown v. Tabor Mill Co., 22 Wash. 317.....	1700
Brown v. Terry, 67 App. Div. 223.....	1401, 1425, 1666
Brown v. Third Ave. R. Co., 18 Misc. 584.....	1229
Brown v. Todd, 46 App. Div. 546.....	1487
Brown v. Toledo &c. R. Co., 10 Oh. C. D. 278.....	1398
Brown v. Warner, 78 Tex. 543.... (95)	
Brown v. Washington &c. R. Co., 11 App. D. C. 37.....	481
Brown v. Webster City, 115 Iowa, 511.....	2029
Brown v. White, 202 Pa. St. 297.....	861, 1898, 2259
Brown v. Wilmington City R. Co., 1 Penn. (Del.) 332.....	827, 1117, 2272, 2277, 2298, 2314
Brown v. Winona R. Co., 27 Minn. 162.....	1611, 1670
Brown v. Wittner, 43 App. Div. 135.....	1321, 1323
Brown v. Wysong, 1 App. Div. 423.....	2259
Browne v. Pine Creek R. Co., 183 Pa. St. 38.....	2207
Browne v. Providence &c. R. Co., 12 Gray, 55.... (1043)	
Browne v. Raleigh &c. Co., 108 N. C. 34.....	443
Browne v. Siegel, 90 Ill. App. 49.....	671, 1074, 1703
Brownfield v. Chicago &c. R. Co., 107 Iowa, 254.....	409, 1108, 1215, 1505
Brozek v. Steinway R. Co., 10 App. Div. 360.....	2281, 2324
Brozek v. Steinway R. Co., 22 App. Div. 623.....	2274
Bruce v. Beall, 99 Tenn. 303.....	1220, 1239, 1461, 1468
Bruce v. Brooklyn Heights R. Co., 68 App. Div. 242.... (657).....	514, 1091
Bruce v. Cincinnati R. Co., 83 Ky. 174.... (965)	
Bruce v. Penn Bridge Co., 197 Pa. St. 439.....	1521
Bueh v. Philadelphia, 5 Pa. Dist. 718.....	1951
Buen v. Uhlmann, 30 App. Div. 453.....	1727
Buen v. Uhlmann, 44 App. Div. 620.....	1443
Brugher v. Buchtenkirch, 29 App. Div. 342.....	1341
Braker v. Covington, 69 Ind. 33.....	699
Brummit v. Furness, 1 Ind. App. 401.....	1245
Bruner's Appeal, 57 Pa. St. 46.... (48)	
Brunker v. Cummins, 133 Ind. 443.....	1322
Brunnell v. Southern P. Co., 34 Ore. 256.....	1493, 1620
Brunner v. Blaisdell, 170 Pa. St. 25.....	1108, 2068
Bruno v. Brooklyn City R. Co., 5 Misc. 327.....	539
Brunswick v. Bath, 90 Me. 479.....	1831
Brunswick v. Tucker, 103 Ga. 233.....	1907
Brunswick Gas Light Co. v. Brunswick, 92 Me. 493.....	1988
Brunswick Grocery Co. v. Brunswick &c. Co., 106 Ga. 270.....	646
Brunswick Grocery Co. v. Spencer, 97 Ga. 764.....	1328
Brunswick Light Co. v. Gale, 91 Ga. 813.....	844
Brunswick &c. R. Co. v. Bostwick, 100 Ga. 96.....	583
Brunswick &c. R. Co. v. Hardey, 112 Ga. 604.....	2245
Brunswick &c. R. Co. v. Moore, 101 Ga. 684.....	385, 526
Brush Electric Light &c. Co. v. Wells, 110 Ga. 192.....	1801
Brush Electric &c. Co. v. Lefevre, 93 Tex. 604.....	669, 1066
Brush Electric &c. Co. v. Simonsohn, 107 Ga. 70.....	919

	PAGE
Brush Electric &c. Co. v. Simonson, 107 Ga. 70.....	12
Brush Electric &c. Co. v. Wells, 103 Ga. 512.....	12
Brush v. Long Island R. Co., 10 App. Div. 535.....	12
Brush v. Scribner, 11 Conn. 395....(182)	
Brushberg v. Milwaukee &c. R. Co., 55 Wis. 106.....	12
Bruss v. Metropolitan Street R. Co., 66 App. Div. 554.....	221, 223
Brusso v. City of Buffalo, 90 N. Y. 679.....693, 1098, 1874, 1945, 1947,	22
Bruswitz v. Netherlands Am. S. Nav. Co., 64 Hun, 262.....	4
Bryan v. Fowler, 70 N. C. 596.....108, 1260,	12
Bryan v. Missouri Pac. R. Co., 32 Mo. App. 228....(416)	
Bryant v. Am. Tel. Co., 1 Daly, 590.....2413, 2416, 2417, 2441, 2447,	24
Bryant v. Bigelow Carpet Co., 131 Mass. 503.....	20
Bryant v. Illinois C. R. Co., (La.) 22 South. 799.....	11
Bryant v. International &c. R. Co., 19 Tex. Civ. App. 88....(731).....	6
Bryant v. Metropolitan Street R. Co., 28 Misc. 532.....	23
Bryant v. N. Y. C. & H. R. R. Co., 81 Hun, 164.....	167
Bryant v. Omaha &c. R. Co., 98 Iowa, 483.....	92
Bryant v. Randolph, 133 N. Y. 70.....	184
Bryant v. Rich, 106 Mass. 180.....	2
Bryant v. St. Paul, 33 Minn. 289.....e.....	198
Bryce v. Chicago &c. R. Co., 103 Iowa, 665.....1129, 1682,	169
Brydon v. Detroit, 117 Mich. 296.....	185
Bryer v. Foerster, 9 App. Div. 542.....	91
Buch v. Amory Man. Co., 69 N. H. 257.....2110, 2134,	213
Buchanan v. Smith, 10 Hun, 474.....105,	11
Buchanan v. West Jersey R. Co., 23 Vroom, (N. J. L.) 265.....	867
Buchel v. Gray, 115 Cal. 421.....	116
Bucher v. Bend, 20 Ind. App. 177.....	187
Bucher v. Fitchburg R. Co., 131 Mass. 156.....	237
Bucher v. N. Y. C. & H. R. R. Co., 98 N. Y. 128.....	485
Bucher v. Pryibil, 19 App. Div. 126.....	1477
Buck v. Glens Falls, 4 App. Div. 323.....	1885
Buck v. Moore, 12 Bush. 337....(979)	
Buck v. R. Co., 98 N. Y. 211.....	1548
Buck v. Peoples' Street &c. Co., 40 Mo. App. 555.....860, 870	
Buck v. Union P. R. Co., 59 Kan. 328.....	1255
Buckalew v. Tennessee Coal &c. Co., 112 Ala. 146.....	2049
Buckber v. Third Ave. R. Co., 64 App. Div. 360.....	408
Buckeley v. Flint &c. R. Co., 119 Mich. 583.....	764
Buckeye Man. Co. v. Woolley &c. Works, 26 Ind. App. 7.....	1215
Buckeye Pipe Line Co. v. Fee, 15 Oh. C. C. 637.....	318
Buckingham v. Fisher, 70 Ill. 124....(1)	
Buckland v. Adams Exp. Co., 97 Mass. 124....(283)	
Buckland v. Johnson, 15 C. B. 145.....	2207
Buckland v. New York &c. R. Co., (Mass.) 62 N. E. Rep. 955.....	410, 1118
Bucklew v. Central &c. R. Co., 64 Iowa, 603.....	1706
Buckley v. Clark, 21 Misc. 138.....1008, 1360, 1365	
Buckley v. Earle &c. Co., 22 R. I. 358.....	975
Buckley v. Flint &c. R. Co., 119 Mich. 583.....	677
Buckley v. G. P. & R. M. Co., 113 N. Y. 540.....	1564
Buckley v. Gray, 110 Cal. 339.....	2177
Buckley v. Kansas City, 156 Mo. 16.....1869, 1874	
Buckley v. Leonard, 4 Denio, (N. Y.) 500....(983).....976, 977, 978, 980	
Buckley v. New Bedford, 155 Mass. 64.....	1905
Buckley v. New York &c. R. Co., 73 App. Div.....	924
Buckley v. N. Y. & H. R. Co., 43 Super. Ct. 187....(16)	
Buckley v. New York &c. R. Co., 77 N. Y. Supp. 128.....	2328
Bulkley v. N. Y. &c. R. Co., 27 Conn. 480....(1034)	
Buckley v. Old Colony R. Co., 161 Mass. 26.....	386
Buckley v. R. Co., 27 Conn. 479....(1014)	
Buckley v. Silverberg, 113 Cal. 673.....	1199
Buckley v. The Gutta Percha &c. Co., 113 N. Y. 540.....	1501
Bucklin v. Bucklin, 1 Abb. Court of App. 242....(158)	



# TABLE OF CASES.

xli

	PAGE
Buckman v. Missouri &c. R. Co., 83 Mo. App. 129.... (1018)	
Buckmaster v. Chicago &c. R. Co., 108 Wis. 353.....	1716
Buckmaster v. Gt. East. Ry. Co., 23 Law T. Rep. (N. S.) 471.....	575
Bucknam v. Great Northern R. Co., 76 Minn. 373.....	867
Buckner v. Richmond &c. R. Co., 72 Miss. 873.....	1335, 2058
Bucknew v. Richmond & D. R. Co., 72 Miss. 873.....	1783
Buck's Estate, 185 Pa. St. 57.....	61
Bucksport &c. R. Co. v. Edinburgh &c. Redwood Co., 68 Fed. Rep. 972.....	203
Buckstaff v. Oshkosh, 92 Wis. 520.....	2027
Bull v. Meriden E. R. Co., 69 Conn. 272.....	2049, 2291
Buddenberg v. Benner, 1 Hilt. 84.....	154
Buddington v. Shearer, 20 Pick. 477.....	997
Boeck v. Lindsey, 65 Mich. 105.....	2352
Boehner Chair Co. v. Feulner, 28 Ind. App. 479.....	1564, 1697, 1779
Buel v. N. Y. C. R. R. Co., 31 N. Y. 314.....	685
Buer v. Rightly, 4 B. & A. 202.....	2174
Buenemann v. St. Paul &c. R. Co., 32 Minn. 390.... (431)	
Buente v. Pittsburg &c. T. Co., 2 Pa. Super. Ct. 185.....	2278, 2284
Bueschell v. Sutherland, 79 Mo. App. 459.....	1925
Buesching v. St. Louis &c. R. Co., 6 Mo. App. 85.....	701, 2230, 2231, 2257
Buffalo v. Delaware &c. R. Co., 39 N. Y. Supp. 4.....	2002
Buffalo v. New York &c. R. Co., 152 N. Y. 276.....	773
Buffalo T. Co. v. Buffalo, 58 N. Y. 639.....	1993, 2005
Buffalo &c. Co. v. Knights &c. Ass'n, 126 N. Y. 450.....	1182
Buffett v. Troy & Boston R. Co., 40 N. Y. 169.....	338, 523
Butrens v. Dry Dock &c. R. Co., 53 Hun, 571.....	2229, 2309
Bulger v. Albany R. Co., 42 N. Y. 459.....	2229, 2290
Bull v. Pullman Palace Car Co., (U. S. C. Ct. S. D. N. Y.) 1 Am. Neg. Rep. 200.....	602
Bullard v. Boston R. Co., 68 N. H. 27.....	1202
Bullington v. Newport News &c. R. Co., 32 Va. 346.... (1025)	
Bullivant v. Spokane, 14 Wash. 577.....	1705
Bullock v. Adair, 63 Ill. App. 30.....	149
Bullock v. Babcock, 3 Wendell, 391.....	1289, 1293
Bullock v. Butler Exch. Co., (R. I.) 46 Atl. Rep. 273.....	1079
Bullock v. Delaware &c. R. Co., 60 N. J. L. 24.....	593, 617
Bullock v. Delaware &c. R. Co., 61 N. J. L. 550.....	903
Bullock v. Houston &c. R. Co., (Tex. Civ. App.) 55 S. W. Rep. 184.....	385
Bullock v. Mayor &c., 99 N. Y. 654.....	693, 1876
Bullock v. Town of Durham, 64 Hun, 380.....	1824, 2010
Bulloe v. Babcock, 3 Wend. 391.....	2024
Bullmaster v. St. Joseph, 70 Mo. App. 60.....	1415, 1567, 1997
Bumbear v. United Traction Co., 198 Pa. St. 198.....	517, 541
Rundschuh v. Mayer, 81 Hun, 111.....	993
Bunn v. Johnson, 77 Mo. App. 596.....	148
Bunn v. Vaughn, Abb. Ct. App. 253.... (158)	
Bunnell v. Berlin, 66 Conn. 24.....	1948, 2047
Bunnell v. Rio Grande &c. R. Co., 13 Utah, 314.....	777, 1013, 1024, 1029
Bunnell v. St. Paul &c. R. Co., 29 Minn. 305.....	1520
Bunsler v. Western &c. Teleg. Co., 65 Ark. 537.....	1222
Bunting v. Central Pac. R. Co., 14 Nev. 351.....	758, 792
Bunting v. Hogsett, 139 Penn. St. 353.... (730)	
Bunting v. C. P. R. Co., 6 Am. & E. B. C. (Nev.) 282.....	662
Bunting v. Penn. R. Co., 118 Penn. 204.....	1763
Buryea v. Metropolitan R. Co., 18 Wash. L. R. 413.....	876
Bunzel v. Maas, 116 Ala. 68.....	1199
Buran v. Great Northern R. Co., 67 Minn. 434.... (751)	
Burbank v. Bethel Steam Mill Co., 75 Me. 373.....	649
Burbank v. Chapin, 140 Mass. 123.... (153)	
Burchell v. Hickisson, 50 L. J. Q. B. C. P.....	2106
Burdick v. Worrall, 4 Barb. 596.....	2346, 2347
Burdon &c. Ref. Co. v. Ferris Sugar Man. Co., 78 Fed. Rep. 417.....	1357
Buresching v. St. Louis &c. R. Co., 73 Mo. 219.....	1360

	PAGE
Burford v. New York, 26 App. Div. 225.....	2022, 2023
Burgevin v. N. Y. C. & H. R. R. Co., 69 Hun, 479.....	620
Burgher v. Chicago &c. R. Co., 105 id. 335.....	224, 247
Burger v. Johnson, 6 Oh. N. P. 252.....	1356
Burger v. Philadelphia, 196 Pa. St. 41.....	1920, 1941
Burgess v. Clements, 4 M. & Sel. 306.....	141, 154
Burgess v. Davis Sulphur Ore Co., 165 Mass. 71.....	1564
Burgess v. Gray, 1 C. B., 50 Eng. C. L. 577.....	633
Burgess v. Salt Lake City R. Co., 17 Utah, 406.....	678, 2299, 2336
Burgess v. Sims Drug Co., 114 Iowa, 275.....	1379
Burian v. Seattle Electric Co., 26 Wash. 606.....	685, 2321
Burk v. Arcata &c. R. Co., 125 Cal. 364.....	883
Burk v. Edison &c. Electric Co., 89 Hun, 498.....	1070
Burk v. Louisville &c. R. Co., 7 Heisk. 451.....	1256, 1264
Burk v. Manhattan R. Co., Daly, 75.... (1276)	
Burke v. Anderson, 69 Fed. Rep. 814.....	1586, 1592, 1630
Burke v. Central R. &c., 64 N. J. L. 576.....	762
Burke v. Citizens' Street R. Co., 102 Tenn. 409.....	1094, 2345
Burke v. DeCastro &c. Co., 11 Hun, 354.....	3, 1377
Burke v. Ellis, 105 Tenn. 702.....	2166
Burke v. Ireland, 26 App. Div. 487.....	641, 2078
Burke v. Ireland, 47 App. Div. 428.....	2077
Burke v. N. Y. Cent. &c. R. Co., 73 Hun, 32.....	750
Burke v. National India-Rubber Co., 31 R. I. 446.....	1486, 1622
Burke v. Shaw, 59 Miss. 443.....	23
Burke v. Syracuse, Binghamton & N. Y. R. Co., 69 Hun, 21.....	1517
Burke v. Witherbee, 98 N. Y. 562.....	1129, 1403, 1445, 1450
Burkett v. New York &c. R. Co., 24 Misc. 76.....	616
Burkhalter v. Second Nat. Bank, 42 N. Y. 538.... (35)	
Burl Turnpike v. Uncapher, 117 Pa. St. 353.....	1825
Burleson v. Reading, 110 Mich. 512.....	1869
Burlington v. Pennsylvania R. Co., 56 N. J. Eq. 259.....	2342
Burlington &c. R. Co. v. Burch, (Colo. App.) 67 Pac. Rep. 6.....	1142, 1257
Burlington &c. R. Co. v. Campbell, 14 Colo. App. 141.....	1223
Burlington &c. R. Co. v. Crockill, 17 Neb. 570.....	2045
Burlington &c. R. Co. v. Franzen, 15 Neb. 365.....	1039
Burlington &c. R. Co. v. Liehe, 17 Colo. 280.....	1573
Burlington &c. R. Co. v. Shoemaker, 18 Neb. 369.... (1029)	
Burlington &c. R. Co. v. Westover, 4 Neb. 268.... (1256)	1269
Burnap v. Marsh, 13 Ill. 535.....	2181
Burnell v. N. Y. C. R. R. Co., 45 N. Y. 184.....	109, 310, 347, 620, 624, 1099
Burnett v. Burlington &c. R. Co., 16 Neb. 332.....	2146
Burnett v. Easton &c. R. Co., 61 N. J. L. 373.....	769
Burnett v. New York, 36 App. Div. 458.....	1907
Burnett v. Oechsner, 92 Tex. 588.....	14
Burnett v. W. U. T. Co., 39 Mo. App. 591.....	2438
Burnham v. Butler, 31 N. Y. 485.....	2350
Burnham v. Concord &c. R. Co., 68 N. H. 567.....	1690
Burnham v. Jackson, 1 Col. App. 237.....	2189
Burnham v. Strother, 66 Mich. 519.... (988)	
Burnhard v. Rochester, 68 Hun, 369.....	2271
Burns v. Boston &c. R. Co., 101 Mass. 150.... (792)	
Burns v. Chicago &c. R. Co., 104 Wis. 646.....	216, 229
Burns v. Chicago &c. R. Co., 69 Iowa, 450.....	1547
Burns v. Elba, 32 Wis. 605.... (704)	
Burns v. Farmington, 31 App. Div. 364.....	1214
Burns v. Glens Falls &c. Street R. Co., 4 App. Div. 426.....	524
Burns v. Nichols Chemical Co., 65 App. Div. 424.....	1561
Burns v. Pethcal, 75 Hun, 437.....	1765
Burns v. Solomon, 3 Oh. N. P. 185.....	1323
Burns v. Southern R. Co., 63 S. C. 46.....	2139
Burns v. Yonkers, 83 Hun, 211.....	1846
Burnside v. Novelty Man. Co., 121 Mich. 115.....	1740, 1744

## TABLE OF CASES.

xliii

	PAGE
Burnstein v. Sweeney, 1 J. & S. 271.... (154)	
Burr v. Pennsylvania R. Co., 64 N. J. L. 30.....	399, 920, 1102
Burr v. Stevens, 90 Me. 500.....	2246
Burrell v. North, 2 Car. & Kir. 680.... (208)	
Burrell v. Preston, 54 Hun. 70.....	1368
Burrell Township v. Uncapper, 117 Pa. St. 353.....	1915
Burridge v. Detroit, 117 Mich. 557.....	1827
Burroughs v. Housatonic R. Co., 15 Conn. 124.....	1256
Burroughs v. Norwich &c. R. Co., 100 Mass. 26.....	339, 342, 345, 351, 354
Burrows v. Erie R. Co., 63 N. Y. 556.....	474
Burrows v. Erie R. R. Co., 63 N. Y. 556.... (477)	
Burrows v. Delta Trans., 106 Mich. 582.....	1252
Burrows v. Gas Light Co., (E. L.) Ex. Ch., vol 5.....	1384
Burrows v. Western &c. Teleg. Co., (Minn.) 90 N. W. Rep. 1111.....	192
Burson v. Louisville &c. R. Co., 116 Ala. 198.....	2144
Burt v. Burt, 41 N. Y. 46.... (62)	
Burt v. Douglas &c. R. Co., 83 Wis. 229.....	413
Burt v. Stafford, 121 Mich. 390.....	2359, 2369
Burtis v. The Buffalo & State Line R. R. Co., 24 N. Y. 269..... (346)	337, 341
Burton v. Scherpf, 1 Allen, 133.....	590
Burton v. Western &c. R. Co., 98 Ga. 783.....	817
Burud v. Great Northern R. Co., 62 Minn. 243.....	1114
Bush v. Brainard, 1 Cow. 78.... (814)	1001, 1006, 1007, 1008
Bush v. Miller, 13 Barr. 481.....	1104
Bush v. Prosser, 11 N. Y. 347.....	2202
Bush v. Southern R. Co., 63 S. C. 96.....	1110
Bush v. Steinman, 1 B. & P. 404.... (655)	
Rush v. St. Joseph &c. Street R. Co., 113 Mich. 513.....	1221, 2327, 2332
Bush v. Wathen, 104 Ky. 548.....	672, 883, 977
Bushby v. N. Y., L. E. & W. R. Co., 107 N. Y. 374.....	1473, 1488, 1609
Bussey v. Gulf &c. R. Co., 79 Miss. 597.....	952
Russian v. Milwaukee &c. R. Co., 56 Wis. 325.....	2245
Bussman v. Western Transit Co., 9 Misc. 410.....	340, 345
Bussman v. Western Transit Co., 71 Fed. Rep. 654.....	358
Butcher v. Gas Co., 12 R. I. 149.....	1382, 1385
Butcher v. Hyde, 10 Misc. 275.....	2124
Butcher v. Philadelphia, 202 Pa. St. 1.....	1882
Butchers' Ice &c. Co. v. Philadelphia, 156 Pa. St. 54.....	1905
Bute v. Pottes, (Cal.) 18 Pac. Rep. 329.....	2195
Butler v. Bangor, 67 Me. 385.....	650, 1957
Butler v. Carns, 37 Wis. 61.... (172)	
Butler v. Cooper, 3 Kan. App. 145.....	1199
Butler v. Cushing, 46 Hun. 521.....	1317, 1320
Butler v. Greene, 59 Neb. 280.... (104)	
Butler v. Heane, 2 Camp. 415.... (296)	
Butler v. Lewman, (Ga.) 42 S. E. Rep. 98.....	646
Butler v. Manhattan R. Co., 3 Misc. 453.....	1193
Butler v. New York &c. R. Co., 42 App. Div. 280.....	1710
Butler v. R. Co., 28 Wis. 487.... (798)	
Butler v. South Carolina &c. R. Co., 130 N. C. 15.....	1160
Butler v. The Manhattan Ry. Co., 143 N. Y. 417.....	845, 1140, 1149, 1154
Butler v. Townsend, 126 N. Y. 105.....	1454
Butte v. Pleasant Valley Coal Co., 14 Utah, 282.....	1729
Buttelli v. Jersey City &c. R. Co., 59 N. J. L. 302.....	2335, 2336
Batten v. Frink, 51 Conn. 342.....	1107
Butterfield v. Western R. Co., 10 Allen, 532.... (792)	
Butterworth v. Clarkson, 3 Misc. 338.....	1560
Butterworth v. Clarkson and another, 3 Misc. 338.....	1564
Butterworth v. Clarkson, 3 Misc. (N. Y.) 338.....	1595
Buttle v. George G. Page Box Co., 175 Mass. 318.....	1492
Button v. H. R. R. Co., 18 N. Y. 248.....	657
Button v. Hudson R. R. Co., 18 N. Y. 248.....	658
Buttrick v. Lowell, 1 Allen, 172.....	1990

	PAG.
Butts v. Cleveland &c. R. Co., 110 Fed. Rep. 329.....	40
Butts v. Eaton Rapids, 116 Mich. 539.....	186
Butts v. Eaton Rapids, 116 Misc. 639.....	183
Butts v. J. C. Mackery Co., 72 Hun. 562.....	64
Butts v. Wood, 37 N. Y. 317....(68)	
Butz v. Cavanaugh, 137 Mo. 503.....722, 1815, 1951, 2108,	2115
Buy v. Third Ave. R. Co., 45 App. Div. 11.....	2274, 2303
Buzzell v. Laconia &c. Co., 48 Me. 113.....	1466, 1547, 1563
Byington v. Merrill, 112 Wis. 211.....	1887, 1897, 2047
Byington v. St. Louis &c. R. Co., 147 Mo. 673.....	1170
Byington v. Simpson, 134 Mass. 169....(4)	
Byrne v. Eastman's Co., 27 App. Div. 270.....	1636
Byrne v. Fargo, 36 Misc. 543.....	329
Byrne v. Montgomery &c. R. Co., 19 Pa. Super. Ct. 531.....	2327
Byrne v. Morel, 20 Ky. L. Rep. 1311....(1012)	
Byrne v. N. Y. C. & H. R. R. Co., 94 N. Y. 12.....	780
Byrne v. N. Y. C. & H. R. R. Co., 104 N. Y. 362.....	635, 813
Byrne v. N. Y. Central &c. Co., 83 N. Y. 620.....	674, 710
Byrne v. Nye &c. R. Co., 46 App. Div. 479.....	1749, 1778
Byrnes v. Brooklyn &c. R. Co., 36 App. Div. 355.....	1560
Byrnes v. Cohoes, 67 N. Y. 204.....	1900, 1902, 2061
Byrnes v. N. Y., L. E. & W. R. Co., 113 N. Y. 251, 257.....	1473, 1534
Byrnes v. Palmer, 18 App. Div. 1.....	2176
Byron v. Lynn &c. R. Co., 177 Mass. 303.....	410
C. B. & Q. R. R. Co. v. Griffin, 68 Ill. 499.....	591
C. B. & Q. R. Co. v. Haggerty, 67 Ill. 113....(1025)	
C. F. Ins. Co. v. Erie R. Co., 73 N. Y. 399.....	1307
C., H. & D. & M. R. Co. v. Pontius, 19 Ohio St. 221....(280)	288
C. I. Machine Co. v. Kiefer, 134 Ill. 481.....	1454
C. M. & St. P. R. Co. v. Ross, 112 U. S. 377.....	1664
C. &c. R. Co. v. Lundstrom, 16 Neb. 254.....	1645
C. & A. R. Co. v. May, 108 Ill. 288.....	1666
C. & A. R. R. Co. v. Murray, 71 Ill. 601....(11)	
C. & A. R. Co. v. Randolph, 53 Ill. 510....(493)	
C. & A. R. Co. v. Sullivan, 63 Ill. 293.....	1519
C. & E. &c. R. Co. v. O'Connor, 119 Ill. 586....(949)	
C. & E. I. R. Co. v. Geary, 110 Ill. 383.....	1543
C. & E. R. R. Co. v. Flexman, 103 Ill. 546....(522)	
C. & I. &c. R. Co. v. Farrell, 31 Ind. 408....(444)	
C. & M. R. Co. v. Ross, 112 U. S. 377.....	1632
C. & Mo. R. Co. v. People, 56 Ill. 365....(349)	
C. & N. W. R. Co. v. Donahue, 75 Ill. 106.....	1543
C. & N. W. R. Co. v. Peacock, 48 Ill. 253.....	584
C. & N. W. R. Co. v. Williams, 55 Ill. 185....(545)	
Cabot v. Kingman, 166 Mass. 403.....	648, 2100
Cable v. Southern R. Co., 122 N. C. 892.....	577
Cadwell v. Arnheim, 152 N. Y. 182.....	674, 2346, 2364
Cage v. Franklin, 11 Pa. Super. Ct. 533.....	1822, 1841
Caglione v. Mt. Morris &c. Light Co., 56 App. Div. 191.....	1059
Cahill v. Chicago &c. R. Co., 74 Fed. Rep. 285.....	2144, 2151, 2163
Cahill v. Cincinnati &c. R. Co., 13 Ky. L. R. 714.....	730
Cahill v. Eastman, 18 Minn. 324.....	2073
Cahill v. Hilton, 106 N. Y. 512.....	658, 1600, 1726
Cahill v. Layton, 57 Wis. 600.....	2132
Cahill v. London &c. R. Co., 13 C. B. (U. S.) 818....(617)	
Cahn v. Manhattan R. Co., 76 N. Y. Supp. 893.....	1165
Cahow v. Chicago &c. R. Co., 113 Iowa, 224.....	1219
Cain v. Macon Consol. Street R. Co., 97 Ga. 298.....	2307
Cain v. Syracuse, 95 N. Y. 83.....	1852
Cain v. Southbound R. Co., 62 S. C. 25.....	2089
Calahan v. Cochren, 2 N. Y. S. Rep. 583.....	1105
Caldwell v. Arnheim, 81 N. Y. 39.....	2346

	PAGE
Caldwell v. Bates, 118 N. C. 323.... (73)	
Caldwell v. Central Park, North & East River R. Co., 7 Misc. 67.....	583
Caldwell v. Mohawk Bank, 64 Barb. 333.... (128)	
Caldwell v. N. J. Steamboat Co., 47 N. Y. 282.....	241, 389, 543, 898, 899, 1087, 1096, 1100
Caldwell v. Pre-emption, 74 Ill. App. 32.....	2245
Caldwell v. Prunelle, 57 Kan. 511.....	1986, 2002
Caldwell v. Snook, 35 Hun, 73.....	976
Calhoun v. Milan, 64 Mo. App. 398.....	1858
California Powder Works v. Atlantic &c. R. Co., 113 Cal. 329.....	209, 244
Callins v. Bump, 120 Mich. 335.....	60
Callins v. Hartford, 33 Conn. 57.....	1131, 2257
Call v. Portsmouth &c. R. Co., 69 N. H. 562.....	458, 2339
Callaghan v. D., L. &c. R. Co., 52 Hun, 276, 277.....	807
Callahan v. Des Moines, 63 Iowa, 705.....	1961
Callahan v. Eel River &c. R. Co., 92 Cal. 89.....	2133
Callahan v. Philadelphia T. Co., 184 Pa. St. 425.....	2320
Callahan v. Sharp, 27 Hun, 85.....	726
Callan v. Bull, 113 Cal. 593.....	1401, 1664
Callan v. Pugh, 54 App. Div. 545.....	642
Callanan v. Gilman, 107 N. Y. 360.....	1726, 2239
Calland v. Nichols, 30 Neb. 532.....	116
Callaway v. Mellett, 15 Ind. App. 366.....	564, 592
Callaway v. Walters, 63 Ill. App. 562.....	2145
Callery v. Easton Traction Co., 185 Pa. St. 176.....	2296
Calligan v. N. Y. C. & H. R. E. Co., 59 N. Y. 651.....	779, 1106
Callway v. Spurgeon, 63 Ill. App. 571.....	2142
Calumet Electric Street R. Co. v. Lewis, 68 Ill. App. 598.....	2295
Calumet Electric Street R. Co. v. Lynhelm, 70 Ill. App. 371.....	2283
Calumet Electric Street R. Co. v. Nolan, 69 Ill. App. 104.....	2339
Calumet Electric Street R. Co. v. Van Peit, 68 Ill. App. 582.....	2295
Calumet &c. Street R. Co. v. Jennings, 83 Ill. App. 612.....	914, 1101, 1103
Calumet Ice &c. R. Co. v. Martin, 115 Ill. 36.... (659)	
Calumet Street R. Co. v. Grosse, 70 Ill. App. 381.....	1061
Calvo v. Railway Co., 23 S. C. 528.....	1405, 1661
Camden &c. R. Co. v. Baldauf, 16 Pa. St. 67.... (297).....	296
Camden &c. R. Co. v. Preston, 59 N. J. L. 264.....	2274
Camden &c. R. Co. v. Young, 60 N. J. L. 193.....	577, 2146, 2167
Cameron v. Boston &c. R. Co., 164 Mass. 523.....	1803
Cameron v. Great Northern R. Co., 8 N. D. 124.....	952, 1111, 1407, 1469, 1631, 1676, 1744
Cameron v. Kenyon &c. Co., 22 Mont. 312.....	73, 2077
Cameron v. McNair &c. Co., 76 Mo. App. 366.....	1123
Cameron v. New York R. Co., 77 Hun, 519.....	1518
Camp v. Hall, 39 Fla. 535.....	10, 1503, 1627, 1629, 1750
Camp v. W. U. T. Co., 1 Met. (Ky.) 164.....	2389, 2399, 2413, 2430
Camp v. Wood, 76 N. Y. 92.....	1318, 1338
Camp Point Man. Co. v. Ballou, 71 Ill. 418.....	1542
Campbell v. Bauland Co., 41 App. Div. 474.....	2035
Campbell v. Boyd, 88 N. C. 129.... (814)	
Campbell v. Consolidated T. Co., 201 Pa. St. 167.....	2327
Campbell v. Davis, 22 S. W. 244.... (95)	
Campbell v. Dearborn, 175 Mass. 183.....	1492, 1779
Campbell v. Equitable Securities Co., (Colo. App.) 68 Pac. Rep. 788.....	189
Campbell v. Fidelity &c. Co., (Ky.) 60 S. W. Rep. 492.....	1309
Campbell v. H. & T. &c. R. Co., 2 Pos. Unrep. Cas. 473.... (905)	
Campbell v. Harris, 4 Tex. Civ. App. 636.....	847
Campbell v. Ins. Co., 98 Mass. 381.....	1166
Campbell v. Los Angeles R. Co., 135 Cal. 137.....	495
Campbell v. Lunsford, 83 Ala. 512.....	2106
Campbell v. McCaskill, 88 Mo. App. 44.....	1199
Campbell v. Mullen, 60 Ill. App. 497.....	1494, 1724
Campbell v. New Jersey &c. T. Co., 61 N. J. L. 382.....	1637

	PAG
Campbell v. New Orleans City R. Co., 104 La. 183.....	229
Campbell v. N. Y. C. & H. R. R. Co., 35 Hun, 506.....	176
Campbell v. North American Co., 22 App. Div. 414.....	92
Campbell v. Perkins, 8 N. Y. 430.....	204, 34
Campbell v. Pullman &c. R. Co., 42 Fed. Rep. 484.....	60
Campbell v. Railway Co., 9 Misc. 483.....	223
Campbell v. St. Louis &c. R. Co., 58 Mo. 498....(1256)	
Campbell v. Seaman, 63 N. Y. 568.....	209
Campbell v. Stakes, 2 Wend. 137.....	202
Campbell v. Texas &c. R. Co., 16 Tex. Civ. App. 665.....	1530, 161
Campbell v. Union R. Co., 9 Misc. 483.....	2273, 231
Campbell v. U. S. Foundry Co., 73 Hun, 576.....	2043, 209
Campbell v. Watson, (N. J. Eq.) 50 Atl. Rep. 120.....	71
Campbell v. Wing, (Tex.) 24 S. W. Rep. 360.....	2057
Campbell v. Wood, 22 App. Div. 599.....	675, 2243, 2354
Campe v. Weir, 28 Misc. 243....(1099)	241
Campion v. Rollwagen, 43 App. Div. 117.....	641, 2255
Canajoharie National Bank v. Diefendorf, 123 N. Y. 191.....	184
Canal Bank v. Bank of Albany, 1 Hill, 287.....	1079
Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215.....	2097
Canavan v. Oil City, 183 Pa. St. 611.....	1864, 1957
Canavan v. Stuyvesant, 7 Misc. 113.....	1317, 1327, 1342
Candee v. Tel. Co., 34 Wis. 471.....	2399, 2408, 2441, 2447, 2448
Candiff v. Louisville &c. R. Co., 42 La. Ann. 477.....	31, 2139
Candler v. Tillett, 22 Beav. 257....(63)	
Canedo v. New Orleans &c. R. Co., 52 La. Ann. 2149.....	2312
Canfield v. B. & O. R. R. Co., 93 N. Y. 532.....	272, 310
Canfield v. Jackson, 112 Mich. 120.....	1134
Canfield v. North Chicago Street R. Co., 98 Ill. App. 1.....	491, 2273, 2286
Canney v. Walkenie, 113 Fed. Rep. 66.....	1665
Cannon v. Brooklyn City R. Co., 14 Misc. 400.....	922
Cannon v. Lewis, 18 Mont. 402.....	1877, 2257
Cannon v. Lindsay, 85 Ala. 198....(172)	
Cannon v. Pittsburg &c. T. Co., 194 Pa. St. 159.....	689, 2333
Cannon v. St. Joseph, 67 Mo. App. 367.....	1965
Cannon v. W. U. T. Co., 109 N. C. 300.....	2446
Canon v. Chicago &c. R. Co., 101 Iowa, 613.....	1734, 1739, 1797
Cantancarito v. Siegel-Cooper Co., 23 Misc. 664.....	1541
Canton v. Dewey, 71 Ill. App. 346.....	1920
Canton v. Simpson, 2 App. Div. 561.....	687, 2358, 2370
Canton Cotton Warehouse Co. v. Pool, 78 Miss. 147.....	32
Canton &c. R. Co. v. Paine, (Miss.) 19 So. 199.....	2090
Cantrell v. Colwell, 3 Head. (Tenn.) 471....(32)	
Cantrell v. Erie R. Co., 64 N. J. L. 277....(755)	
Capen v. Hall, 21 R. I. 364.....	1357
Capital Bank v. Armstrong, 62 Mo. 59....(173)	
Capital Electric Co. v. Hauswald, 78 Ill. App. 359.....	647
Capitol Printing Co. v. Raleigh, 126 N. C. 516.....	1821
Capital Traction Co. v. Lusby, 12 App. D. C. 295.....	451, 2298
Capasso v. Woolfolk, 163 N. Y. 472.....	1664
Capper v. Louisville &c. R. Co., 103 Ind. 305.....	1614, 1620, 1669
Carberry v. Sharron, 166 Mass. 32.....	2019, 2020
Card v. Case, 57 Eng. Com. Law, 622....(982)	
Card v. Columbia, 191 Pa. St. 254.....	1848
Card v. Ellsworth, 65 Me. 547.....	688, 1913, 1915
Card v. Manhattan R. Co., 103 N. Y. 670.....	480
Card v. Wilkins, 61 N. J. L. 296.....	1729
Carden v. Louisville &c. R. Co., 101 Ky. 113.....	1371
Cardonner v. Metropolitan Street R. Co., 38 App. Div. 597.....	2329
Cardot v. Barney, 62 N. Y. 81....(76)	
Cardot v. Barney, 63 N. Y. 281.....	89
Carey v. Berkshire R. Co., 1 Cush. 475....(943)	
Carey v. Hubbardson, 172 Mass. 106.....	1952

## TABLE OF CASES.

xlvii

	PAGE
Carey v. St. Louis &c. R. Co., 60 Mo. 213....(1034)	
Carey v. Sellers, 41 La. Ann. 500.....	1698
Carey v. Cleveland &c. R. Co., 29 Barb. (N. Y.) 35.....	620, 624
Carhart v. Wainman, 114 Ga. 632.....	106, 859
Carl v. Pierce, 20 Oh. C. C. 68.....	1123, 1680
Carland v. Aurin, 103 Tenn. 555.....	2097
Carland v. W. U. T. Co., 118 Mich. 369.....	2393
Carleton v. Caribou, 88 Me. 461.....	1837
Carleton v. Franconia &c. Co., 99 Mass. 216.....	1319, 1340, 2117
Carleton Min. &c. Co. v. Ryan, (Colo.) 68 Pac. Rep. 279.....	1571, 1805
Carlinville Nat. Bank v. Wilson, 78 Ill. App. 339.....	39
Carlisle v. Brisbane, 113 Pa. St. 544.....	536, 730, 2030
Carlisle v. Sheldon, 38 Vt. 440....(726)	
Carll v. Interstate &c. R. Co., (R. I.) 51 Atl. Rep. 305.....	1771
Carll v. Northport, 11 App. Div. 120.....	1962
Carlson v. Cincinnati &c. R. Co., 120 Mich. 481.....	1715
Carlson v. Lynn &c. R. Co., 172 Mass. 388.....	2336
Carlson v. Marston, 68 Minn. 400.....	1728
Carlson v. Northwestern Teleph. &c. Co., 63 Minn. 428.....	1628, 1678
Carlson v. P. B. Co., 132 N. Y. 277.....	1403
Carlson v. St. Louis &c. Co., 73 Minn. 128.....	2085
Carlson v. Sioux Falls Water Co., 8 S. D. 47.....	1494, 1683
Carlson v. Stocking, 91 Wis. 432.....	655
Carlson v. Walsh, 56 App. Div. 551.....	1697
Carlson v. Wilkeson Coal &c. Co., 19 Wash. 473.....	1521
Carlson v. United &c. P. Asso., 93 Fed. Rep. 468.....	1625, 1668
Carlton v. Wilmington &c. R. Co., 104 N. Car. 365....(1021)	
Carman v. Central R. &c., 10 Kulp, 87....(777)	
Carman v. Steubenville &c. R. Co., 4 Oh. St. 399....(652).....	2073
Carmer v. Chicago &c. R. Co., 95 Wis. 513....(771)	
Car michael v. Texarkana, 94 Fed. Rep. 561.....	2097
Carnegie v. Penn Bridge Co., 197 Pa. St. 441.....	1724
Carney v. Brome, 77 Hun, 583.....	988
Carney v. Cincinnati Street R. Co., 8 Oh. S. & C. P. Dec. 587.....	371
Carnie v. Ervin, 59 Ill. App. 555....(730)	
Carolan v. Southern P. Co., 84 Fed. Rep. 84.....	1441
Caron v. Boston &c. R. Co., 164 Mass. 523.....	1591
Carpenter v. Blake, 50 N. Y. 696.....	2183, 2184
Carpenter v. Blake, 75 N. Y. 12.....	2184, 2185
Carpenter v. Blake, 10 Hun, 358.....	2187
Carpenter v. Blake, 60 Barb. 488.....	2188, 2194
Carpenter v. Boston & Albany R. R. Co., 97 N. Y. 494.....	368, 424
Carpenter v. B. & N. Y. & P. R. Co., 38 Hun, 116.....	923
Carpenter v. Central Park R. Co., 11 Abb. (N. S.) 416.....	2337
Carpenter v. Cohoes, 81 N. Y. 21.....	1820, 1830, 2328
Carpenter v. Eastern R. Co., 67 Minn. 188....(240)	
Carpenter v. East Trans. Co., 71 N. Y. 574.....	232, 1208
Carpenter v. Mexico National R. Co., 17 Wash. L. R. 630.....	852
Carpenter v. N. Y., N. H. & H. R. Co., 124 N. Y. 53.....	596, 597
Carpenter v. Rolling, 107 Wis. 559.....	1826, 1925, 1954, 2020, 2023
Carpenter v. Red Cloud, (Neb.) 89 N. W. Rep. 637.....	928
Carpenter v. Taylor, 1 Hilt. 193.....	149
Carr v. Glover, 70 Mo. App. 242.....	2182
Carr v. Manchester Electric Co., 70 N. H. 308.....	1562
Carr v. Missouri P. R. Co., 58 Kan. 814.....	736
Carr v. N. Y. Central &c. R. Co., 60 N. Y. 633....(798).....	764
Carr v. North River Construction Co., 48 Hun, 266.....	1441, 1483
Carr v. Schafer, 15 Colo. 48....(244)	
Carr v. Sheehan, 81 Hun, 291.....	2119
Carr v. Toledo T. Co., 19 Oh. C. C. 281.....	904
Carr v. Spencer, 72 N. Y. St. Rep. 108.....	366
Carrico v. W. Va. &c. R. Co., 35 W. Va. 389.....	541
Carrier v. Union P. R. Co., 61 Kan. 447.....	1126, 1709, 1742

	PAGE
Carrier v. Union P. R. Co., 58 Kan. 816.....	170
Carrier v. McWilliams, 104 La. 678.....	1743
Carrigan v. Washburn & Co., 170 Mass. 79.....	155
Carrington v. Mueller, 65 N. J. L. 244.....	1480, 175
Carroll v. Allen, 20 R. I. 541.....	1946, 205
Carroll v. B. C. & R. Co., 38 Iowa, 120.....	237
Carroll v. Burleigh, 15 Wash. 208.....	44
Carroll v. Chicago & C. R. Co., 99 Wis. 399.....	1603
Carroll v. East Tenn. & C. R. Co., 82 Ga. 452.....	173
Carroll v. Interstate & C. Co., 107 Mo. 653.....	516
Carroll v. Minn. & C. R. Co., 14 Minn. 57.....	683, 689
Carroll v. Mo. Roc. R. Co., 80 Mo. 239.... (943)	
Carroll v. New York, 29 App. Div. 420.....	1997
Carroll v. N. Y. & C. R. Co., 1 Duer (N. Y.) 578.... (381)	
Carroll v. Staten Island R. Co., 58 N. Y. 126.....	388, 389, 1100, 2373, 2382
Carroll v. Tidewater Oil Co., 67 N. J. L. 679.....	1478, 1675
Carroll v. Willstons, 44 Minn. 287.....	1448
Carrow v. Barre R. Co., (Vt.) 52 Atl. Rep. 537.....	797, 864
Carsley v. Whites, Pick. 254.... (1104)	
Carson v. Chicago & C. R. Co., 96 Iowa, 583.....	707, 721
Carson v. Godley, 26 Pa. St. 111.....	652
Carson & Co. v. Fincher, (Mich.) 89 N. W. Rep. 570.....	179
Carsteen v. Stratford, 67 Conn. 428.....	1939, 1950
Carstens v. Burleigh, 20 Wash. 283.....	227
Carster v. Northern P. R. Co., 44 Minn. 454.....	573, 833
Carstesen v. Stratford, 67 Conn. 428.....	1933, 2017, 2255
Carswell v. Wilmington, 2 Marv. (Del.) 360.....	1165, 1822, 1948, 1951, 1954
Carter v. Cape Fear Lumber Co., 129 N. C. 203.....	1413
Carter v. Columbia & C. R. Co., 19 S. C. 20.... (657)	662, 2140
Carter v. Central Vermont R. Co., 72 Vt. 190.... (761)	
Carter v. Chambers, 79 Ala. 223.....	2230, 2358
Carter v. Harden, 78 Me. 328.....	1379
Carter v. Hobbs, 12 Mich. 52.... (147)	148
Carter v. Kansas City & C. R. Co., 69 Mo. App. 295.....	1005
Carter v. Louisville & C. R. Co., 98 Ind. 552.... (31)	
Carter v. Nunda, 55 App. Div. 501.....	859, 862, 1883
Carter v. Seattle, 21 Wash. 585.....	1148
Carter v. Towne, 103 Mass. 508.....	1379
Carterville Coal Co. v. Abbott, 81 Ill. App. 279.....	1783, 1784
Cartlidge v. Sloan, 124 Ala. 596.....	106, 114
Cartwright v. Chicago & C. R. Co., 52 Mich. 606.....	442
Caruth v. Texas & C. R. Co., 45 La. Ann. 1228.....	473
Caruthers v. Caruthers, 99 Ill. App. 402.....	59
Carver v. Christian, 36 Minn. 413.....	1699
Carvin v. St. Louis, 151 Mo. 334.....	1857
Cary v. Chicago, 60 Ill. App. 341.....	647
Cascade County v. Great Falls, 18 Mont. 537.....	1831
Case v. Chicago & C. R. Co., 64 Iowa, 762.....	1107
Case v. Chicago & C. R. Co., 100 Iowa, 487.... (792)	
Case v. Delaware & C. R. Co., 191 Pa. St. 450.....	561
Case v. N. Y. Cent. & C. R. Co., 75 Hun, 527.....	807
Case v. Perew, 34 Hun, 130, rev'g judg't for pl'ff.....	1168
Casement v. Brown, 148 U. S. 582.....	654
Casey v. Donovan, 65 Mo. App. 521.....	1105
Casey v. Grand Trunk R. Co., 68 N. H. 162.....	1702
Casey v. N. Y. C. & H. R. Co., 78 N. Y. 518.....	798, 1120, 1142
Casey v. Pennsylvania Asphalt & C. Co., 198 Pa. St. 348.....	1449, 1496, 1671
Cash v. Wabash R. Co., 81 Mo. App. 109.....	226
Casista v. Boston & C. R. Co., 69 N. H. 649.... (1044)	
Caskeney v. Nagle, 83 Ga. 696.....	147
Cason v. Ottumwa, 102 Iowa. 99.....	1133, 1872, 1881
Casoni v. Jerome, 58 N. Y. 315.....	626
Casper v. Dry Dock & C. R. Co., 23 App. Div. 451.....	2338



## TABLE OF CASES.

xlix

	PAGE
Casper v. Dry Dock &c. R. Co., 56 App. Div. 372.....	1091
Caspary v. Portland, 19 Oregon, 496.....	2007
Cass v. Dicks, 14 Wash. 75.....	2083
Cass v. Railroad Co., 14 Allen, 448.....	1099
Cass v. Third Ave. R. Co., 20 App. Div. 591.....728, 1229, 1234, 2305,	2310
Cassel's Estate, 180 Pa. St. 252.....	67
Cassida v. Oregon R. Co., 14 Ore. 551.....	720, 1123
Cassidy v. Uhlman, 27 App. Div. 80.....	70
Cassidy v. Poughkeepsie, 71 Hun, 144.....	1907
Cassidy v. Angell, 12 R. I. 447.... (658)	
Castello v. Landwehr, 28 Wis. 522.... (871)	
Castle v. Duryee, 2 Keyes, 169.....	1289
Castle v. Noyes, 14 N. Y. 329.....	2204
Castor v. Kansas City &c. R. Co., 65 Mo. App. 359.....	1018
Castoriano v. Millers, 15 Misc. 254.....	2111
Caswell v. Chicago &c. R. Co., 42 Wis. 193.....	1264
Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.... (871).....	700
Cate v. Blodgett, (N. H.) 48 Atl. Rep. 281.... (1327)	
Cates v. Itner, 104 Ga. 679.....	1669
Catheart v. Hannibal &c. R. Co., 19 Mo. App. 113.....	793
Catlin v. Valentine, 9 Paige, 575.....	2091
Caton v. Rumney, 13 Wend. 387.... (201)	
Caton v. Sedalia, 62 Mo. App. 227.....	1862
Cattaraugus Cutlery Co. v. Buffalo &c. R. Co., 24 App. Div. 267.....	623
Cauley v. Pittsburg &c. R. Co., 95 Pa. St. 398.....	718
Cauley v. Pittsburg R. Co., 98 Pa. St. 498.....	2159
Caulkins v. Whistler, 29 Iowa, 495.....	172
Cavagnaro v. Clark, 171 Mass. 359.....	1804
Cavallaro v. Texas &c. R. Co., 110 Cal. 348.....315, 321, 341	
Cavanagh v. Dinsmore, 12 Hun, 465.....	16
Cavanagh v. O'Neil, 27 App. Div. 48.....1132, 1487,	1627
Cave v. Carolina &c. R. Co., 53 S. C. 496.....	2044
Caven v. Troy, 32 App. Div. 154.....	1089, 1090
Caw v. Texas &c. R. Co., 113 Fed. Rep. 91.....	257
Cawley x. La Crosse City R. Co., 101 Wis. 145.....	2280, 2331
Cawley v. La Crosse City R. Co., 106 Wis. 239.....	2327, 2332
Cawtley v. Morgan, 51 W. Va. 304.....	1086
Cayo v. Pool's Assignee, (Ky.) 55 S. W. Rep. 887.....	200
Cedar Falls v. Hansen, 104 Iowa, 189.....	2085
Cedarson v. Oregon &c. R. Co., 38 Or. 343.....	2167
Celderon v. Atlas S. S. Co., 69 Fed. Rep. 574.....	291
Centlivre v. Ryder, Edm. Select Cas. (N. Y.) 273.....	147
Central Branch &c. R. Co. v. Lea, 20 Kan. 353.... (1040)	
Centralia v. Krouse, 64 Ill. App. 19.... (699)	
Central Man. Co. v. Cotton, (Tenn.) 65 S. W. Rep. 403.....	840, 1449
Central Ohio R. Co. v. Lawrence, 13 Oh. St. 66.... (1026)	
Central Pa. T. S. Co. v. Wilkesbarre & W. S. R. Co., 11 Pa. County Court, 417.	1058
Central Passenger R. Co. v. Kuhn, 86 Ky. 578.....	851
Central &c. R. Co. v. Bond, 111 Ga. 13.....	774, 883
Central &c. R. Co. v. Cannon, 106 Ga. 828.....	556, 1104
Central &c. R. Co. v. Dorsey, 106 Ga. 826.....	575
Central &c. R. Co. v. Felton, 110 Ga. 597.....	275
Central &c. R. Co. v. Foshee, 125 Ala. 199.... (751).....	772, 779, 792, 796
Central &c. R. Co. v. Hoard, (Tex. Civ. App.) 49 S. W. Rep. 142.....	578, 669
Central &c. R. Co. v. Holmes, 110 Ga. 282.....	1165
Central &c. R. Co. v. Hotham, 22 Kan. 41.....	1263
Central &c. R. Co. v. Ingram, 98 Ala. 395.... (1025)	
Central &c. R. Co. v. Kenney, 58 Ga. 485.....	699
Central &c. R. Co. v. Kitchens, 83 Ga. 83.....	1736
Central &c. R. Co. v. Lamb, 124 Ala. 172.....	1742, 1778
Central &c. R. Co. v. Lippman, 110 Ga. 665.....	262, 281, 394, 403
Central &c. R. Co. v. McWorter, (Ga.) 42 S. E. Rep. 82.....	1717
Central &c. R. Co. v. Perry, 58 Ga. 461.... (384)	

	PA
Central &c. R. Co. v. Price, 106 Ga. 176.....	3
Central &c. R. Co. v. Ricks, 109 Ga. 339.....	5
Central &c. R. Co. v. Ryles, 84 Ga. 420.....	17
Central &c. R. Co. v. Strickland, 90 Ga. 562.....	8
Central &c. R. Co. v. Windham, 126 Ala. 552.....	20
Central R. Co. v. Avant, 80 Ga. 195.....	3
Central R. Co. v. Bannister, 96 Ill. App. 332.....	9
Central R. Co. v. Brinson, 70 Ga. 207.....	2145,
Central R. Co. v. Brinson, 64 Ga. 475.... (657).....	22
Central R. Co. v. Bryant, 89 Ga. 457.... (1023)	13
Central R. Co. v. Crosby, 74 Ga. 737.....	9
Central R. Co. v. DeBray, 71 Ga. 406.....	17
Central R. Co. v. Feller, 84 Pa. St. 226.... (758)	
Central R. Co. v. Green, 81 Ill. 19.....	4
Central R. Co. v. Harrison, 73 Ga. 744.....	17
Central R. Co. v. Henigh, 23 Kan. 347.....	21
Central R. Co. v. Keegan, 82 Fed. Rep. 174.....	1611, 16
Central R. Co. v. Keegan, 160 U. S. 259.....	16
Central R. Co. v. Letcher, 68 Ala. 106.....	493, 4
Central R. Co. v. Lea, 20 Iowa, 353.... (1040)	
Central R. Co. v. McCartney, (N. J. L.) 52 Atl. Rep. 575.....	2
Central R. Co. v. Mitchell, 63 Ga. 174.....	17
Central R. Co. v. Mundy, 21 Ind. 48.... (261)	
Central R. Co. v. Peacock, 69 Md. 257.... (29)	
Central R. Co. v. Perry, 58 Ga. 461.... (482)	
Central R. Co. v. Thompson, 76 Ga. 770.....	4
Central R. Co. v. State, 82 Md. 647.....	19
Central R. Co. v. Van Horn, 9 Vroom (N. J.) 133.... (474)	
Central R. &c. v. Feller, 84 Pa. St. 226.....	702, 70
Central R. &c. Co. v. Kitchens, 83 Ga. 83.....	17
Central R. &c. Co. v. Robertson, 95 Ga. 430.....	8
Central R. &c. v. Smalley, 61 N. J. L. 277.....	70
Central R. &c. Co. v. Smith, 80 Ga. 526.... (11)	
Central State Bank v. Spurlin, 111 Iowa, 187.....	14
Central Texas &c. R. Co. v. Douglass, (Tex. Civ. App.) 36 S. W. Rep. 120.....	214
Central Texas &c. R. Co. v. Holloway, (Tex. Civ. App.) 54 S. W. Rep. 419.....	41
Central Trust Co. v. Denver &c. R. Co., 97 Fed. Rep. 239.....	131
Central Trust Co. v. East Tennessee &c. R. Co., 69 Fed. Rep. 353.....	173
Central Trust Co. v. East Tennessee &c. R. Co., 69 Fed. Rep. 357.....	160
Central Trust Co. v. East Tennessee R. Co., 70 Fed. Rep. 764.....	336, 1099, 111
Central Trust Co. v. East Tennessee &c. R. Co., 73 Fed. Rep. 661.....	1437, 168
Central Trust Co. v. Savannah &c. R. Co., 69 Fed. Rep. 683.....	216, 83
Central Trust Co. v. Wabash &c. R. Co., 31 Fed. Rep. 246.....	70
Central Trust Co. v. Wabash &c. R. Co., 35 Fed. Rep. 147.....	61
Central U. Telephone Co. v. Bradbury, 106 Ind. 1.....	2386, 238
Cerillos Coal R. Co. v. Deserant, 9 N. M. 49.....	903, 1452, 1631, 178
Certain Logs of Mahogany, 2 Sum. 589.... (204)	
Chacey v. Fargo, 5 N. D. 173.....	186
Chaddick v. Lindsay, 5 Okla. 616.....	1564, 160
Chaddock v. Plummer, 88 Mich. 225.....	202
Chaffee v. Boston &c. R. Co., 104 Mass. 108.....	1093, 168
Chaffee v. Erie R. Co., 68 App. Div. 578.....	174
Chaffee v. Old Colony R. Co., 17 R. I. 658.....	48
Challis v. Lake, 71 N. H. 90.....	1236, 219
Chamberlain v. Enfield, 43 N. Y. 359.....	191
Chamberlain v. Lake Shore &c. R. Co., 122 Mich. 477.....	92
Chamberlain v. Lake Shore &c. R. Co., 110 Mich. 614.....	53
Chamberlain v. Missouri P. R. Co., 133 Mo. 587.....	2146, 214
Chamberlain v. Murphy, 41 Vt. 118.....	2026, 220
Chamberlain v. Pierson, 87 Fed. Rep. 420.....	267, 37
Chamberlain v. Platt, 68 Conn. 126.....	120
Chamberlain v. Pullman &c. Co., 55 Mo. App. 475.....	600
Chamberlain v. Railroad Co., 17 Wis. 238.....	1600

# TABLE OF CASES.

li

	PAGE
Chamberlain v. West Trans. Co., 45 Barb. 223....(617)	
Chambers v. Matthews, 18 N. J. L. 368....(1010)	1008
Chamber's Appeal, 11 Pa. St. 436.....	51
Chambersburg Savings Bank v. McLellan, 76 Pa. St. 203.....	57
Champaign v. Forrester, 29 Ill. App. 117.....	1908
Champaign County v. Church, 62 Oh. St. 318.....	1911
Champion v. Bostwick, 48 Wend. 475....(992)	
Champion Ice Man. Co. v. Carter, (Ky.) 51 S. W. Rep. 16.....	1143, 1675
Champlin v. Penn Yan, 34 Hun, 33.....	1912
Champlin v. Village of Penn Yan, 34 Hun, 33.....	1131
Champlin v. Village of Penn Yan, 102 N. Y. 680.....	1914, 2366
Champlin v. Ry. Pass. Association Co., 6 Lansing, 71.....	1309
Chance v. St. Louis &c. R. Co., 10 Mo. App. 351.....	428
Chandler v. Atlantic &c. R. Co., 61 N. J. L. 380.....	1513, 1547
Channon v. Sanford Co., 70 Conn. 573.....	1737
Chapeton v. Portland &c. Electric Co., (Ore.) 67 Pac. Rep. 928.....	829, 1064
Chapin v. Sullivan &c. R. Co., 39 N. H. 53....(1043)	
Chapman v. Atlantic Ave. R. Co., 14 Misc. 404.....	932, 2271
Chapman v. Boardman, 69 Conn. 93.....	2266
Chapman v. Charleston, 28 S. C. 373.....	1997, 2008
Chapman v. Decrow, 93 Me. 378.....	990
Chapman v. Erie R. Co., 55 N. Y. 579....(605).....	1130, 1512, 1529
Chapman v. New Haven R. Co., 19 N. Y. 341.....	533
Chapman v. N. Y. C. & H. R. R. Co., 14 Hun, 484.....	1164
Chapman v. New York &c. R. Co., 41 App. Div. 618.....	680
Chapman v. Reynolds, 77 Fed. Rep. 274.....	1623
Chapman v. Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364.....	167, 168, 626
Chapman v. Southern P. Co., 12 Utah, 30.....	910, 1623, 1875
Chapman v. Western Union Tel. Co., 88 Ga. 763.....	857
Chapman v. W. U. T. Co., 13 S. W. Rep. 880.....	2454
Charitable Corporation v. Sutton, 2 Atkyns, 405....(68)	
Charles Pope Glucose Co. v. Byrne, 60 Ill. App. 17.....	1681
Charlock v. Freel, 125 N. Y. 357.....	635
Charlock v. Friel, 50 Hun, 395.....	639
Charlton's Appeal, 34 Pa. St. 473.....	51
Charman v. Lake Erie &c. R. Co., 105 Fed. Rep. 449.....	1803, 1806, 2031
Chase v. Maine &c. R. Co., 77 Me. 62.....	1241
Chase v. Middleton, 123 Mich. 647.....	2007
Chase v. Surry, 88 Me. 468.....	2023
Chatham v. Bradford, 50 Ga. 327....(82)	
Chatham v. Hampson, 2 L. Raymond, 804....(996)	
Chattanooga v. Dowling, 101 Tenn. 342.....	1964
Chattanooga v. Reid, 103 Tenn. 616.....	1815
Chattanooga &c. R. Co. v. Huggins, 89 Ga. 494.....	353
Chattanooga &c. R. Co. v. Myers, 112 Ga. 237.....	1531, 1727
Chattanooga Electric R. Co. v. Lawson, 101 Tenn. 406.....	1647
Chattanooga R. Co. v. Liddell, 85 Ga. 482.....	901
Chattanooga &c. R. Co. v. Walton, 105 Tenn. 415.....	743
Chau Sing v. Portland, 37 Ore. 68.....	1821
Cheatham v. Red River Line, 56 Fed. Rep. 248.....	955, 1770
Cheeseborough v. Taylor, 12 Abb. Pr. (N. Y.) 227.....	106
Cheetham v. Hampson, 4 Term. R. 318.....	1333
Cheever v. Pittsburg &c. R. Co., 150 N. Y. 59.....	184
Cheeves v. Danielly, 80 Ga. 114.....	2085
Chemung Canal Bank v. Bradner, 44 N. Y. 680....(175)	
Cheney v. Boston &c. R. Co., 11 Mete. 121....(546)	
Cheney v. N. Y. C. & H. R. R. R. Co., 16 Hun, 415.....	795
Cherokee &c. Co. v. Britton, 3 Kan. App. 292.....	1146, 1479, 1513, 1585, 1629
Cherokee &c. Co. v. Limb, 47 Kan. 469.....	880
Chesapeake &c. R. Co. v. American Exch. Bank, 92 Va. 495.....	229, 258, 685
Chesapeake &c. R. Co. v. Anderson, 93 Va. 650.....	422
Chesapeake &c. Telephone Co. v. Baltimore &c. T. Co., 66 Md. 399.....	2386
Chesapeake &c. R. Co. v. Clowes, 93 Va. 189.....	401

	PAGE
Chesapeake &c. R. Co. v. Davis, (Ky.) 58 S. W. Rep. 698.....	911, 2029
Chesapeake &c. R. Co. v. Davis, (Ky.) 60 S. W. Rep. 14....	(736)
Chesapeake &c. R. Co. v. Dodge, (Ky.) 66 S. W. Rep. 606.....	902
Chesapeake &c. R. Co. v. Dupree, (Ky.) 67 S. W. Rep. 15....	(735)..... 874, 925
Chesapeake &c. R. Co. v. Friel, (Ky.) 39 S. W. Rep. 704.....	436, 913
Chesapeake &c. R. Co. v. Gunter, (Ky.) 56 S. W. Rep. 527.....	808
Chesapeake &c. R. Co. v. Hammer, (Ky.) 66 S. W. Rep. 375.....	2044
Chesapeake &c. R. Co. v. Hennessey, 96 Fed. Rep. 713.....	1495, 1586, 1591
Chesapeake &c. R. Co. v. Higgins, 85 Tenn. 620.....	949, 953
Chesapeake &c. R. Co. v. Howard, 178 U. S. 153.....	1336
Chesapeake &c. R. Co. v. Howard, 14 App. D. C. 262.....	409, 2205
Chesapeake &c. R. Co. v. Hyde, (Ky.) 56 S. W. 423.....	2029
Chesapeake &c. R. Co. v. Jennings, 98 Va. 70.....	1832, 1840
Chesapeake &c. R. Co. v. King, 99 Fed. Rep. 251.....	387, 454
Chesapeake &c. R. Co. v. Lang, 100 Ky. 221.....	502, 874
Chesapeake &c. R. Co. v. Lash, (Va.) 24 S. E. Rep. 385.....	1407, 1430, 1687
Chesapeake &c. R. Co. v. Perkins, (Ky.) 47 S. W. Rep. 259.....	2150
Chesapeake R. Co. v. Saulsberry, (Ky.) 66 S. W. Rep. 1051.....	587, 592
Chesapeake &c. R. Co. v. Smith, 101 Ky. 104.....	1159, 2055
Chesapeake &c. R. Co. v. Sparrow, 98 Va. 630.....	1726
Chesapeake &c. R. Co. v. Steele, 84 Fed. Rep. 93....	(784)..... 1111
Chesson v. Roper Lumber Co., 118 N. C. 59.....	1406, 1469, 1484, 1633
Chester v. Burkhardt, 104 Mass. 69.....	2373
Chester v. First Nat. Bank, 9 Pa. Super. Ct. 517.....	1300, 2261
Chester Glass Co. v. Dewey, 16 Mass. 94....	(355)
Chesterfield v. Ratliff, 52 S. C. 563.....	1290
Chesterman v. Eyland, 81 N. Y. 398....	(45)
Chestnut v. Southern Ind. R. Co., 157 Ind. 509.....	1480
Chicago v. Baker, 95 Ill. App. 413.....	1827
Chicago v. Baker, 98 Fed. Rep. 830.....	1961
Chicago v. Cronin, 91 Ill. App. 466.....	1634
Chicago v. Doolan, 99 Ill. App. 143.....	932
Chicago v. Fitzgerald, 75 Ill. App. 174.....	912, 1876
Chicago v. Fowler, 60 Ill. 322.....	1937
Chicago v. Gilford, 99 Ill. App. 88.....	851
Chicago v. Gillett, 91 Ill. App. 287.....	918, 1872
Chicago v. Hoy, 75 Ill. 530.....	1914
Chicago v. Hessing, 83 Ill. 204.....	719, 1936
Chicago v. Keefe, 114 Ill. 222.....	720, 875
Chicago v. Kohlhof, 64 Ill. App. 349.....	1858
Chicago v. McGuirl, 86 Ill. App. 392.....	1961
Chicago v. Major, 18 Ill. 349....	(719)
Chicago v. Manhattan Cement Co., 178 Ill. 372.....	1910
Chicago v. Moyer, 18 Ill. 439.....	1945
Chicago v. Norton Milling Co., 97 Ill. App. 651.....	1815
Chicago v. O'Malley, 95 Ill. App. 355.....	4, 912, 1839, 1841
Chicago v. People, 56 Ill. 365....	(545)
Chicago v. Richardson, 75 Ill. App. 198.....	699, 1897
Chicago v. Robbins, 2 Black, 418.....	654, 1299
Chicago v. Rumsey, 87 Ill. 348.....	1960
Chicago v. Rustin, 99 Ill. App. 47.....	1812
Chicago v. Scholten, 75 Ill. 468....	(857)..... 879
Chicago v. Seben, 165 Ill. 371.....	1813, 1821, 1908
Chicago v. Starr, 42 Ill. 174....	(718)..... 1939
Chicago v. Taylor, 125 U. S. 161.....	1963
Chicago v. Wallace, 2 Black, 428....	(654)
Chicago v. Wisconsin S. Co., 97 Fed. Rep. 107.....	1836, 1119
Chicago Bridge &c. Co. v. Hayes, 91 Ill. App. 26.....	1571
Chicago Edison Co. v. Moren, 86 Ill. App. 152.....	925
Chicago Edison Co. v. Hudson, 66 Ill. App. 639.....	1738
Chicago General R. Co. v. Carroll, 91 Ill. App. 356.....	2318
Chicago General R. Co. v. Chicago City R. Co., 186 Ill. 219.....	2275
Chicago Packing &c. Co. v. Savannah &c. R. Co., 103 Ga. 140.....	315

## TABLE OF CASES.

liii

	PAGE
Chicago Title &c. Co. v. Brugger, 196 Ill. 96.....	190
Chicago &c. Bottling Co. v. McGinnia, 86 Ill. App. 38.....	11
Chicago &c. Build. Co. v. Nelson, 98 Ill. App. 189.....	1075
Chicago &c. Club v. Chicago, 77 Ill. App. 124.....	1910
Chicago &c. Co. v. Holdridge, 118 Ind. 281.....	574
Chicago &c. Co. v. Sobkowiak, 34 Ill. App. 312.....	1643
Chicago &c. Gas. Co. v. Myers, 168 Ill. 139.....	646, 1382, 1397, 2048
Chicago &c. T. Co. v. Bugbee, 184 Ill. 353.....	1136
Chicago &c. T. Co. v. Schmelling, 99 Ill. App. 577.....	386, 427
Chicago &c. Works v. Nagel, 80 Ill. App. 492.....	1412, 1666
Chicago R. R. Co. v. Gillan, 27 Ill. App. 386.....	856
Chicago City R. Co. v. Anderson, 182 Ill. 298.....	851, 854, 856
Chicago City R. Co. v. Canevin, 72 Ill. App. 81.... (657)	
Chicago City R. Co. v. Fennimore, 99 Ill. App. 174.....	1111
Chicago City R. Co. v. Gregg, 69 Ill. App. 77.....	496
Chicago City R. Co. v. Hennessey, 16 Bradw. (Ill.) 153.... (648)	
Chicago City R. Co. v. Leach, 182 Ill. 359.....	920, 1370, 1608
Chicago City R. Co. v. Meehan, 77 Ill. App. 215.....	486, 496
Chicago City R. Co. v. Roach, 76 Ill. App. 496.....	2283
Chicago City R. Co. v. Taylor, 68 Ill. App. 613.....	922
Chicago R. Co. v. Manning, 170 Ill. 417.....	471
Chicago &c. R. Co. v. Abel, 60 Miss. 1017.....	250
Chicago &c. R. Co. v. Adams, 60 Ill. App. 571.....	548, 854
Chicago &c. R. Co. v. American Strawboard Co., 91 Ill. App. 635.....	1106, 1262
Chicago &c. R. Co. v. Anderson, 193 Ill. 9.....	2286
Chicago &c. R. Co. v. Anderson, 182 Ill. 298.....	923
Chicago &c. R. Co. v. Anderson, 67 Ill. App. 386.....	1443
Chicago &c. R. Co. v. Archer, 46 Neb. 907.....	1230
Chicago &c. R. Co. v. Argo, 82 Ill. App. 667.....	774, 2168
Chicago &c. R. Co. v. Armstrong, 62 Ill. App. 228.....	1473
Chicago &c. R. Co. v. Arnol, 144 Ill. 261.... (474)	
Chicago &c. R. Co. v. Avery, 109 Ill. 314.....	1403, 1405
Chicago &c. R. Co. v. Ayers, 106 Ill. 518.....	1963
Chicago &c. R. Co. v. Bailey, 9 Kan. App. 207.....	863
Chicago &c. R. Co. v. Bannerman, 15 Bradw. 100.....	563
Chicago &c. R. Co. v. Barnes, 116 Ind. 126.....	1048
Chicago &c. R. Co. v. Bartley, 59 Kan. 776.... (821)	
Chicago &c. R. Co. v. Bayfield, 37 Mich. 210.....	1544, 1597, 1599, 1600, 1618
Chicago &c. R. Co. v. Beaver, 96 Ill. App. 558.... (771)	
Chicago &c. R. Co. v. Becker, 76 Ill. 25.....	687
Chicago &c. R. Co. v. Becker, 84 Ill. 483.....	737
Chicago &c. R. Co. v. Beevins, 46 Kan. 370.....	1479
Chicago &c. R. Co. v. Bell, 70 Ill. 102.... (751)	
Chicago &c. R. Co. v. Bellwith, 83 Fed. Rep. 437.....	2206
Chicago &c. R. Co. v. Bentz, 38 Ill. App. 485.... (732)	
Chicago &c. Co. v. Bert, 69 Ill. 388.....	2270
Chicago &c. B. Co. v. Bills, 104 Ind. 13.....	584
Chicago &c. B. Co. v. Bills, 118 Ind. 221.....	584
Chicago &c. R. Co. v. Blauhl, 175 Ill. 183.....	810, 917
Chicago &c. B. Co. v. Blinkopaki, 72 Ill. App. 22.....	1674
Chicago &c. R. Co. v. Body, 85 Ill. App. 133.....	738, 770
Chicago &c. R. Co. v. Boggs, 101 Ind. 522.....	784
Chicago &c. R. Co. v. Bond, 58 Neb. 385.....	2045
Chicago & Alton R. Co. v. Bonifield, 104 Ill. 223.....	1613
Chicago &c. R. Co. v. Bosworth, 179 U. S. 442.....	350
Chicago &c. R. Co. v. Boyce, 73 Ill. 510.... (619)	
Chicago &c. R. Co. v. Boyles, 11 Tex. Civ. App. 522.....	414, 895
Chicago &c. R. Co. v. Bozarth, 91 Ill. App. 68.... (240)	
Chicago &c. R. Co. v. Brackman, 78 Ill. App. 141.....	19
Chicago &c. R. Co. v. Bragonier, 119 Ill. 51.....	1466, 1543, 1547
Chicago &c. R. Co. v. Brandan, 65 Ill. App. 150.....	1607
Chicago &c. R. Co. v. Branyan, 10 Ind. App. 570.....	1470
Chicago &c. R. Co. v. Brisbane, 24 Ill. App. 463.... (552)	

	PAGE
Chicago &c. R. Co. v. Buck, 14 Ill. App. 394.....	1042
Chicago &c. R. Co. v. Buckmaster, 74 Ill. App. 575.....	530
Chicago &c. R. Co. v. Bunker, 81 Ill. App. 616.....	775
Chicago &c. R. Co. v. Burden, 14 Ind. App. 512.....	1265
Chicago &c. R. Co. v. Burrow, 32 Ill. App. 161.....	832
Chicago &c. R. Co. v. Calumet Stock Farm, 96 Ill. App. 337.....	224, 282
Chicago &c. R. Co. v. Canevin, 72 Ill. App. 81..... (854)	
Chicago &c. R. Co. v. Carpenter, 56 Fed. Rep. 451.....	375
Chicago &c. R. Co. v. Carroll, 5 Ill. App. 201.....	580
Chicago &c. R. Co. v. Casey, 9 Ill. App. 632.....	19
Chicago &c. R. Co. v. Casaza, 83 Ill. App. 421.....	592
Chicago &c. R. Co. v. Catlin, 70 Ill. App. 97.... (1103)	
Chicago &c. R. Co. v. Chancellor, 165 Ill. 438.....	1158
Chicago &c. R. Co. v. Chancellor, 60 Ill. App. 525.....	369, 426, 452
Chicago &c. R. Co. v. Chapman, 133 Ill. 96.....	245, 281, 285
Chicago &c. R. Co. v. Chipman, 87 Ill. App. 292.....	1133
Chicago &c. R. Co. v. Church, 12 Ill. App. 17.... (281)	
Chicago &c. R. Co. v. Clark, 108 Ill. 113.....	1437
Chicago &c. R. Co. v. Clark 11 Ill. App. 104.....	1437, 1691
Chicago &c. C. R. Co. v. Clark, 2 Bradwell (Ill.) 116.... (657)	
Chicago &c. R. Co. v. Clausen, 70 Ill. App. 550.....	486
Chicago &c. R. Co. v. Clonch, 2 Kan. App. 728.....	1054
Chicago &c. R. Co. v. Considine, 50 Ill. App. 471.....	580
Chicago &c. R. Co. v. Cooney, 196 Ill. 466.....	898, 918, 1370
Chicago &c. R. Co. v. Cowles, 54 Neb. 269.....	1744
Chicago &c. R. Co. v. Cullen, 187 Ill. 523.....	1465, 1631, 1677, 1685
Chicago &c. R. Co. v. Cummings, 24 Ind. App. 192.... (739).....	1214, 2046
Chicago &c. R. Co. v. Curtis, 51 Neb. 442.....	1587, 2205
Chicago &c. R. Co. v. Czaja, 59 Ill. App. 21.....	452
Chicago &c. R. Co. v. Damerell, 81 Ill. 450.....	737, 741
Chicago &c. R. Co. v. Davis, 159 Ill. 53.....	245, 282, 305
Chicago &c. R. Co. v. Davis, 74 Ill. App. 595.... (888)	
Chicago &c. R. Co. v. Delaney, 68 Ill. App. 307.....	1432, 1485
Chicago &c. R. Co. v. Dewey, 26 Ill. 258.... (711)	
Chicago &c. R. Co. v. Dickson, 63 Ill. 151.....	28
Chicago &c. R. Co. v. Dignam, 56 Ill. 487.... (798)	
Chicago &c. R. Co. v. Dillon, 123 Ill. 570.....	775
Chicago &c. R. Co. v. Dimick, 96 Ill. 42.... (737).....	659
Chicago &c. R. Co. v. Dixon, 49 Ill. App. 292.....	1479
Chicago &c. R. Co. v. Doan, 195 Ill. 168.....	441
Chicago &c. R. Co. v. Dougherty, 110 Ill. 521.... (796)	
Chicago &c. R. Co. v. Dougherty, 12 Ill. App. 181.....	775
Chicago &c. R. Co. v. Downey, 85 Ill. App. 175.....	1121
Chicago &c. R. Co. v. Downey, 96 Ill. App. 398.....	934
Chicago &c. R. Co. v. Doyle, 18 Kan. 58.....	1519
Chicago &c. R. Co. v. Drake, 33 Ill. App. 114.....	471
Chicago &c. R. Co. v. Driscoll, 176 Ill. 330.....	1434, 1590, 1608
Chicago &c. R. Co. v. Driscoll, 70 Ill. App. 91.....	1443, 1629, 1678
Chicago &c. R. Co. v. Dumsor, 161 Ill. 190.... (343).....	409
Chicago &c. R. Co. v. Dunn, 61 Ill. 385.... (740)	
Chicago &c. R. Co. v. Durant, (Kan.) 69 Pac. Rep. 356.....	800
Chicago &c. R. Co. v. DuBois, 65 Ill. App. 142.....	1489, 1519
Chicago &c. R. Co. v. Dudgeon, 69 Ill. App. 57.....	646
Chicago &c. R. Co. v. Eaton, 194 Ill. 441.....	1680
Chicago &c. R. Co. v. Eaton 96 Ill. App. 570.....	1489, 1531, 1613
Chicago &c. R. Co. v. Eggman, 59 Ill. App. 680.....	1713, 1752
Chicago &c. R. Co. v. Elliott, 55 Fed. Rep. 949.....	375
Chicago &c. R. Co. v. Emmert, 53 Neb. 237.... (1369)	
Chicago &c. R. Co. v. Engel, 58 Ill. 381.... (1053)	
Chicago &c. R. Co. v. Eselin, 86 Ill. App. 94.....	2055
Chicago &c. R. Co. v. Esten, 178 Ill. 192.....	1118
Chicago &c. R. Co. v. Featherly, (Neb.) 89 N. W. Rep. 792.... (658).....	751, 1090
Chicago &c. R. Co. v. Fell, 71 Ill. App. 89.... (751)	

	PAGE
Chicago &c. R. Co. v. Fell, 79 Ill. App. 376....(771)	
Chicago &c. R. Co. v. Fennimore, 78 Ill. App. 478.....	2314
Chicago &c. R. Co. v. Ferguson, 3 Colo. App. 414.....	638
Chicago &c. R. Co. v. Fifth Nat. Bank, 26 Ind. App. 600.....	330
Chicago &c. R. Co. v. Filler, 195 Ill. 9.....	766
Chicago &c. R. Co. v. Finnan, 84 Ill. App. 383.....	1411
Chicago &c. R. Co. v. First &c. Church, 102 Fed. Rep. 85.....	2096
Chicago &c. R. Co. v. Fisher, 66 Ill. 152.....	576
Chicago &c. R. Co. v. Flaherty, 96 Ill. App. 563.....	478
Chicago &c. R. Co. v. Fry, 131 Ind. 319.....	1733
Chicago &c. R. Co. v. Garner, 78 Ill. App. 281.....	1407, 1682
Chicago &c. R. Co. v. Gates, 61 Ill. App. 211.....	409
Chicago &c. R. Co. v. Geary, 110 Ill. 383.....	1605
Chicago &c. R. Co. v. Gertsen, 15 Ill. App. 614.....	737
Chicago &c. R. Co. v. Gibbons, 65 Ill. App. 550.....	1125
Chicago &c. R. Co. v. Gillison, 173 Ill. 264.....	1142, 1673, 1675
Chicago &c. R. Co. v. Gillison, 72 Ill. App. 207.....	912, 1473, 1631
Chicago &c. R. Co. v. Gitchell, 95 Ill. App. 1.....	889
Chicago &c. R. Co. v. Glenney, 118 Ill. 487.....	2089
Chicago &c. R. Co. v. Glenney, 175 Ill. 238.....	1308
Chicago &c. R. Co. v. Goltz, 71 Ill. App. 414.....	1590, 1646, 1714
Chicago &c. R. Co. v. Graham, 3 Ind. App. 28.....	551
Chicago &c. R. Co. v. Graham, 84 Ill. App. 480.....	2159
Chicago &c. R. Co. v. Gretzner, 46 Ill. 82....(737)	
Chicago &c. R. Co. v. Griffin, 68 Ill. 499....(564)	
Chicago &c. R. Co. v. Grim, 25 Ind. App. 494.....	395, 1101, 1215
Chicago &c. R. Co. v. Grimes, 71 Ill. App. 397....(240)	246
Chicago &c. R. Co. v. Groves, Kan. 601....(544)	
Chicago &c. R. Co. v. Gunderson, 174 Ill. 495.....	873, 1118, 1206
Chicago &c. R. Co. v. Gunderson, 65 Ill. App. 638....(771)	1122
Chicago &c. R. Co. v. Hackendahl, 88 Ill. App. 37.....	1371
Chicago &c. R. Co. v. Hague, 48 Neb. 97.....	398, 442
Chicago &c. R. Co. v. Halsey, 133 Ill. 248....(689)	
Chicago &c. R. Co. v. Hambel, (Neb.) 89 N. W. Rep. 643.....	874
Chicago &c. R. Co. v. Hansen, 166 Ill. 623....(755)	761
Chicago &c. R. Co. v. Harney, 28 Ind. 28.....	1750
Chicago &c. R. Co. v. Harrington, 77 Ill. App. 499.....	1711
Chicago &c. R. Co. v. Harris, 54 Ill. 528....(1043)	1049
Chicago &c. R. Co. v. Hartley, 90 Ill. App. 284.....	1608
Chicago &c. R. Co. v. Hartmann, 71 Ill. App. 427.....	1485
Chicago &c. R. Co. v. Harwood, 90 Ill. 425....(785)	
Chicago &c. R. Co. v. Hatch, 79 Ill. 137....(737)	
Chicago &c. R. Co. v. Hawk, 36 Ill. App. 327.....	262
Chicago &c. R. Co. v. Healy, 86 Fed. Rep. 245.....	1469, 1631
Chicago &c. R. Co. v. Hebreg, 99 Ill. App. 563....(950)	
Chicago &c. R. Co. v. Hedges, 105 Ind. 398....(761)	
Chicago &c. R. Co. v. Hecht, 115 Ind. 443.....	896
Chicago &c. R. Co. v. Heinrich, 157 Ill. 388.....	1094
Chicago &c. R. Co. v. Helbreg, 99 Ill. App. 563.....	934
Chicago &c. R. Co. v. Heuey, Ill. App. 322....(1181)	
Chicago &c. R. Co. v. Hines, 183 Ill. 482....(774)	779
Chicago &c. R. Co. v. Hines, 45 Ill. App. 299....(856)	
Chicago &c. R. Co. v. Hines, 56 Kan. 758.....	739, 792
Chicago &c. R. Co. v. Hoffman, 82 Ill. App. 453.....	369, 419
Chicago &c. R. Co. v. Holland, 122 Ill. 461.....	2036
Chicago &c. R. Co. v. Hoover, (Ind. Terr.) 64 S. W. Rep. 579.....	830
Chicago &c. R. Co. v. House, 172 Ill. 601.....	1095, 1589, 1608, 1673, 1695
Chicago &c. R. Co. v. Howard, 6 Ill. App. 569.....	1146
Chicago &c. R. Co. v. Howard, 90 Ill. 425.....	2043
Chicago &c. R. Co. v. Hutchinson, 120 Ill. 587.....	737, 810
Chicago &c. R. Co. v. Hyatt, 48 Neb. 161.....	398, 487
Chicago &c. R. Co. v. Hazzard, 26 Ill. 373....(443)	498
Chicago &c. R. Co. v. Jackson, 55 Ill. 492.....	1466

	PAGE
Chicago &c. R. Co. v. Jennings, 157 Ill. 274.....	2047
Chicago &c. R. Co. v. Jennings, 89 Ill. App. 335.....	452
Chicago &c. R. Co. v. Johnson, 116 Ill. 206.....	659, 1439
Chicago &c. R. Co. v. Johnson, 61 Ill. App. 464.... (738)	
Chicago &c. R. Co. v. Jones, 59 Miss. 465.... (1024)	
Chicago &c. R. Co. v. Kane, 70 Ill. App. 676.....	929, 1122, 1695, 1716
Chicago &c. R. Co. v. Kansas City &c. R. Co.....	2141
Chicago &c. R. Co. v. Kansas City &c. R. Co., 78 Mo. App. 245.....	2141, 2143, 2155, 2158, 2161, 2163
Chicago &c. R. Co. v. Kelley, 182 Ill. 267.....	2163
Chicago &c. R. Co. v. Kellogg, 54 Neb. 127.....	1602, 1631, 1676
Chicago &c. R. Co. v. Kelly, 75 Ill. App. 490.... (452).....	2137
Chicago &c. R. Co. v. Kendall, 72 Ill. App. 105.....	330, 1092
Chicago &c. R. Co. v. Kennedy, 2 Kan. App. 693.....	770, 777, 863
Chicago &c. R. Co. v. Kenyon, 70 Ill. App. 567.... (738)	
Chicago &c. R. Co. v. Ketchum, 99 Ill. App. 660.....	2151
Chicago &c. R. Co. v. Kinnare, 76 Ill. App. 394.....	687, 1438, 1564
Chicago &c. R. Co. v. Knapp, 176 Ill. 127.....	1485, 1567
Chicago &c. R. Co. v. Kreig, 22 Ind. App. 393.....	2047
Chicago &c. R. Co. v. Krueger, 23 Ill. App. 639.... (659)	
Chicago &c. R. Co. v. Kuckkuck, 98 Ill. App. 252.....	926, 976, 979
Chicago &c. R. Co. v. Lace, 62 Ill. App. 535.....	544
Chicago &c. R. Co. v. Lambert, 119 Ill. 255.....	1215
Chicago &c. R. Co. v. Lammert, 12 Ill. App. 408.....	2159
Chicago &c. R. Co. v. Langston, 92 Tex. 709.....	2038
Chicago &c. R. Co. v. Lawrence, 96 Ill. App. 635.....	427
Chicago &c. R. Co. v. Leach, 80 Ill. App. 354.....	2047
Chicago &c. R. Co. v. Lee, 68 Ill. 576.... (741)	
Chicago &c. R. Co. v. Lee, 17 Ind. App. 215.....	1146, 1407, 1408, 1548
Chicago &c. R. Co. v. Lee, 92 Fed. Rep. 318.....	268, 372, 517
Chicago &c. R. Co. v. Lesh, 158 Ind. 423.....	1267
Chicago &c. R. Co. v. Levy, 160 Ill. 385.....	1091
Chicago &c. R. Co. v. Lewis, 5 Ill. App. 242.... (704)	
Chicago &c. R. Co. v. Libey, 68 Ill. App. 144.....	1602
Chicago &c. R. Co. v. Logue, 158 Ill. 621.....	682, 717
Chicago &c. R. Co. v. Lonergan, 118 Ill. 41.....	1411
Chicago &c. R. Co. v. Long, (Tex. Civ. App.) 65 S. W. Rep. 882.....	841, 1207
Chicago &c. R. Co. v. Lowell, 151 U. S. 209.....	454
Chicago &c. R. Co. v. Luka, 72 Ill. App. 60.....	395
Chicago &c. R. Co. v. McCarthy, 20 Ill. 385.... (1336)	
Chicago &c. R. Co. v. McCarthy, 66 Ill. App. 667.....	2314
Chicago &c. R. Co. v. McCarty, 49 Neb. 475.....	1599, 1740
Chicago &c. R. Co. v. McDonnell, 194 Ill. 82.....	544, 918, 2047
Chicago &c. R. Co. v. McElhaney, 87 Ill. App. 420.....	769
Chicago &c. R. Co. v. McGinnis, 49 Neb. 649.....	1551
Chicago &c. R. Co. v. McGraw, 22 Colo. 363.....	1527, 1715
Chicago &c. R. Co. v. McLallen, 84 Ill. 109.....	1642, 1657, 1731
Chicago &c. R. Co. v. Mahara, 47 Ill. App. 208.....	580
Chicago &c. R. Co. v. Mahoney, 77 Ill. App. 191.....	1590, 1776
Chicago &c. R. Co. v. Maloney, 99 Ill. App. 623.....	676, 1204
Chicago &c. R. Co. v. Manning, 23 Neb. 552.....	233
Chicago &c. R. Co. v. Maroney, 170 Ill. 520.....	1454, 1629
Chicago &c. R. Co. v. Maroney, 67 Ill. App. 618.....	1624, 1676
Chicago &c. R. Co. v. Martin, 59 Kan. 437.....	263, 396, 735
Chicago &c. R. Co. v. May, 108 Ill. 288.....	1605, 1639, 1665
Chicago &c. R. Co. v. Meech, 59 Ill. App. 69.....	544
Chicago &c. R. Co. v. Merckes, 36 Ill. App. 195.....	1542
Chicago &c. R. Co. v. Merriam, 86 Ill. App. 454.....	1479, 1567
Chicago &c. R. Co. v. Merriman, 95 Ill. App. 628.....	1481, 1484, 1542, 1682
Chicago &c. R. Co. v. Miller, 79 Ill. App. 473.....	271
Chicago &c. R. Co. v. Miller, 46 Mich. 532.....	761, 771, 784, 2046
Chicago &c. R. Co. v. Mills, 91 Ill. 39.....	439, 440
Chicago &c. R. Co. v. Mills, 105 Ill. 63.... (491)	



## TABLE OF CASES.

lvii

	PAGE
Chicago &c. R. Co. v. Mochell, 96 Ill. App. 178.....	666, 771, 774, 932
Chicago &c. R. Co. v. Mogk, 44 Ill. App. 17.... (30)	
Chicago &c. R. Co. v. Monroe, 85 Ill. 25.....	1542
Chicago &c. R. Co. v. Moranda, 108 Ill. 576.....	1613, 1666
Chicago &c. N. W. R. Co. v. Mountford, 60 Ill. 176.... (349).....	281, 348
Chicago &c. R. Co. v. Moranda, 93 Ill. 302.....	1605, 1612, 1613, 1614
Chicago &c. R. Co. v. Morse, 197 Ill. 327.....	464
Chicago &c. R. Co. v. Morse, 98 Ill. 662.....	395, 464, 918, 1102
Chicago &c. R. Co. v. Mountford, 60 Ill. 175.... (351)	
Chicago &c. R. Co. v. Mumford, 97 Ill. 560.... (476)	
Chicago &c. R. Co. v. Murowski, 179 Ill. 77.... (786)	
Chicago &c. R. Co. v. Murphy, 99 Ill. App. 126.....	395, 932
Chicago &c. R. Co. v. Murray, 62 Ill. 326.... (659)	
Chicago &c. R. Co. v. Myers, 83 Ill. App. 469.....	1108, 1513
Chicago &c. R. Co. v. Myers, 95 Ill. App. 578.....	1728, 1754
Chicago &c. R. Co. v. Myers, 80 Fed. Rep. 361.....	517
Chicago &c. R. Co. v. Neimann, 84 Ill. App. 272.....	276
Chicago &c. R. Co. v. Nelson, 59 Ill. App. 308.....	738, 769
Chicago &c. R. Co. v. Nicholas, 71 Ind. 271.....	1219
Chicago &c. R. Co. v. Nichols, 74 Ill. App. 197.... (791)	
Chicago &c. R. Co. v. Norton Milling Co., 97 Ill. App. 651.....	647
Chicago &c. R. Co. v. O'Connor, 119 Ill. 586.....	765, 935
Chicago &c. R. Co. v. Ohlsson, 70 Ill. App. 487.....	775, 810
Chicago &c. R. Co. v. Olson, 12 Ill. App. 245.....	737
Chicago &c. R. Co. v. O'Neil, 172 Ill. 527.....	1169, 2150
Chicago &c. R. Co. v. O'Neil, 64 Ill. App. 623.....	787, 798, 2162
Chicago &c. R. Co. v. Oyster, 58 Neb. 1.....	1094, 1408, 1531
Chicago &c. R. Co. v. Parks, 59 Kan. 709.... (793)	
Chicago &c. R. Co. v. Patrick, 71 Ill. App. 632.... (751)	
Chicago &c. R. Co. v. Patterson, 72 Ill. App. 428.....	1015, 1048
Chicago &c. R. Co. v. Pearson, 184 Ill. 386.... (738).....	764
Chicago &c. R. Co. v. Pearson, 82 Ill. App. 605.... (735).....	791
Chicago &c. R. Co. v. Pelletier, 33 Ill. App. 455.... (365).....	364
Chicago &c. R. Co. v. Pennell, 94 Ill. 448.....	1263, 1264, 1265
Chicago &c. R. Co. v. People &c. 120 Ill. 667.....	775
Chicago &c. R. Co. v. Pettigrew, 82 Ill. App. 33.....	1494, 1750
Chicago &c. R. Co. v. Pollard, 53 Neb. 730.....	683, 737, 738
Chicago &c. R. Co. v. Pondrum, 51 Ill. 333.....	541
Chicago &c. R. Co. v. Posten, 59 Kan. 449.....	263, 396, 838
Chicago &c. R. Co. v. Pounds, 82 Fed. Rep. 217.....	752, 755, 761
Chicago &c. R. Co. v. Pounds, (Ind. Terr. App.) 35 S. W. Rep. 249.... (736)	
Chicago &c. R. Co. v. Price, 97 Fed. Rep. 423.....	1218, 1683
Chicago &c. R. Co. v. Ptacek, 62 Ill. App. 375.....	924
Chicago &c. R. Co. v. Randolph, 65 Ill. App. 208.....	19, 418
Chicago &c. R. Co. v. Randolph, 53 Ill. 510.... (486)	
Chicago &c. R. Co. v. Ransom, 56 Kan. 559.....	544
Chicago &c. R. Co. v. Rathburn, 90 Ill. App. 238.....	920
Chicago &c. R. Co. v. Redmond, 70 Ill. App. 119.... (804).....	800, 2050
Chicago &c. R. Co. v. Reed, (Ind. App.) 63 N. E. Rep. 878.... (791).....	751
Chicago &c. R. Co. v. Reichert, 69 Ill. App. 91.....	2168
Chicago &c. R. Co. v. Reilly, 75 Ill. App. 125.....	1371
Chicago &c. R. Co. v. Reith, 65 Ill. App. 461.....	794, 2036
Chicago &c. R. Co. v. Reoth, 65 Ill. App. 461.... (751)	
Chicago &c. R. Co. v. Rhoades, 64 Kan. 553.....	1098, 1118
Chicago &c. R. Co. v. Rhomas, 147 Ind. 35.....	2045
Chicago &c. R. Co. v. Richardson, 75 Ill. App. 198.....	1146, 1887
Chicago &c. R. Co. v. Riley, 40 Ill. App. 416.....	514
Chicago &c. R. Co. v. Robinson, 27 Ill. App. 26.... (705)	
Chicago &c. R. Co. v. Roberts, (Colo.) 57 Pac. Rep. 1076.....	1162
Chicago &c. R. Co. v. Robinson, 8 Ill. App. 140.... (794)	
Chicago &c. R. Co. v. Robinson, 9 Ill. App. 89.... (776)	
Chicago &c. R. Co. v. Robinson, 106 Ill. 142.... (785).....	796
Chicago &c. R. Co. v. Robinson, 127 Ill. 9.....	2343

	PAGE
Chicago &c. R. Co. v. Rood, 163 Ill. 477.....	1102, 1103
Chicago &c. R. Co. v. Ross, 24 Ind. App. 222.....	1262, 1267
Chicago &c. R. Co. v. Ross, 112 U. S. 377.....	1647
Chicago &c. R. Co. v. Russell, 91 Ill. 398.....	1447, 1691
Chicago &c. R. Co. v. Ryan, 165 Ill. 88.....	452
Chicago &c. R. Co. v. Sattler, (Neb.) 90 N. W. Rep. 649.....	387
Chicago &c. R. Co. v. Sawyer, 69 Ill. 285.... (140)	
Chicago &c. R. Co. v. Scanlan, 170 Ill. 106.....	1481, 1629, 1702
Chicago &c. R. Co. v. Scates, 90 Ill. 586.....	481, 1263
Chicago &c. R. Co. v. Scheinkoenig, 62 Kan. 57.... (838)	
Chicago &c. R. Co. v. Schroeder, 18 Ill. App. 328.....	962
Chicago &c. R. Co. v. Scranton, 78 Ill. App. 230.....	666
Chicago &c. R. Co. v. Scranton, 95 Ill. App. 619.....	741
Chicago &c. R. Co. v. Seirer, 60 Ill. 295.....	1041, 1042
Chicago &c. R. Co. v. Shannon, 43 Ill. 338.... (885)	
Chicago &c. R. Co. v. Shaw, 63 Neb. 380.....	2090
Chicago &c. R. Co. v. Sheldon, 6 Kan. App. 347.....	1222
Chicago &c. R. Co. v. Simon, 160 Ill. 648.....	282
Chicago &c. R. Co. v. Simosson, 54 Ill. 504.....	1262, 1263
Chicago &c. R. Co. v. Sims, 17 Neb. 365.... (1040)	
Chicago &c. R. Co. v. Smith, 18 Bradw. (Ill.) 119.....	1547
Chicago &c. R. Co. v. Smith, 64 Ill. App. 69.....	1222
Chicago &c. R. Co. v. Smith, 77 Ill. App. 492.....	763, 820, 2154
Chicago &c. R. Co. v. Smith, 81 Ill. App. 364.....	246
Chicago &c. R. Co. v. Smith, (Kan. App.) 63 Pac. Rep. 294.....	1398
Chicago &c. R. Co. v. Smith, 46 Mich. 504.... (721)	
Chicago &c. R. Co. v. Snyder, 117 Ill. 376.....	1717
Chicago &c. R. Co. v. Sonderberg, 50 Neb. 674.....	1585
Chicago &c. R. Co. v. Spirk, 51 Neb. 167.....	568, 833, 1054
Chicago &c. R. Co. v. Spring, 13 Ill. App. 174.... (808)	
Chicago &c. R. Co. v. Spurney, 197 Ill. 471.....	854, 913, 1598
Chicago &c. R. Co. v. Stallings, 90 Ill. App. 609.....	1606
Chicago &c. R. Co. v. Stevens, 189 Ill. 226.....	1437, 1674, 1691
Chicago &c. R. Co. v. Stewart, 71 Ill. App. 647.... (1091)	
Chicago &c. R. Co. v. Stewart, 77 Ill. App. 66.....	369, 426, 481
Chicago &c. R. Co. v. Stickman, 95 Ill. App. 4.....	930
Chicago &c. R. Co. v. Stonecipher, 90 Ill. App. 511.....	426, 441
Chicago &c. R. Co. v. Stormont, 90 Ill. App. 505.....	464
Chicago &c. R. Co. v. Stumps, 53 Ill. 367.....	1165
Chicago &c. R. Co. v. Stumps, 69 Ill. 409.... (708)	
Chicago &c. R. Co. v. Surouwieski, 67 Ill. App. 682.....	742
Chicago &c. R. Co. v. Sutherland, 88 Ill. App. 295.... (805)	
Chicago &c. R. Co. v. Swan, 176 Ill. 424.....	919, 1606, 2046
Chicago &c. R. Co. v. Sweet, 45 Ill. 197.... (878)	
Chicago &c. R. Co. v. Sykes, 96 Ill. 162.....	439, 440, 808
Chicago &c. R. Co. v. Taylor, 8 Ill. App. 108.... (1015)	
Chicago &c. R. Co. v. Taylor, 170 Ill. 49.....	854, 1125, 1206
Chicago &c. R. Co. v. Thomas, 155 Ind. 634.....	751, 762
Chicago &c. R. Co. v. Thompson, 99 Ill. App. 277.....	1608
Chicago &c. R. Co. v. Thorson, 68 Ill. App. 288.....	770
Chicago &c. R. Co. v. Tietz, 37 Ill. App. 599.....	880
Chicago &c. R. Co. v. Totten, 1 Kan. App. 558.....	1052
Chicago &c. R. Co. v. Trach, 80 Ill. App. 354.....	2048
Chicago &c. R. Co. v. Truitt, 68 Ill. App. 76.....	1206
Chicago &c. R. Co. v. Tuohy, 196 Ill. 410.....	1161, 2291
Chicago &c. R. Co. v. Van Buskirk, 58 Neb. 218.....	2046
Chicago &c. R. Co. v. Wagner, 17 Ind. App. 22.....	1685
Chicago &c. R. Co. v. Walsh, 157 Ill. 672.....	788
Chicago &c. R. Co. v. Warner, 108 Ill. 538.....	864, 1710
Chicago &c. R. Co. v. Weeks, 99 Ill. App. 518.....	369, 737
Chicago &c. R. Co. v. Weir, 91 Ill. App. 420.....	452
Chicago &c. R. Co. v. Western Hay &c. Co., (Neb.) 90 N. W. Rep. 205.....	340
Chicago &c. R. Co. v. Wilcox, (Ill.) 24 N. E. Rep. 419.....	714

Chicago &c. R. Co. v. Wilcox, 33 Mo. App. 450.... (706)	
Chicago &c. R. Co. v. Willard, 31 Ill. App. 435.....	574
Chicago &c. R. Co. v. Williams, 55 Ill. 185.... (545).....	368, 596
Chicago &c. R. Co. v. Williams, 56 Kan. 333.... (738)	
Chicago &c. R. Co. v. Williams, 59 Kan. 700.....	761
Chicago &c. R. Co. v. Wilson, 63 Ill. 167.... (384)	
Chicago &c. R. Co. v. Wilson, 35 Ill. App. 346.....	880
Chicago &c. R. Co. v. Winter, 175 Ill. 293.... (771).....	374
Chicago &c. R. Co. v. Winters, 65 Ill. App. 435.....	441, 4521
Chicago &c. R. Co. v. Wood, 104 Fed. Rep. 663.....	387
Chicago &c. R. Co. v. Woolridge, 72 Ill. App. 551.....	739
Chicago &c. R. Co. v. Yorty, 158 Ill. 321.... (740)	
Chicago &c. R. Co. v. Yost, 56 Neb. 439.....	1715
Chicago &c. R. Co. v. Young, 58 Neb. 678.....	1101, 2046
Chicago &c. R. Co. v. Zernecke, 59 Neb. 689.....	398, 952, 1101
Chickering v. Lord, 57 N. H. 555.... (973).....	672
Chielinsky v. Hoopes &c. Co., 1 Marv. (Del.) 273.....	1117, 1145, 1158, 1199, 1397, 1584, 1727
Childs v. Comstock, 69 App. Div. 160.....	2176
Childs v. Crawford County, 176 Pa. St. 139.....	1820
Childs v. Garrison, 32 Mo. 475.....	117
Childs v. N. Y., O. & N. R. Co., 77 Hun, 539.... (1054)	
Chipman v. Union P. R. Co., 12 Utah, 68.....	911
Chisholm v. New England Telephone &c. Co., 176 Mass. 125.....	1805
Chisholm v. Seattle Electric Co., 27 Wash. 237.....	2274
Chisholm v. State, 141 N. Y. 246.....	656, 658, 1929, 2223
Chitty v. St. Louis &c. R. Co., 148 Mo. 64.....	486
Chitty v. St. Louis &c. R. Co., 166 Mo. 435.....	930
Chivers v. Rogers, 50 La. Ann. 57.... (1373)	
Choate v. Hyde, 129 Cal. 580.....	627
Choate v. Missouri &c. R. Co., 67 Mo. App. 105.....	370, 502
Choctaw &c. R. Co. v. Alexander, 7 Okla. 579, 591.....	828
Choctaw &c. R. Co. v. Holloway, 114 Fed. Rep. 458.....	1408, 1696
Choctaw &c. R. Co. v. McDade, 112 Fed. Rep. 888.....	1439
Chope v. Eureka, 78 Cal. 588.....	1961
Chopin v. Badger Paper Co., 83 Wis. 192.....	1510, 1753
Chouquette v. Southern Electric R. Co., 152 Mo. 257.....	928, 2283
Chouquette v. Southern &c. R. Co., 80 Mo. App. 515.... (398).....	1102
Chouteaux v. Leech, 6 Harris, 232-3.... (289)	
Chrissey v. Hestonville &c. R. Co., 75 Pa. St. 83.... (472)	
Chrissey v. Hestonville &c. R. Co., 25 P. F. Smith, (Pa.) 83.....	467, 497
Christ v. E. R. Co., 58 N. Y. 638.....	1130
Christensen v. American Express Co., 15 Minn. 270.... (272)	
Christensen v. Lambert, (N. J. L.) 51 Atl. Rep. 702.....	1598
Christian v. Minneapolis, 69 Minn. 530.....	913, 1144
Christianson v. Chicago &c. R. Co., 67 Minn. 94.....	1747
Christianson v. Pacific B. Co., 27 Wash. 582.....	1739
Christie v. Chicago &c. R. Co., 104 Iowa, 707.....	2705
Christie v. Galveston City R. Co., (Tex. Civ. App.) 39 S. W. Rep. 638. 401, 479	
Chrystal v. T. & B. R. R. Co., 124 N. Y. 519.....	2153
Chrystal v. T. & B. R. Co., 52 Hun, 55.....	782
Church v. Howard City, 111 Mich. 298.....	1879
Churchill v. Chicago &c. R. Co., 67 Ill. 390.....	571
Churchill v. Holt, 127 Mass. 165.....	2261, 2233
Churchill v. Hulbert, 110 Mass. 42.....	590
Churchill v. Rose, (Cal.) 69 Pac. Rep. 416.....	2089
Churchman v. Kansas City, 44 Mo. App. 665.... (829)	
Cicero &c. R. Co. v. Boyd, 95 Ill. App. 510.....	925
Cicero &c. R. Co. v. Brown, 193 Ill. 274.... (854).....	863
Cicero &c. Street R. Co. v. Meixner, 160 Ill. 320.... (478).....	659
Cincinnati v. Fleischer, 63 Oh. St. 229.....	1867
Cincinnati v. Frazier, 18 Oh. C. C. 50.....	1092, 1858, 1872
Cincinnati v. Frazier, 19 Oh. C. C. 604.....	1821

	PAGE
Cincinnati v. Gregory, 3 Oh. N. P. 142.....	718
Cincinnati &c. R. Co. v. Berdan, 22 Oh. C. C. 326.... (252)	
Cincinnati &c. R. Co. v. Boyer, 18 Oh. C. C. 327.....	2151
Cincinnati &c. R. Co. v. Bowling Green, 57 Oh. St. 336.....	743
Cincinnati &c. R. Co. v. Bradshaw, 10 Oh. C. C. 645.....	1747
Cincinnati &c. R. Co. v. Chester, 57 Ind. 297.... (943)	
Cincinnati &c. R. Co. v. City & S. T. Association, 48 Oh. St. 390.... (1058)	
Cincinnati &c. R. Co. v. Cook, (Ky.) 67 S. W. 383.... (902) ..954, 955, 1159, 1443	
Cincinnati &c. R. Co. v. Cross, 15 Oh. C. C. 398.....	1434, 2166
Cincinnati &c. R. Co. v. Dickerson, (Ky.) 44 S. W. Rep. 99.....	2154
Cincinnati &c. R. Co. v. Duffrain, 36 Ill. App. 352.... (492)	
Cincinnati &c. R. Co. v. Duncan, 143 Ind. 524.....	761
Cincinnati &c. R. Co. v. Fairbanks &c. Co., 90 Fed. Rep. 467.... (346)	
Cincinnati &c. R. Co. v. Gray, 101 Fed. Rep. 623.....1371, 1499, 1621	
Cincinnati &c. R. Co. v. Graves, (Ky.) 52 S. W. Rep. 961.....	247
Cincinnati &c. R. Co. v. Hedges, 15 Oh. C. C. 254.....	1542
Cincinnati &c. R. Co. v. Hiltzhauer, 99 Md. 486.....	784
Cincinnati &c. R. Co. v. Jackson, (Ky.) 58 S. W. Rep. 526.....403, 416, 2138	
Cincinnati &c. R. Co. v. Lally, 14 Oh. C. C. 333.....	2143, 2157
Cincinnati &c. R. Co. v. Lewis, 23 Oh. C. C. 127.....	2284
Cincinnati &c. R. Co. v. Long, 112 Ind. 166.... (741)	
Cincinnati &c. R. Co. v. Murphy, 17 Oh. C. C. 223.....1123, 2142, 2343	
Cincinnati &c. R. Co. v. Murphy, 18 Oh. C. C. 298.....	772
Cincinnati &c. R. Co. v. McLain, 148 Ind. 188.....	464
Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439.....	1543, 1614
Cincinnati &c. R. Co. v. Peters, 80 Ind. 108.....	490
Cincinnati &c. R. Co. v. Pontius, 19 Oh. St. (N. S.) 22.... (341)	
Cincinnati &c. R. Co. v. Revallee, 17 Ind. App. 657.....	464
Cincinnati &c. R. Co. v. Ridge, 54 Ind. 39.... (1045)	
Cincinnati &c. R. Co. v. Rolsch, 126 Md. 445.....	1463
Cincinnati &c. R. Co. v. Smith, 22 Oh. St. 227.... (1015)	
Cincinnati &c. R. Co. v. Thiebaud, 114 Fed. Rep. 918.....965, 1801	
Cincinnati &c. R. Co. v. Wagner, 15 Oh. C. C. 395.....	436
Cincinnati &c. R. Co. v. Waterson, 4 Oh. St. 424.... (1041)	
Cincinnati &c. R. Co. v. Webb, (Ky.) 46 S. W. Rep. 11.....	213
Cincinnati &c. R. Co. v. Wright, (Ky.) 34 S. W. Rep. 526.... (756)	
Cincinnati R. Co. v. Fairbanks & Co., 90 Fed. Rep. 467.....	307
Cincinnati R. Co. v. Roy, 102 U. S. 451.... (1181)	
Cincinnati Street R. Co. v. Jenkins, 20 Oh. C. C. 256.....	2317
Cincinnati Street R. Co. v. Murray, 53 Oh. St. 570.....677, 805	
Cincinnati Street R. Co. v. Snell, 54 Oh. St. 197.....453, 2280, 2298, 2320	
Cincinnati Street R. Co. v. Wright, 54 Oh. St. 181.....	731
Circleville v. Neuding, 41 Oh. St. 465.... (650)	
Circleville v. Sohn, 59 Oh. St. 285.....	1819, 1822
Circleville v. Sohn, 20 Oh. C. C. 368.....1809, 1813, 1868, 1895	
Circleville v. Throne, 1 Oh. C. D. 200.....	1160
Ciriack v. Merchants' &c. Co., 146 Mass. 182.....1448, 1498, 1504, 1565	
Citizens' Bank v. Booze, 75 Mo. App. 189.....	180
Citizens' Bank v. Houston, 98 Ky. 139.....	40
Citizens' Gas Company v. O'Brien, 118 Ill. 174.....	1464
Citizens' Ins. Co. &c. v. Crist, (Ky.) 56 S. W. Rep. 658.....	1314
Citizens' Nat. Bank v. Third Nat. Bank, 19 Ind. App. 69.....	39
Citizens' C. R. Co. v. Hamer, (Ind. App.) 62 N. E. Rep. 658.....	2304
Citizens' R. Co. v. Craig, (Tex. Civ. App.) 69 S. W. Rep. 239.... (400)	
Citizens' R. Co. v. Gifford, 19 Tex. Civ. App. 631.....	1065
Citizens' R. Co. v. Hair, (Tex. Civ. App.) 32 S. W. Rep. 1050.....2289, 2333	
Citizens' R. Co. v. Holmes, 19 Tex. Civ. App. 266.....2288, 2298	
Citizens' R. Co. v. Washington, 24 Tex. Civ. App. 422.....	926
Citizens' &c. Ass'n v. Friedley, 123 Ind. 143.....	2175
Citizens' &c. R. Co. v. Foxley, 107 Pa. St. 537.....2229, 2230, 2297	
Citizens' &c. R. Co. v. Howard, 102 Tenn. 474.....	1160
Citizens' &c. R. Co. v. Stern, 42 Ark. 221.....	2331
Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317.....2273, 2279	

# TABLE OF CASES.

lxi

	PAGE
Citizens' Rapid-Transit Co. v. Seigrist, 96 Tenn. 119.....	2319
Citizens' Street R. Co. v. Albright, 14 Ind. App. 433.....	2046, 2047, 2320
Citizens' Street R. Co. v. Ballard, 22 Ind. App. 151.....	2255, 2339
Citizens' Street R. Co. v. Dan, 102 Tenn. 320.....	2291
Citizens' Street R. Co. v. Hainer, (Ind. App.) 62 N. E. 658.....	
Citizens' Street R. Co. v. Heath, (Ind. App.) 62 N. E. Rep. 107.....	2046, 2058
Citizens' Street R. Co. v. Helvie, 22 Ind. App. 515.....	2315
Citizens' Street R. Co. v. Hobbs, 15 Ind. App. 610.....	(1094)
Citizens' Street R. Co. v. Hoffbauer, 23 Ind. App. 614.....	496
Citizens' Street R. Co. v. Howard, 102 Tenn. 474.....	2272
Citizens' Street R. Co. v. Merl, 26 Ind. App. 284.....	370, 396, 458, 472
Citizens' Street R. Co. v. Shepherd, (Ind. App.) 62 N. E. Rep. 300.....	472
Citizens' Street R. Co. v. Sutton, 148 Ind. 169.....	1949
Citizens' Street R. Co. v. Twinane, 121 Ind. 375.....	846
Citron v. Bayley, 36 App. Div. 130.....	1321, 1361
City v. Campbell, 123 N. Y. 405.....	1317
City Bank v. Rome &c. R. R. Co., 44 N. Y. 136.....	(312)
City Electric R. Co. v. Shropshire, 101 Ga. 33.....	583
City R. Co. v. Lee, 50 N. J. L. 435.....	510
City R. Co. v. Thompson, 20 Tex. Civ. App. 16.....	2286
City &c. R. Co. v. Finley, 76 Ga. 11.....	901
City &c. Street R. Co. v. Conery, 61 Ark. 381.....	1060, 1064, 2028
City Sav. Bank v. Kensington Land Co., (Tenn.) 37 S. W. Rep. 1037.....	181
Civil Rights Cases, 109 U. S. 3.....	367, 368
Clack v. Southern Electrical Supply Co., 72 Mo. App. 506.....	13
Clack v. Wood, 14 Tex. Civ. App. 400.....	627
Claffin v. Meyer, 75 N. Y. 260.....	105, 106, 107, 109, 310, 1088, 1099, 1120
Claiborne v. Chesapeake &c. R. Co., 46 W. Va. 363.....	529, 907
Claiborne v. Missouri &c. R. Co., 21 Tex. Civ. App. 648.....	383
Clancy v. Byrne, 56 N. Y. 129.....	1311, 1316, 1345
Clancy v. Guaranty Const. Co., 25 App. Div. 355.....	1724
Clapp v. Clapp, 49 Hun, 195.....	91
Clapp v. H. R. R. Co., 19 Barb. 461.....	930
Clapp v. La Grill, 103 Tenn. 164.....	2113
Clapp v. Town of Ellington, 51 Hun, 58.....	1833
Clapper v. Town of Waterford, 131 N. Y. 382.....	1140, 1826, 1943
Clar v. Sacramento &c. R. Co., 122 Cal. 504.....	850
Clardy v. Southern R. Co., 112 Ga. 37.....	2167
Clare v. New York &c. R. Co., 172 Mass. 211.....	957, 1372
Clerc v. Morgan's &c. R. Co., (La.) 31 South. Rep. 886.....	540
Clare v. Sacramento Electric &c. Co., 122 Cal. 504.....	837, 917
Clark v. Bennett, 123 Cal. 275.....	2321
Clark v. Boston &c. R. Co., 164 Mass. 434.....	776, 804
Clark v. Brown, 18 Wend. 229.....	1224
Clark v. Baird, 9 N. Y. 183.....	(1222)
Clark v. Barnard, 12 How. (U. S.) 292.....	(230)
Clark v. Barnes, 37 Hun, 389.....	1445
Clark v. Canadian &c. R. Co., 73 Fed. Rep. 76.....	2053
Clark v. Chicago &c. R. Co., 92 Ill. 43.....	1542, 1764
Clark v. Chicago &c. Co., 62 Mich. 358.....	(1044)
Clark v. Chicago &c. R. Co., 28 Minn. 69.....	2046
Clark v. Chicago &c. R. Co., 15 Fed. Rep. 588.....	2050
Clark v. Clark, 8 Paige, 152.....	63, 66
Clark v. Clark, 23 Misc. 272.....	53
Clark v. Commonwealth, 21 Mass. (4 Pick.) 125.....	2345
Clark v. Davison, 118 Mich. 420.....	2015
Clark v. Dyer, 81 Tex. 339.....	94, 2091
Clark v. Eighth Ave. R. R. Co., 36 N. Y. 135.....	504, 537
Clark v. Ellithorp, 9 Kan. App. 503.....	860
Clark v. Faxton, 21 Wend. N. Y. 153.....	(295)
Clark v. Ford, 7 Kan. App. 332.....	1223
Clark v. Garfield, 8 Allen, 427.....	72
Clark v. Geer, 86 Fed. Rep. 447.....	4, 267

	PAGE
Clark v. Hill, 69 Mo. App. 541.....	849
Clark v. Holmes, 7 Hurl. & Nor. 937.....	1572
Clark v. Howard, 98 Fed. Rep. 199.....	430, 436
Clark v. Hughes, 51 Neb. 780.....	1647
Clark v. Koehler, 46 Hun, 536.....	2228
Clark v. Lebanon, 63 Me. 393.....	1915
Clark v. Louisville &c. R. Co., (Ky.) 49 S. W. 1120.....	530
Clark v. Manchester, 62 N. Y. 577.... (949).....	1997
Clark v. Marsiglia, 1 Denio, 317.... (665).....	
Clark v. Metropolitan Street R. Co., 68 App. Div. 49.....	460, 2044
Clark v. Michigan C. R. Co., 113 Mich. 24.....	2141
Clark v. Miller, 54 N. Y. 548.... (76).....	77, 78
Clark v. N. Y. &c. R. R. Co., 113 N. Y. 670.... (686).....	
Clark v. N. Y., L. E. & W. R. Co., 80 Hun, 320.....	1695
Clark v. N. Y., L. E. & W. R. Co., 40 Hun, 605.....	26, 27, 1201
Clark v. Oregon &c. R. Co., 20 Utah, 401.....	1050, 2056
Clark v. R. Co., 139 Mass. 423.....	617
Clark v. Railroad Co., 28 Minn. 128.....	1551
Clark v. Richards Lumber Co., 68 Minn. 282.....	1084
Clark v. Richmond &c. R. Co., 78 Va. 709.....	1712
Clark v. Russell, 97 Fed. Rep. 900.....	401
Clark v. St. Louis &c. R. Co., 64 Mo. 440.....	250
Clark v. St. Paul Co., 28 Minn. 128.....	1565
Clark v. Shrimski, 77 Mo. App. 166.....	106
Clark v. Union Ferry Co., 35 N. Y. 485.....	603
Clark v. W. B. &c. R. Co., 128 Mass. 1.....	1718
Clark County Cement Co. v. Wright, 16 Ind. App. 630.....	1465, 1623, 1739
Clarke v. Louisville &c. R. Co., 101 Ky. 34.....	540, 676
Clarke v. Penn. Co., 132 Ind. 199.....	1620
Clarke v. Rochester & Syracuse R. Co., 14 N. Y. 570.....	220
Clarke v. W. U. T. Co., 112 Ga. 633.....	2430
Clark's Adm'r v. Richmond &c. R. Co., 78 Va.....	1440
Clarkin v. Biwabik-Bessemer Co., 65 Minn. 483.....	2112
Clarkson v. Edes, 4 Cow. (N. Y.) 470.... (204).....	
Clarksville, 94 Fed. Rep. 201.....	257
Clarke Co. v. Wright, 16 Ind. App. 630.....	2049
Classen v. Leopold, 2 Sweeny, 705.....	150, 154
Clausen v. Chicago &c. R. Co., 106 Wis. 308.....	2089
Claxton &c. v. Lexington &c. R. Co., 13 Bush, (Ky.) 636.....	659, 660
Clay v. Central R. Co., 84 Ga. 345.....	950
Clay v. Hart, 25 Misc. 110.....	2260
Clay v. St. Albans, 34 W. Va. 539.....	1965
Clay v. Willan, 1 Hy. Blk. 298.... (268).....	
Clay Center v. Jevons, 2 Kan. App. 568.....	1954
Clayton v. Henderson, (Ky.) 44 S. W. Rep. 667.....	1999
Cleary v. Blake, 14 App. Div. 602.....	2119
Cleary v. Dakota Packing Co., 71 Minn. 150.....	1721
Cleary v. Long Island R. Co., 54 App. Div. 284.....	1685
Cleary v. The Municipal G. Co., 47 N. Y. St. Rep. 172.....	2204
Cleghorn v. N. Y. C. R. Co., 56 N. Y. 44.....	899
Clegg v. Boston Storage Warehouse Co., 149 Mass. 454.... (129).....	
Clegg v. Metropolitan Street R. Co., 1 App. Div. 207.....	1221, 1229, 1234, 1237
Clem v. Wabash R. Co., 72 Mo. App. 433.....	937, 1014
Clemence v. Auburn, 66 N. Y. 334.... (424).....	1811, 1816, 1818, 1880, 1882
Clemens v. Hannibal &c. R. Co., 53 Mo. 366.....	1268
Clement v. W. U. T. Co., 137 Mass. 463.....	2393, 2397, 2398, 2399, 2413
Clements v. Alabama R. Co., 127 Ala. 166.....	1479, 1776
Clements v. Louisiana Elec. L. Co., 44 La. 692.... (1058).....	
Clements v. W. U. T. Co., 77 Miss. 747.....	2410
Cleung v. Buffalo, 72 Hun, 541.....	1891
Clerk v. Morgan's &c. R. Co., (La.) 31 South Rep. 886.....	396
Cleveland v. Bangar, 87 Me. 259.....	2377
Cleveland v. N. J. S. Co., 68 N. Y. 306.....	368, 534, 604, 605, 1128

# TABLE OF CASES.

lxiii

	PAGE
Cleveland v. N. J. S. S. Co., 125 N. Y. 299.....	604
Cleveland v. Stofer, 52 Oh. St. 684.....	1879
Cleveland v. Town of Pittsford, 72 Hun, 552.....	2258
Cleveland R. Co. v. Newell, 104 Ind. 261.....	1143
Cleveland R. Co. v. Walroth, 30 Oh. St. 461..... (602)	
Cleveland &c. R. Co. v. Ahrens, 42 Ill. App. 434..... (1013)	
Cleveland &c. R. Co. v. Baddeley, 150 Ill. 328.....	883
Cleveland &c. R. Co. v. Ballentine, 84 Fed. Rep. 935..... 669, 2068, 2102, 2132	
Cleveland &c. R. Co. v. Baker, 91 Fed. Rep. 224.....	1533, 1777
Cleveland &c. R. Co. v. Bertram, 11 Oh. St. 457..... (569)	
Cleveland &c. R. Co. v. Bernard, 15 Oh. C. C. 588..... (743)	
Cleveland &c. R. Co. v. Berry, 152 Ind. 607.....	1108, 2158
Cleveland &c. R. Co. v. Best, 169 Ill. 301.....	380
Cleveland &c. R. Co. v. Brown, 73 Fed. Rep. 970.....	1671
Cleveland &c. R. Co. v. Bruce, 63 Ill. App. 233..... (755)	
Cleveland &c. R. Co. v. Capoot, 69 Ill. App. 163.....	1052
Cleveland &c. R. Co. v. Carr, 95 Ill. App. 576.....	1552, 1599, 1751
Cleveland &c. R. Co. v. Case, 71 Ill. App. 459.....	1106, 1112
Cleveland &c. R. Co. v. Coffman, (Ind. App.) 64 N. E. Rep. 233.....	751, 800
Cleveland &c. R. Co. v. Curran, 19 Oh. St. 1.....	264, 296
Cleveland &c. R. Co. v. Ducharme, 49 Ill. App. 520..... (1041)	
Cleveland &c. R. Co. v. Dunn, 63 Ill. App. 531.....	1054
Cleveland &c. R. Co. v. Ebart, 10 Oh. C. D. 291.....	867
Cleveland &c. R. Co. v. Elliott, 40 Oh. St. 474.....	1018
Cleveland &c. R. Co. v. Green, 65 Ill. App. 414.....	1052
Cleveland &c. R. Co. v. Halbert, 179 Ill. 196..... (786)	792
Cleveland &c. R. Co. v. Hall, 70 Ill. App. 429.....	1215
Cleveland &c. R. Co. v. Hamilton, 17 Tex. Civ. App. 76..... (752)	
Cleveland &c. R. Co. v. Heath, 22 Ind. App. 47.....	213, 240, 246, 276
Cleveland &c. R. Co. v. Heine, (Ind. App.) 62 N. E. Rep. 455..... (791)	792
Cleveland &c. R. Co. v. Heinman, 16 Oh. C. C. 487.....	771
Cleveland &c. R. Co. v. Huddleston, 21 Ind. App. 621.....	2089
Cleveland &c. R. Co. v. Kernochan, 55 Oh. St. 306.....	1585
Cleveland &c. R. Co. v. Klee, 154 Ind. 430.....	660, 741, 742
Cleveland &c. R. Co. v. McClintonck, 91 Fed. Rep. 223.....	1411
Cleveland &c. R. Co. v. McKelvey, 12 Oh. C. C. 426.....	889, 1217
Cleveland &c. R. Co. v. Marsh, 63 Oh. St. 236.....	1091, 1118, 1605, 2138, 2150
Cleveland &c. R. Co. v. Marsh, 17 Oh. C. C. 1.....	1396
Cleveland &c. R. Co. v. Martin, 13 Ind. App. 485.....	1397, 1398
Cleveland &c. R. Co. v. Maxwell, 59 Ill. App. 673.....	441
Cleveland &c. R. Co. v. Miller, 149 Ind. 490..... (751)	
Cleveland &c. R. Co. v. Moline Plow Co., 13 Ind. App. 225.....	316
Cleveland &c. R. Co. v. Moneyhun, 146 Ind. 147.....	502
Cleveland &c. R. Co. v. Newall, 104 Ind. 264.....	1101
Cleveland &c. R. Co. v. Newell, 75 Ind. 542.....	1126
Cleveland &c. R. Co. v. Newlin, 74 Ill. App. 638.....	240, 246
Cleveland &c. R. Co. v. Oliver, 83 Ill. App. 64..... (751)	
Cleveland &c. R. Co. v. Osborn, 66 Oh. St. 45..... (1092)	510
Cleveland &c. R. Co. v. Patterson, 69 Ill. App. 438.....	282
Cleveland &c. R. Co. v. Pattison, 67 Ill. App. 351.....	2097
Cleveland &c. R. Co. v. Quillen, 22 Ind. App. 496.....	849
Cleveland &c. R. Co. v. Reiss, 13 Oh. C. C. 405..... (800)	808
Cleveland &c. R. Co. v. Richardson, 10 Oh. C. D. 326..... (808)	
Cleveland &c. R. Co. v. Rowan, 66 Pa. St. 393.....	1110
Cleveland &c. R. Co. v. St. Bernard, 15 Oh. C. C. 588.....	410
Cleveland &c. R. Co. v. Scantland, 151 Ind. 488.....	1262
Cleveland &c. R. Co. v. Schneider, 14 West. R. 558..... (810)	
Cleveland &c. R. Co. v. Scudder, 40 Oh. St. 173..... (1041)	
Cleveland &c. R. Co. v. Simon, 15 Oh. C. C. 123.....	252
Cleveland &c. R. Co. v. Stephens, 173 Ill. 430.....	1262
Cleveland &c. R. Co. v. Tartt, 99 Fed. Rep. 369.....	2142
Cleveland &c. R. Co. v. Terry, 8 Oh. St. 570..... (702)	
Cleveland &c. R. Co. v. Wade, 18 Ind. App. 346.....	410, 441

	PAGE
Cleveland &c. R. Co. v. Ward, 147 Ind. 256.....	1487
Cleveland &c. R. Co. v. Wheeler, 14 Ill. App. 12.....	1360
Cleveland &c. R. Co. v. Wilson, 99 Ill. App. 367.....	282
Cleveland &c. R. Co. v. Wynant, 100 Ind. 160.....	2046
Cleveland &c. R. Co. v. Wynant, 114 Ind. 525.....	2289
Cleveland &c. R. Co. v. Ullom, 20 Oh. C. C. 512.....	1532, 1777
Cleveland &c. R. Co. v. Umphenour, 63 Ill. App. 642.....	1054
Cleveland Iron Min. Co. v. Eastern R. Co., 75 Minn. 505.....	1303
Cleves v. Willoughby, 7 Hill, (N. Y.) 83.....	1324, 1341
Clews v. Bank of N. Y. N. B. Association, 114 N. Y. 70.....	1079
Clifford v. Dam, 81 N. Y. 52.....	3, 659, 1346, 2041, 2232, 2250,
Clifford v. Denver &c. R. Co., 9 Colo. 333.....	2258
Clifford v. Railroad Co., 141 Mass. 564.....	1538
Clifford v. Tyman, 61 N. H. 508.....	1614
Clim v. Railroad Co., 41 La. Ann. 1031.....	2349
Cline v. Baker, 118 N. C. 780.....	1824
Clinton v. Boston Beer Co., 164 Mass. 514.....	2085
Clinton v. Howard, 42 Conn. 294.....	2354
Clinton v. Welch, 166 Mass. 133.....	2366
Clinton Nat. Bank v. National Park Bank, 37 App. Div. 601.....	2260
Cloney v. Kalamazoo, 124 Mich. 655.....	126, 1121
Clore v. McIntire, 120 Ind. 262.....	1950
Closs v. Thiefels, 79 Mich. 589.....	2365
Closser v. Washington, 11 Pa. Super. Ct. 112.....	172
Clotworthy v. Hannibal &c. R. Co., 80 Mo. 220.....	1214, 1849
Cloud County v. Vickers, 62 Kan. 25.....	474
Clough v. London &c. R., L. R. 7 Ex. 26.....	2009
Clowdis v. Fresno Flume &c. Co., 118 Cal. 315.....	2419
Clukey v. Seattle Electric Co., 27 Wash. 70.....	673, 974
Clune v. Ristine, 94 Fed. Rep. 745.....	402, 2051
Clussman v. L. I. R. Co., 9 Hun, 618.....	1438
Clussman v. Merkel, 3 Bosw. 402.....	424
Clute v. Wiggins, 14 Johns. (N. Y.) 175.....	2177
Clyde v. Helmes, 61 N. J. L. 358.....	135, 140, 141
Clyde v. Richmond & D. R. Co., 69 Fed. Rep. 673.....	2045
Clyde Steamship Co. v. Burrows, 36 Fla. 121.....	1658
Clyne v. Helmes, 61 N. J. L. 358.....	245
Cmielewski v. Mollenhauer &c. Co., 11 App. Div. 111.....	1356
Coal Co. v. Healer, 84 Ill. 126.... (687)	1494
Coal Creek R. Co. v. Davis, 90 Tenn. 711.....	
Coal Valley Min. Co. v. Haywood, 98 Ill. App. 258.....	1621
Coal &c. Co. v. Brawley, 83 Ala. 371.....	1404
Coal &c. Co. v. Nelson, 87 Ill. App. 180.....	717
Coates v. Burlington &c. R. Co., 62 Iowa, 486.....	1594
Coates v. Chapman, 195 Pa. St. 109.....	699, 1122
Coats v. The People, 22 N. Y. 245.....	1604
Coates v. U. S. Express Co., 45 Mo. 238.... (341)	76
Coates & Sons v. Early, 46 S. C. 220.....	629
Coatney v. St. Louis &c. R. Co., 151 Mo. 35.....	2137
Cobb v. Deiches, 7 Pa. Super. Ct. 252.....	101
Cobb v. Dows, 10 N. Y. 335.....	308
Cobb v. Lindell R. Co., 149 Mo. 135.....	474
Cobb v. R. Co., 37 S. C. 194.... (32)	
Cobb v. St. Louis &c. R. Co., 149 Mo. 609.....	410, 920, 1607
Cobb v. Standish, 14 Me. 198.....	1955
Cobb v. Welcher, 75 Hun, 283.....	1408, 1409
Coburn v. Philadelphia &c. R. Co., 198 Pa. St. 436.....	411
Coburn v. San Mateo County, 75 Fed. Rep. 520.....	2006
Cochran v. Dinsmore, 49 N. Y. 249.....	241, 1088
Cochran v. Shanhan, (W. Va.) 41 S. E. Rep. 140.....	1536
Cochran v. Sherherdsville, (Ky.) 43 S. W. Rep. 250.....	1825
Cochran v. Walker, (Tex. Civ. App.) 49 S. W. Rep. 403.....	115
Cochran v. Sess, 49 App. Div. 223.....	1454



## TABLE OF CASES.

lxv

	PAGE
Cochrane v. Little, 71 Md. 323.....	2177
Cockersham v. Nixon, 11 Ind. 269.... (979) .....	978
Cockle v. South Eastern &c. R. Co., 27 L. T. R. (Eng.) 320.... (444)	
Cocks v. Haviland, 124 N. Y. 426.....	65
Cocks v. Masterman, 9 id. 922.... (166)	
Coddington v. Brooklyn C. R. Co., 102 N. Y. 66.....	543
Coddington v. Canady, 157 Ind. 243.....	71
Coffee v. Phillips, 21 Misc. 663.....	1505
Coffee v. Louisville &c. R. Co., 76 Miss. 569.....	553, 612
Coffeen v. Lang, 67 Ill. App. 359.....	1819, 2259
Coffman v. McCauslin, 70 Mo. App. 34.....	1118
Cogan v. Burnham, 175 Mass. 391.....	1624
Cogdell v. Southern R. Co., 129 N. C. 398.....	1585, 1778
Cogdell v. Wilmington &c. R. Co., 130 N. C. 313.....	1094, 2050, 2055
Coger v. N. W. &c. Packet Co., 37 Iowa, 145.... (368)	
Coggens v. Myrick, (Ala.) 31 South Rep. 22.....	2245
Coggs v. Bernard, 2 Lord Raymer, 909, 910.... (105)	
Cogswell v. Baldwin, 15 Vt. 404.... (982) .....	973, 987
Cogswell v. Lexington, 4 Cush. (Mass.) 307.....	1842, 1914
Coghlan v. Third Ave. R. Co., 7 App. Div. 124.....	718
Cogswell v. Railroad Co., 68 N. H. 192.... (50)	
Cogswell v. Railway Co., 103 N. Y. 10.....	2061, 2091
Cogswell v. Rochester Mach. Screw Co., 39 App. Div. 223.....	18
Cohen v. Dry Dock &c. R. Co., 69 N. Y. 173.... (10)	
Cohen v. Eureka &c. R. Co., 14 Nev. 376.....	776
Cohen v. Hume, 1 McCord, (S. C.) 439.....	606
Cohen v. Manuel, 91 Me. 274.....	136, 142, 155
Cohen v. Metropolitan Street R. Co., 34 Misc. 186.....	2272, 2273, 2332
Cohen v. Moshkowitz, 17 Misc. 389.....	111
Cohen v. The Mayor, 113 N. Y. 532.....	1097, 1916, 2227, 2236, 2238
Cohen v. Simmons, 50 N. Y. S. R. 146.... (638)	
Cohen v. West Chicago St. R. Co., 60 Fed. Rep. 698.....	475
Coghlan v. Third Ave. R. Co., 16 Misc. 677.....	871
Cohn v. Davidson, 2 Q. B. Div. 455.... (202)	
Cohn v. New York &c. R. Co., 5 App. Div. 196.....	800
Cohn v. New York &c. R. Co., 6 App. Div. 196.....	1132
Cohoes v. Morrison, 42 Hun. 216.....	1299
Colburn v. Grant, 16 App. D. C. 107.....	67
Coldwell-Wileox Co. v. Sullivan, 3 App. Div. 359.....	110
Cole v. Duluth &c. R. Co., 104 Wis. 460.....	1055
Cole v. Fall Brook Coal Co., 159 N. Y. 59.....	2034
Cole v. Fisher, 11 Mass. 137.....	1287, 2367
Cole v. Goodwin, 19 Wend. (N. Y.) 251.....	295
Cole v. Lippitt, 22 R. I. 31.....	2030
Cole v. New York Bottling Co., 23 App. Div. 177.....	2066
Cole v. New York &c. R. Co., 174 Mass. 537.....	1162, 2169
Cole v. Parker, (Tex. Civ. App.) 66 S. W. Rep. 135.... (879)	955
Cole v. R. Co., 71 Wis. 114.....	1600
Cole v. R., W. & O. R. Co., 72 Hun. 467.....	1524
Cole v. Scranton, 4 Lack. L. News, 287.....	1874
Cole v. Tel. Co., 8 Am. & Eng. Corp. Cas. 45.....	2412
Cole v. Warren Man. Co., 62 N. J. L. 626.....	1469, 1487, 1632, 1672, 1679
Cole v. W. U. T. Co., 33 Minn. 227.....	2409
Colegrove v. N. Y. &c. R. Co., 20 N. Y. 492.....	534
Colegrove v. Smith, 33 Pac. Rep. (Cal.) 115.... (654)	
Coleman v. Fargo, 8 N. D. 69.....	2022
Coleman v. Georgia R. Co., 84 Ga. 1.....	383
Coleman v. Kentucky C. R. Co., (Ky.) 33 S. W. Rep. 945.....	2049, 2145
Coleman v. Lipscomb, 18 Mo. App. 443.....	73
Coleman v. Mechanics' Iron Foundry Co., 168 Mass. 254.....	1106
Coleman v. New York Central R. R. Co., 33 N. Y. 610.... (300)	
Coleman v. New York &c. R. Co., 106 Mass. 160.....	584
Coleman v. Railroad Co., 25 S. C. 446.....	1661

	PAGE
Coleman v. Second Ave. R. Co., 114 N. Y. 609.....	537, 97
Coles v. Central R. Co., 86 Ga. 251.... (351).....	35
Coles v. Louisville &c. R. Co., 41 Ill. App. 607.....	24
Coles v. Perry, 7 Tex. 109.....	110
Coles v. Revere, 181 Mass. 175.....	184
Coley v. North Carolina R. Co., 129 N. C. 407.....	1777, 1799, 1800
Coley v. Statesville, 121 N. C. 301.....	874, 1984, 1985
Coley v. Statesville, 126 N. C. 301.....	1985
Colfax &c. Fruit Co. v. Southern P. R. Co., 118 Cal. 648.....	340
Colgate v. Pennsylvania Co., 31 Hun, 297.....	31
Colgrove v. R. Co., 5 Duer, 382; 20 N. Y. 49.....	63
Coll v. Easton Transit Co., 180 Pa. St. 618.....	1154
Collard v. S. E. Railway Co., 7 Hurl. & N. 79.... (824)	
Collender v. Dinsmore, 55 N. Y. 200.... (279).....	29
Collensworth v. New Whatcom, 16 Wash. 224.....	200
Coller v. Cincinnati S. R. Co., 18 Oh. C. C. 382.....	114
Collett v. London &c. R. Co., 6 Eng. L. & Eq. 305.... (381)	
Collett v. New York, 51 App. Div. 394.....	1813, 1948, 1954
Collier v. Hyatt, 110 Ga. 317.....	225
Collier v. Munn, 41 N. Y. 143.....	5
Collinghill v. Haverhill, 128 Mass. 218.....	99
Collins v. Atlantic &c. R. Co., 65 Me. 231.... (1018)	
Collins v. Bennett, 46 N. Y. 494.....	104, 114, 115, 12
Collins v. Boston &c. R. Co., 10 Cush. 506.....	611, 617
Collins v. Bristol &c. R. Co., 11 Ech. 790.... (349)	
Collins v. Burns, 63 N. Y. 1.....	308
Collins v. Davidson, 19 F. R. 83.... (688)	
Collins v. Dorchester, 6 Cush. 396.....	1844, 2257
Collins v. Gilbert, 94 U. S. 753.... (182)	
Collins v. Greenfield, 172 Mass. 78.....	1594, 1701
Collins v. Hoehle, 99 Wis. 639.....	1201
Collins v. Illinois C. R. Co., 77 Miss. 855.....	77
Collins v. Janesville, 99 Wis. 464.....	863
Collins v. Janesville, 107 Wis. 436.....	932, 1868, 1877, 2017
Collins v. Janesville, 111 Wis. 348.....	930, 1207, 1821, 1873
Collins v. Laconia Car Co., 68 N. H. 196.....	1494, 1645
Collins v. McDowell, 65 Minn. 110.....	191
Collins v. N. Y. Cent. &c. R. Co., 71 N. Y. 609.....	1107, 1261
Collins v. N. Y. C. & H. R. R. Co., 109 N. Y. 243.....	1138
Collins v. N. Y. C. & H. R. R. Co., 5 Hun, 503.... (938, 1260)	
Collins v. New York &c. R. Co., 92 Hun, 563.....	754, 773
Collins v. O'Laverty, 136 Cal. 31.....	2053
Collins v. Philadelphia, 93 Pa. St. 272.....	1903
Collins v. R. Co., 10 Cush. 606.....	616
Collins v. St. Paul &c. R. Co., 30 Minn. 31.....	1608, 1638
Collins v. Second Ave. T. Co., 7 Pa. Super. Ct. 318.....	174
Collins v. South Boston &c. R. Co., 142 Mass. 301.... (711)	705, 721
Collins v. Texas &c. R. Co., 15 Tex. Civ. App. 169.....	533
Collins Park &c. R. Co. v. Ware, 112 Ga. 663.....	837
Colliot v. American Man. Co., 71 Mo. App. 163.....	1721, 1773
Collis v. N. Y. C. & H. R. R. Co., 71 Hun, 504.....	2107
Collis v. Selden, L. R. 3 C. P. 495.....	653, 1377
Collom v. Justice, 161 Ill. 372.....	1877
Collum v. Lucksinger, 83 Mo. App. 110.....	180
Colorado City v. Smith, (Colo. App.) 67 Pac. Rep. 909.....	919
Colorado &c. Co. v. Rees, 21 Colo. 435.....	1133, 1205
Colorado Fuel &c. Co. v. Cummings, 8 Colo. App. 541.....	1397
Colorado &c. Inv. Co. v. Rees, 21 Colo. 435.... (1075)	
Colorado R. Co. v. Naylor, 17 Col. 501.....	1647
Colorado &c. R. Co. v. Holmes, 5 Colo. 197.... (662)	
Colorado &c. R. Co. v. Mitchell, 26 Colo. 284.....	1794
Colorado &c. R. Co. v. Ogden, 3 Colo. 499.....	1573
Colson v. Craver, 80 Ill. App. 99.....	1122, 1567, 1584

## TABLE OF CASES.

lxvii

	PAGE
Colter v. Cincinnati St. Ry. Co., 18 Oh. C. C. 382.....	2297
Colton v. Onderdonk, 69 Cal. 155.....	2059, 2072
Colton v. Woods, 8 Com. B. (N. S.) 566.....	2363
Columbia v. Ashton, 14 App. D. C. 571.....	1950
Columbia v. Crumbaugh, 13 App. D. C. 553.....	1876
Columbia v. Moulton, 181 U. S. 576.....	1914
Columbia v. Payne, 13 App. D. C. 500.....	1869
Columbia v. Wayne, 13 App. Div. 500.....	1873
Columbia City v. Langohr, 20 Ind. App. 395.... (898)	
Columbus v. Ogletree, 102 Ga. 293.....	1824, 1870
Columbus v. Strassner, 124 Ind. 482.....	851
Columbus &c. R. Co. v. Bradford, 86 Ala. 574.....	1715
Columbus &c. R. Co. v. Bridges, 86 Ala. 448.....	900, 1736
Columbus &c. R. Co. v. Farrell, 31 Ind. 408.....	427, 432
Columbus &c. R. Co. v. Ludden, 89 Ala. 612.....	329
Columbus &c. R. Co. v. O'Brien, 4 Oh. City Ct. R. 515.....	1618
Colvin v. Peabody, 155 Mass. 104.....	4, 1292
Colwell v. M. R. Co., 57 Hun, 452.....	460
Colwell v. Waterbury, 74 Conn. 568.....	1989
Comben v. Belleville Stone Co., 59 N. J. L. 226.....	1465, 1469, 1682
Combs v. Cordage Co., 102 Mass. 572.....	1503
Combu v. New York &c. R. Co., 25 App. Div. 309.....	751
Comby v. Wannamaker, 14 Mont. Co. L. Rep. 30.....	21
Comer v. Barfield, 102 Ga. 485.... (792)	
Comer v. Columbia &c. R. Co., 52 S. C. 36.....	226
Comer v. Foley, 98 Ga. 678.....	548
Comer v. Shaw, 98 Ga. 543.... (791).....	787
Comer v. State, 26 Tex. App. 509.....	147
Comerford v. Atlantic Ave. R. Co., 8 Misc. 599.....	911, 1203
Comiskie v. Ypsilanti, 116 Mich. 321.....	1827
Commercial &c. Asso. v. Springsteen, 23 Ind. App. 657.....	1309
Commercial Bank v. Chatfield, 121 Mich. 641.....	72
Commercial Bank v. Chicago &c. R. Co., 160 Ill. 401.....	38
Commercial Bank v. Kortright, 22 Wend. 348.....	78
Commercial Bank v. Nat. Bank, 30 Md. 11.... (182)	
Commercial Bank v. Red River Valley Nat. Bank, 8 N. D. 382.....	12
Commercial Bank v. Union Bank, 11 N. Y. 203.... (69).....	33
Commercial Club v. Hilliker, 20 Ind. App. 239.....	884, 2045
Commercial Electric Light Co. v. Tacoma, 20 Wash. 288.....	2002
Commission Co. v. Nashville &c. R. Co., 64 Mo. App. 144.....	909
Commissioners v. Church, 62 Oh. St. 318.....	1911
Commissioners &c. v. Ryckman, 91 Md. 36.....	1835
Commonwealth v. Allen, 52 Mass. 403.....	2345
Commonwealth v. B. & L. R. Co., 134 Mass. 211.... (657)	
Commonwealth v. Boston &c. R. Co., 101 Mass. 201.... (808)	
Commonwealth v. Begley, (Ky.) 66 S. W. 754.....	85
Commonwealth v. Coburn, 132 Mass. 555.....	535
Commonwealth v. Fitchburg R. Co., 10 Allen 189.... (792)	
Commonwealth v. Gabby, 5 Pa. Dist. 159.....	991
Commonwealth v. Moore, 145 Mass. 244.....	135, 148
Commonwealth v. New York &c. R. Co., 112 Mass. 412.....	12
Commonwealth v. Passmore, 1 Serg. & Rawle, 219.....	2237, 2239
Commonwealth v. Piper, 120 Mass. 185.... (1220)	
Commonwealth v. Power, 7 Metc. 596.... (365).....	522, 545, 590, 1731
Commonwealth v. R. R. Co., 108 Mass. 7.....	263
Commonwealth v. Ruggles, 88 Mass. 588.....	2239
Commonwealth v. Yost, 11 Pa. Super. Ct. 323.....	1967
Compania de Navigacion la Flecha v. Brauer, 168 U. S. 104.....	256
Compton v. Omaha &c. R. Co., 82 Mo. App. 175.....	1566
Comstock v. Hannah, 76 Ill. 530.... (182)	
Comstock v. Union P. R. Co., 56 Kan. 228.....	1695
Conaty v. New York &c. R. Co., 164 Mass. 572.... (804)	
Conckling v. Erie R. Co., 63 N. J. L. 338.....	755

	PAGE
Concord v. Boston &c. R. Co., (N. H.) 38 Atl. Rep. 378.....	818
Concord v. Burleigh, 67 N. H. 106.....	2247
Concord Variety Works v. Beckham, 112 Ga. 242.....	100, 108
Condens v. Shreveport Bell R. Co., 106 La. 236.....	2315
Condict v. Grand Trunk R. Co., 50 N. Y. 500.... (340)	
Condict v. G. T. R. Co., 4 Lansing, 106.....	327
Condiff v. Kansas &c. R. Co., 25 Pac. (Kan.) 562.....	691
Condon v. Mo. P. R. Co., 78 Mo. 567.....	1615
Cone v. Central R. &c., 62 N. J. L. 99.....	903
Cone v. D., L. & W. R. Co., 81 N. Y. 206.....	1671
Conelly v. Nashville, 100 Tenn. 262.....	1988
Cones v. Cincinnati &c. R. Co., 114 Ind. 328.....	769
Coney v. Gilboa, 55 App. Div. 111.....	1841
Conger v. Flint &c. R. Co., 86 Mich. 76.....	1729
Conger v. The Hudson River R. R. Co., 6 Duer, 375.... (212)	
Congreve v. Morgan & Smith, 18 N. Y. 84.....	2231, 2249
Congreve v. Smith, 18 N. Y. 79.... (632).....	1097, 2249, 2251
Conkey v. Bueherer, 84 Ill. App. 633.....	1605
Conklin v. Elmira, 11 App. Div. 402.....	1861
Conklin v. Railroad Co., 102 N. Y. 107.....	1960
Conklin v. Thompson, 29 Barb. 218.....	1290, 1292, 2024
Conklin v. Erie R. Co., 63 N. J. L. 338.... (791).....	805
Conlan v. New York &c. R. Co., 74 Hun, 115.....	1762
Conley v. American Express Co., 87 Me. 352.....	1537, 1541
Conley v. Lincoln Foundry Co., 14 Pa. Super. Ct. 626.....	1398
Conlin v. Rogers, 39 N. Y. St. Repr. 51.....	1117
Conlin v. Bailey, 58 Ill. App. 261.....	2136
Conlon v. St. Paul, 70 Minn. 216.....	1813
Connaughton v. Sun &c. Asso., 76 N. Y. Supp. 755.....	879, 2358
Conneaut v. Naef, 54 Oh. St. 529.....	1898
Connecticut &c. Ins. Co. v. N. Y. &c. R. Co., 25 Conn. 265.... (943)	
Connell v. Chesapeake &c. R. Co., (Ky.) 58 S. W. Rep. 374.... (814)	
Connell v. Chesapeake &c. R. Co., 93 Va. 44.....	603
Connell v. McNutt, 109 Mich. 329.....	1235
Connell v. Southern R. Co., 91 Fed. Rep. 466.....	2161, 2164, 2165
Connell v. Stark, 108 Wis. 92.....	2083
Connell v. Western Union Tel. Co., (Mo.) 48 Alb. L. J. 74 (1893).....	858
Connell v. W. U. T. Co., 108 Mo. 459.....	2438
Connolly v. Boothby Hotel Co., 190 Pa. St. 553.....	1396
Connolly v. Manhattan R. Co., 142 N. Y. 377.....	389
Connolly v. N. Y. C. & H. R. R. Co., 88 N. Y. 346.....	768
Connolly v. Minn. &c. R. Co., 38 Minn. 80.....	1610
Connolly v. Rist, 20 Misc. 31.....	2124
Conner v. Citizen R. Co., 105 Ind. 62.... (476)	
Conner v. Winton, 8 Ind. 315.....	2189
Connors v. Burlington &c. R. Co., 74 Iowa, 383.....	1728
Connors v. Hennessey, 112 Mass. 96.....	649
Conniff v. San Francisco, 67 Cal. 45.....	1993
Connolly v. Central Vermont R. Co., 4 App. Div. 221.....	
Connolly v. Kniekerbocker Ice Co., 114 N. Y. 104-109.... (16).....	534, 673, 674
Connolly v. N. Y. &c. R. Co., 158 Mass. 8.....	453
Connolly v. St. Joseph &c. Co., 166 Mo. 447.....	1572, 1680
Connolly v. Waltham, 156 Mass. 369.....	2007
Connolly v. Warren, 106 Mass. 146.... (619)	
Connor v. Electric T. Co., 173 Pa. St. 602.....	2275
Connors v. Adams, 13 Hun, 427.....	82
Connors v. Chicago &c. R. Co., 111 Iowa, 384.....	1093
Connyers v. Sioux City R. Co., 78 Iowa, 410.... (1042)	
Conover v. Wood, 48 Minn. 438.....	1306
Conrad v. Ellington, 104 Wis. 367.....	670, 1221, 1946
Conrad v. Gray, 109 Ala. 130.....	2048, 2067
Conrad v. Ithaca, 16 N. Y. 158.....	1899, 1960
Conrad v. Vulcan Iron Works. 62 Mo. 35.....	1572

	PAGE
Conrad v. W. U. T. Co., 162 Pa. St. 204.....	2411
Conrad Grocery Co. v. St. Louis &c. R. Co., 89 Mo. App. 391.....	2286, 2287, 2308
Conrad v. Clauve, 93 Ind. 476.....	2125
Conroy v. Chicago &c. R. Co., 96 Wis. 243.....	388, 402, 431, 541
Conroy v. Gale, 5 Lansing, 344.... (633).....	638
Conroy v. Iron Works, (Mo.) 35.....	698
Conroy v. Oregon &c. R. Co., 23 Fed. Rep. 71.....	2058
Conroy v. Twenty-third St. R. Co., 52 How. Pr. 49.....	2337
Conshohocken R. Co. v. Penn. R. Co., 15 Pa. Co. Ct. 445.....	2262
Consolidated Coal Co. v. Bokamp, 181 Ill. 9.....	1722, 1783
Consolidated Coal Co. v. Carson, 66 Ill. App. 434.....	1451, 1783
Consolidated Coal Co. v. Gruber, 188 Ill. 584.....	1451, 1631
Consolidated Coal Co. v. Haenni, 146 Ill. 614.....	850
Consolidated Coal Co. v. Lundak, 196 Ill. 594.....	1451, 1624, 1528
Consolidated Coal Co. v. Oeltjen, 91 Ill. App. 123.....	911
Consolidated Coal Co. v. Scheiber, 167 Ill. 539.....	959, 1425, 1594
Consolidated Coal Co. v. Seniger, 179 Ill. 370.....	1121, 1402, 1519
Consolidated Coal Co. &c. v. Bruce, (Ill.) 37 N. E. 912.....	1396
Consolidated City &c. R. Co. v. Carlson, 58 Kan. 62.....	2304
Consolidated Electric &c. Co. v. Koopp, (Kan.) 68 Pac. Rep. 608.....	1062
Consolidated Gas Co. v. Crocker, 82 Md. 113.....	1383, 2068
Consolidated &c. R. Co. v. Home, 59 N. J. L. 275.....	952
Consolidated &c. R. Co. v. Peterson, 8 Kan. App. 316.....	1660
Consolidated &c. R. Co. v. Wyatt, 59 Kan. 772.....	2320
Consolidated &c. Storage Co. v. Atlantic Trust Co., 24 App. Div. 172.....	627
Consolidated Stone Co. v. Summit, 152 Ind. 297.....	2048
Consolidated T. Co. v. Behr, 59 N. J. L. 477.....	731, 2299
Consolidated T. Co. v. Chenowith, 61 N. J. L. 554.....	2287
Consolidated T. Co. v. Glynn, 59 N. J. L. 432.....	2282
Consolidated T. Co. v. Haight, 59 N. J. L. 577.....	2287, 2298, 2325
Consolidated T. Co. v. Home, 60 N. J. L. 444.....	876
Consolidated T. Co. v. Lamberton, 60 N. J. L. 457.....	855, 867, 2319
Consolidated T. C. v. Scott, 58 N. J. L. 682.....	2298, 2308
Consolidated Traction Co. v. Taborn, 58 N. J. L. 1.....	547, 592
Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474.....	502, 1102
Consumers' Gas &c. Co. v. Corbaley, 14 Ind. App. 549.....	1122, 1383
Consumers' Gas &c. Co. v. Perrego, 144 Ind. 350.....	1383
Content v. New York &c. R. Co., 165 Mass. 267.....	1685
Continental Nat. Bank v. Tradesman Nat. Bank, 36 App. Div. 112.....	680
Continental &c. Co. v. Stead, 95 U. S. 161.....	734, 735, 777
Converse v. Norwich &c. R. Co., 33 Conn. 166.... (338).....	345
Converse v. Trans. Co., 33 Conn. 166.... (351).....	
Converse Bridge Co. v. Collins, 119 Ala. 534.....	356
Conway v. Grant, 88 Ga. 40.....	981, 985, 987
Conway v. Lewiston &c. R. Co., 90 Me. 199.....	442, 458
Conway v. New Orleans &c. R. Co., 51 La. Ann. 146.....	920, 2287, 2335
Conway v. Reed, 66 Mo. 346.....	2024
Cook v. Barnes, (Ky.) 43 S. W. Rep. 682.....	59
Cook v. Carroll, (Tex. Civ. App.) 39 S. W. Rep. 1006.....	1201
Cook v. Central &c. Co., 67 Ala. 533.... (659).....	662, 737, 809, 2143
Cook v. Champlain Truss Co., 1 Denio, 91, 101.... (1041).....	
Cook v. Clay Street R. Co., 60 Cal. 604.....	877, 924
Cook v. Dean, 11 App. Div. 123.....	2260
Cook v. Fogarty, 103 Iowa, 500.....	2348
Cook v. Hannibal &c. R. Co., 63 Mo. 397.....	1643
Cook v. Hopper, 23 Mich. 511.....	2181
Cook v. Houston &c. Co., 76 Tex. 353.....	14
Cook v. Illinois Central R. Co., 30 Iowa, 202.... (31).....	
Cook v. Johnson, 58 Mich. 437.....	1708
Cook v. Lalance Grojean Mfg. Co., 33 Hun, 351.....	1781, 1806
Cook v. Los Angeles E. R. Co., 134 Cal. 279.....	2322
Cook v. Macon, 54 Ga. 568.... (30).....	
Cook v. Milwaukee &c. R. Co., 36 Wis. 45.....	1335

	PAGE
Cook v. Missouri &c. R. Co., 12 Mo. App. 32.....	762
Cook v. Missouri Pac. R. Co., 19 Mo. 329.....	864
Cook v. Missouri &c. R. Co., (Mo. App.) 68 S. W. Rep. 230.... (657)	
Cook v. N. Y. C. & H. R. R. Co., 119 N. Y. 653.....	1451
Cook v. N. Y. C. R. Co., 1 Abb. Ct. of App. Cas. 432.... (734)	
Cook v. N. Y. Central R. Co., 3 Keyes. 476.... (673)	
Cook v. N. Y. C. R. Co., 5 Lansing, 401.....	782
Cook v. Parham, 24 Ala. 21.....	687
Cook v. Piper, 79 Ill. App. 291.....	2354
Cook v. Railroad Co., 34 Minn. 45.....	1479, 1566
Cook v. Railroad Co., 72 Ga. 48.....	1772
Cook v. S. P. &c. R. Co., 34 Minn. 45.....	1600
Cook v. Standard Oil Co., 9 App. Div. 105.....	2355
Cook v. Wilmington City Electric Co., 9 Houst. 306.....	1064
Cookman v. Hill, 81 Mo. App. 297.....	2269
Cookson v. Pittsburg &c. R. Co., 179 Pa. St. 184.... (762)	
Coombs v. Cordage Co., 102 Mass. 572.... (689).....	1510, 1547
Coombs v. New Bedford Co., 102 Mass. 572.....	
..... 1406, 1448, 1543, 1544, 1550, 1565, 1599.....	1751
Coombs v. Topshan, 38 Me. 204.....	799
Coon v. Fremont, 25 App. Div. 250.....	2047
Coon v. Syracuse & Utica R. Co., 5 N. Y. 492.....	1606, 1612
Coon v. Utica &c. R. Co., 6 Barb. 231.....	1750
Cooney v. Pullman Palace Car Co., 121 Ala. 368.....	599
Cooney v. Southern &c. R. Co., 80 Mo. App. 226.....	2279, 861,
Coontz v. Railroad Co., (Mo.) 22 S. W. Rep. 572.....	2051
Coop v. St. Paul, 32 Alb. L. J. 319.....	1567
Coops v. Lake Shore R. Co., 66 Mich. 448.....	1728
Cooper v. Butler, 103 Penn. 412.....	1684
Cooper v. Cedar Rapids, 112 Iowa, 367.....	1961, 1963
Cooper v. Central &c. R. Co., 44 Iowa, 134.....	1524, 1409,
Cooper v. Eastern Trans. Co., 75 N. Y. 116.....	2026
Cooper v. Floyd County, 112 Ga. 70.....	1838
Cooper v. Georgia &c. R. Co., 56 S. C. 91.....	487
Cooper v. Hill, 94 Fed. Rep. 582.....	75
Cooper v. Lake Shore R. Co., 66 Mich. 261.... (878)	
Cooper v. Milwaukee &c. R. Co., 23 Wis. 668.....	1602
Cooper v. Milwaukee, 97 Wis. 458.....	1869
Cooper v. New York &c. R. Co., 25 App. Div. 383.....	923, 1518
Cooper v. Overton, 102 Tenn. 211.....	2134, 2135
Cooper v. Raleigh &c. R. Co., 105 Ga. 83.....	223
Cooper v. Raleigh &c. R. Co., 110 Ga. 659.....	223
Cooper v. Railroad Co., 23 Wis. 668.....	1616
Cooper v. Seattle, 16 Wash. 462.....	654
Cooper v. Shore Electric Co., 63 N. J. L. 558.....	952
Cooper v. Waterloo, 98 Wis. 424.....	1897
Coosa Man. Co. v. Williams, 133 Ala. 606.....	1404, 1746
Copeland v. Metropolitan Street R. Co., 67 App. Div. 483.....	2313
Copithorne v. Hardy, 173 Mass. 400.....	1638, 1804
Copley v. Balle, 9 Kan. App. 465.....	1344
Copley v. New Haven &c. R. Co., 136 Mass. 6.....	720
Copper v. Raleigh &c. R. Co., 110 Ga. 659.....	245
Coppins v. N. Y. &c. R. Co., 122 N. Y. 557.....	1512, 1672
Coppins v. N. Y. C. & H. R. R. Co., 48 Hun, 292.....	929, 1409
Coppner v. Penn. R. Co., 12 Ill. App. 600.....	2133
Coppock v. Long Island R. Co., 89 Hun, 186.....	261
Coppuck v. Philadelphia &c. R. Co., 191 Pa. St. 172.... (756)	
Copson v. New York &c. R. Co., 171 Mass. 233.....	839, 1101
Corbett v. Smith, 101 Tenn. 368.....	1542
Corbett v. Troy, 53 Hun, 228.....	1889
Corbin v. Bores, 29 Chicago L. N. 205.....	2177
Corbin v. Philadelphia, 195 Pa. St. 461.....	1952
Corbin v. Western E. Co., 78 Ill. App. 516.... (1118)	

	PAGE
Corbin v. Winona &c. R. Co., 64 Minn. 185.....	1706
Corcoran v. D., L. & W. R. Co., 126 N. Y. 673.....	1526
Corcoran v. Holbrook, 59 N. Y. 517.....	1067, 1481, 1487, 1516
Corcoran v. Milwaukee R. Co., 81 Wis. 191.....	1570, 1579
Corcoran v. N. Y. Elevated R. Co., 19 Hun, 368.....	6
Corcoran v. New York &c. R. Co., 46 App. Div. 201.....	1609
Corcoran v. New York &c. R. Co., 25 App. Div. 479.....	545
Corcoran v. Peekskill, 108 N. Y. 151.....	1139, 1929, 1938
Corcoran v. Ulster &c. R. Co., 40 N. Y. Supp. 1117.....	931
Corcoran v. Wanamaker, 185 Pa. St. 496.....	1464
Cordell v. N. Y. &c. R. Co., 64 N. Y. 535.....	780
Cordell v. N. Y. &c. R. Co., 70 N. Y. 119.....	738, 811
Cordell v. N. Y. &c. R. Co., 75 N. Y. 330.....	735
Corey v. Ann Arbor, 124 Mich. 134.....	1890
Corey v. Northern &c. R. Co., 32 Minn. 457.....	820
Corey v. Railroad Co., 86 Mo. 635.....	1405
Corlett v. Leavenworth, 27 Kan. 673.....	699
Corlin v. West End &c. R. Co., 154 Mass. 197.....	476
Corliss v. Worcester &c. R. Co., 63 N. H. 404.....	874, 949
Corn Exchange Bank v. American Dock &c. Co., 14 App. Div. 453.....	132
Cornell v. Butternuts &c. Co., 25 Wend. 364.....	2220
Cornell v. Manistee &c. R. Co., 117 Mich. 238.....	1064
Cornielson v. State, (Tex. Civ. App.) 49 S. W. Rep. 384.....	2245
Corning Steel Co. v. Pohlplotz, (Ind. App.) 64 N. E. Rep. 476.....	1748, 1802
Corning v. Saginaw, 116 Mich. 74.....	1988, 1989
Cornish v. F. B. F. Ins. Co., 74 N. Y. 295.... (1282)	
Cornman v. Eastern Counties R. Co., 4 Ll. & N. 781.... (605)	
Cornwall v. McFarland Real Estate Co., 150 Mo. 377.....	629
Cornwell v. Deck, 8 Hun, 122.....	57
Corper &c. Malting Co. v. Huggins, 96 Ill. App. 144.....	4
Correll v. B. C. R. &c. Co., 38 Iowa, 120.....	672
Correll v. Cedar Rapids, 110 Iowa, 333.....	1464
Corrigan v. Elsinger, 81 Minn. 42.....	651
Corsi v. Maretzek, 4 E. D. Smith, (N. Y.) 1.....	2187
Corsicana Cotton Oil Co. v. Valley, 14 Tex. Civ. App. 250.....	1374, 1857
Corsicana v. Tobin, (Tex. Civ. App.) 57 S. W. Rep. 319.....	1301
Corso v. New Orleans &c. R. Co., 48 La. Ann. 1286.....	230, 317
Corson v. Coal Hill Coal Co., 101 Iowa, 224.....	1452, 1806
Corson v. Maine Cent. R. Co., 76 Me. 244.....	1519
Cort v. W. U. T. Co., 130 Cal. 657.....	2399
Cortiz v. N. Y. &c. R. Co., 83 Hun, 271.....	760
Corwin v. N. Y. &c. R. Co., 13 N. Y. 42, 49.....	1039, 1040, 1041, 1043, 1045
Cosgriff v. Hudson City Sav. Inst., 24 Misc. 4.....	163
Cosgrove v. N. Y. C. & H. R. R. R. Co., 13 Hun, 329.... (725)	
Cosgrove v. Ogden, 49 N. Y. 255.....	5, 8, 2133
Cosgrove v. Provident Institution &c., 64 N. J. L. 653.....	165
Cosmelly v. Warren, 108 Mass. 146.... (617)	
Costa v. Pacific Coast Co., 26 Wash. 138.....	1623
Costello v. Third Ave. R. Co., 161 N. Y. 317.....	710, 2300, 2302
Costich v. Rochester, 68 App. Div. 623.....	1904
Costikyan v. R. W. &c. R. Co., 58 Hun, 590.....	500
Cosulich v. Standard Oil Co., 122 N. Y. 118.....	1095, 1096, 1108, 2060
Cote v. Lawrence Man. Co., 178 Mass. 295.....	1634, 1720
Cothran v. W. U. T. Co., 83 Ga. 25.....	2435
Cott v. L. R. R. Co., 36 N. Y. 214.....	816, 1197, 2086
Cotter v. Frankfort &c. R. Co., 15 Phila. 255.....	21
Cotter v. C. & P. Co., 67 Pa. St. 211.....	252
Cottrell v. The Marshall Infirmary, 70 Hun, 495.....	2081
Cottrell v. Southern R. Co., (Miss.) 32 South Rep. 1.... (774)	
Cottrill v. Chicago &c. R. Co., 47 Wis. 634.....	689, 1713
Couch v. Mills, 21 Wend. 424.....	2206
Couch v. Railroad Co., 32 S. C. 557.....	1661
Coughlan v. Cambridge, 166 Mass. 268.....	1591, 1603, 1776, 1796

	PAGE
Coughtry v. G. W. Co., 56 N. Y. 124.....	1338, 1400, 2122
Coullard v. Tecumseh Mills, 151 Mass. 85.....	1504, 1565
Coulson v. Leonard, 77 Fed. Rep. 538.....	1643, 1671
Coulter v. Great Northern R. Co., 5 N. D. 568.....	796
Coulter v. A. M. U. Express Co., 56 N. Y. 585.....	686, 1197, 1199
County of Bibb v. Ham, 110 Ga. 340.....	863
Coup v. Wabash R. Co., 56 Mich. 111.... (266)	
Coupe v. Platt, 172 Mass. 458.....	1344
Coupland v. Housatonic R. Co., 61 Conn. 531.....	245
Courtney v. Baker, 60 N. Y. 1.....	6
Courts v. Louisville &c. R. Co., 99 Ky. 574.....	832
Courvoiser v. Raymond, 23 Colo. 113.....	1235
Couts v. Neer, 70 Tex. 468.....	2263
Covell v. Wabash R. Co., 82 Mo. App. 180.....	920, 1206
Covey v. Hannibal &c. R. Co., 27 Mo. App. 170.....	1732
Covey v. R. C., 86 Mo. 635.....	1403, 1614
Covington v. Diehl, (Ky.) 59 S. W. Rep. 492.....	915, 1946
Covington v. Manwaring, (Ky.) 68 S. W. Rep. 625.....	1882
Covington v. Western &c. R. Co., 81 Ga. 273.... (474)	
Covington &c. Bridge Co. v. Goodnight, (Ky.) 60 S. W. Rep. 415.....	932, 1401
Covington &c. Bridge Co. v. Patrick, 5 Ohio N. P. 374.... (652)	
Covington Stockyards Co. v. Keith, 139 U. S. 128.....	306
Cowan v. Chicago R. Co., 80 Wis. 284.....	1474
Cowan v. Umbagog Pulp Co., 91 Me. 26.....	1479, 1644
Cowen v. Adams County, (Md.) 699.....	1988
Cowen v. Kirby, 180 Mass. 504.....	2112
Cowen v. Sunderland, 145 Mass. 363.....	1328
Cowen v. Winters, 96 Fed. Rep. 929.....	358
Cowgill v. Petfish, 51 Mo. App. 264.... (172)	
Cowie v. Seattle, 22 Wash. 659.....	1872, 1875, 1882, 1898, 1949
Cowles v. Chicago &c. R. Co., 102 Iowa, 507.....	1549, 1709
Cowles v. Pointer, 26 Miss. 253.....	134
Cowley v. The People, 83 N. Y. 464.... (1237)	1233
Cox v. Burbridge, 13 C. B. (N. S.) 430.....	2363, 2364
Cox v. Central Vermont R. Co., 170 Mass. 129.... (240)	247, 1113, 2102
Cox v. Chicago, 83 Ill. App. 540.....	938
Cox v. Des Moines, 111 Iowa, 646.....	1880
Cox v. Hiesley, 19 Pa. St. 243.... (288)	
Cox v. Jeffries, 73 Mo. App. 412.....	180
Cox v. Livingston, 2 W. & S. (Pa.) 103.... (42)	2180
Cox v. Los Angeles &c. R. Co., 109 Cal. 100.....	
Cox v. Minneapolis &c. R. Co., 41 Minn. 101.... (1054)	
Cox v. Murphy, 82 Ga. 623.... (973)	
Cox v. New York &c. R. Co., 69 App. Div. 451.....	770
Cox v. Norfolk &c. R. Co., 126 N. C. 103.....	1217
Cox v. Norfolk &c. R. Co., 123 N. C. 604.....	1094
Cox v. Peterson, 30 Ala. 608.... (288)	
Cox v. Sullivan, 7 Ga. 144.....	2174
Coxhead v. Johnson, 20 App. Div. 605.....	929, 2243, 2268
Coy v. Indianapolis Gas Co., 146 Ind. 655.....	1383
Coykendall v. Eaton, 55 Barb. 188.....	154
Coyle v. Baum, 3 Okla. 695.....	1217
Coyle v. Griffing Iron Co., 62 N. J. L. 540.....	1593
Coyle v. Griffing Iron Co., 63 N. J. L. 609.....	1699
Coyle v. Pierrepont, 33 Hun. 311.....	3
Coyle v. Pierrepont, 37 Hun. 379.....	3
Coyle v. Pittsburg &c. R. Co., 155 Ind. 429.....	1743
Coyle v. Southern R. Co., 112 Ga. 121.....	548, 552, 573
Coyle v. Third Ave. R. Co., 17 Misc. 282.....	2318
Coyle v. W. R. R. Co., 47 Barb. 152.... (207)	
Cozzens v. Higgins, 1 Abb. (U. S.) App. 457.... (1237)	
Crabb v. Young, 92 N. Y. 56.....	45
Crabell v. Wapello Co., 68 Iowa, 751.....	1711



## TABLE OF CASES.

lxxiii

	PAGE
Crabtree v. Otterson, 22 App. Div. 393.....	2350
Craddock v. Goodwin, 54 Texas. 588.....	829
Craft v. Madison, 98 Wis. 252.....	2016
Craft's Appeal, 42 Conn. 146.... (182)	
Crafter v. Metropolitan R. Co., L. R., 1 C. P. 300.... (605)	
Cragin v. N. Y. C. R. Co., 51 N. Y. 61.....	221, 239, 484
Craig v. Chambers, 17 Oh. St. 254.....	2191
Craig v. Charleston, 180 Ill. 154.....	1986
Craig v. Lake Erie &c. R. Co., 35 Oh. L. J. 15.....	1777, 1778
Craig v. New York &c. R. Co., 118 Mass. 431.... (805)	
Craig v. Parkis, 40 N. Y. 181.... (177)	
Craig v. Rochester City &c. R. Co., 39 N. Y. 410.....	2270
Craighead v. Brooklyn City R. Co., 123 N. Y. 391.....	538, 976
Craker v. C. & N. W. R. Co., 36 Wis. 657.... (522)	
Crall v. Atchison &c. R. Co., 57 Kan. 548.....	1591
Cram v. Metropolitan R. Co., 112 Mass. 38.....	497, 509
Cramblet v. Chicago &c. R. Co., 82 Ill. App. 542.....	409, 1102
Cramer v. Slade, 66 App. Div. 59.....	1214
Crampton v. Ive, N. C. 894.... (732).....	2352
Crandall v. New York &c. R. Co., 19 R. I. 594.....	1545
Crane v. Chicago &c. R. Co., 93 Wis. 487.....	1727
Crane v. Fourth Street Nat. Bank, 173 Pa. St. 568.....	12
Crane v. Michigan C. R. Co., 107 Mich. 511.....	1119
Crane v. Turner, 67 N. Y. 437.....	313
Crank v. Forty-second Street R. Co., 53 Hun, 425.....	893
Cranston v. Bank of State of Georgia, 112 Ga. 617.....	189
Cranston v. N. Y. C. & H. R. Co., 39 Hun, 308.....	759
Cranville &c. R. Co. v. Mosier, 114 Ind. 447.....	1048
Crapo v. King, 16 Wall. 610.... (968)	
Crassett v. Janesville, 28 Wis. 420.....	1993
Crause v. Harris County, 18 Tex. Civ. App. 375.....	1983, 1986
Craven v. Bloomingdale, 54 App. Div. 266.....	9
Craven v. Central Pac. R. C. Co., 72 Cal. 345.....	493
Craven v. Mayers, 165 Mass. 271.....	1452
Crawford v. Cashman, 82 Mo. App. 554.....	106, 116
Crawford v. Chicago &c. R. Co., 109 Iowa, 433.... (657).....	751, 1091
Crawford v. Chicago &c. R. Co., (Mo.) 66 S. W. Rep. 350.... (1374)	
Crawford v. Cincinnati &c. R. Co., 26 Ohio St. 580.... (546).....	549
Crawford v. Houston &c. R. Co., 89 Tex. 89.....	1708
Crawford v. Johnson, 87 Mo. App. 478.....	192
Crawford v. N. Y. C. R. Co., 18 Hun, 108.... (1043)	
Crawford v. New York &c. R. Co., 23 Oh. C. C. 207.....	1681
Crawford v. Southern R. Co., 106 Ga. 870.....	2150
Crawford v. Southern R. Co., 56 S. C. 136.....	226, 253
Crawford v. Wilson &c. Co., 8 Misc. 48.....	2250
Crawford, Jr. v. Wilson & Baillie Manufacturing Co., 8 Misc. 48.....	2254
Crawleigh v. Galveston &c. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 140.... 422, 1202	
Creamer v. Mellvain, 89 Md. 343.....	698, 1107
Crebarry v. The National Transit Co., 77 Hun, 74.....	1723
Cree v. Charleston &c. Gas Co., 51 W. Va. 129.....	1384
Creed v. Hartman, 29 N. Y. 591..... 632, 1097, 2026, 2202, 2231, 2249, 2251	
Creed v. Kendal, 156 Mass. 291.... (719)	
Creed v. Penn. R. Co., 5 Norr. (Pa.) 139.....	381
Cregan v. Marston, 126 N. Y. 568-571.....	1535
Cregin v. Brooklyn Cross-Town R. Co., 75 N. Y. 192.....	1366
Crenshaw v. Ullman, 20 S. W. Rep. (Mo.) 1077.... (645)	
Crescent Culbertson v. City R. Co., 48 La. Ann. 1376.....	2296
Cressey v. Northern R., 59 N. H. 564.... (1041)	
Creswell v. Wilmington &c. R. Co., (Del.) 43 Atl. Rep. 629..... 1538, 1546, 1606	
Crete v. Childs, 11 Neb. 252.....	898
Crew v. St. Louis &c. R. Co., 20 Fed. Rep. 87.....	1525
Crine v. East Tennessee &c. R. Co., 84 Ga. 651.....	402
Crippen v. Des Moines, (Iowa) 78 N. W. Rep. 688.... (1178)	

	PAGE
Crispin v. Babbitt, 81 N. Y. 516.....	1533, 1661, 1663
Crissey &c. Co. v. Denver &c. R. Co., (Colo. App.) 68 Pac. Rep. 670.....	1118
Crites v. New Richmond, 98 Wis. 55.....	1118, 1230, 1877
Critten v. Chemical Nat. Bank, 171 N. Y. 219.....	520
Crocheron v. North Shore S. I. F. Co., 56 N. Y. 656.....	424, 604, 605
Crocker v. Hartford, 66 Conn. 387.....	2013, 2015
Crocker v. Knickerbocker Ice Co., 92 N. Y. 562.....	2230, 2357
Crocker v. Mexico, 62 Mo. App. 385.....	2013
Crocker v. Pacific Lounge &c. Co., (Wash.) 69 Pac. Rep. 359.....	1749
Crocker v. Schureman, 7 Mo. App. 358.....	1126, 1168
Crockett v. Calvert, 8 Ind. 127.....	1399
Crockwit v. Fletcher, 1 Hurl. & Norm. 893.... (575)	
Crofoot v. Syracuse &c. R. Co., 77 N. Y. Supp. 389.....	2111
Croft v. Chicago &c. R. Co., 72 Minn. 47.... (784)	1053
Croft v. North Western S. S. Co., 20 Wash. 175.....	446, 2045, 2050
Croft v. Williams, 88 N. Y. 384.... (43)	64
Croker v. Pusey &c. Co., 3 Penn. (Del.) 1.....	872, 1406
Croll v. Atchison &c. R. Co., 57 Kan. 548.....	1443
Cromwell v. Stephens, 2 Daly, (N. Y.) 15.....	149
Cronan v. Crescent City R. Co., 49 La. Ann. 65.....	496
Crook v. Jadis, 5 B. & A. 909.... (184)	
Crooker v. Hutchinson, 3 Chipm. 117.....	2174
Crosby v. Fitch, 12 Conn. 410.....	236
Crosby v. Grant, 36 N. H. 273.... (183)	
Crosdale v. Cinthiana, (Ky.) 50 S. W. Rep. 977.....	1986
Cross v. Evans, 86 Fed. Rep. 1.... (1371)	
Cross v. Southern R. Co., 109 Ga. 170.....	2153
Cross Lake R. Co. v. Joyce, 83 Fed. Rep. 989.....	1157
Crossville v. Stuart, 77 Ill. App. 513.....	2084
Crouch v. L. & M. W. R. Co., 14 C. B. 255.... (288)	
Crouse v. Chicago &c. R. Co., 102 Wis. 196.....	852, 862, 1094, 1236, 1736
Crouse v. Chicago &c. R. Co., 104 Wis. 473.... (894)	
Crouse v. First National Bank, 137 N. Y. 383.....	37
Crowe v. N. Y. C. R. Co., 70 Hun, 37.....	1552, 1584
Crowell v. Thomas, 90 Hun, 193.....	679, 1476, 1672
Crowley v. Cutting, 165 Mass. 436.....	1740, 1804
Crowley v. Groonell, 73 Vt. 45.... (973)	
Crowley v. Louisville &c. R. Co., (Ky.) 55 S. W. Rep. 434.....	775, 788
Crowley v. Metropolitan Street R. Co., 24 App. Div. 101.....	2329
Crowley v. Pacific Mills, 148 Mass. 228.....	1504
Crowley v. Palen, 65 How. Pr. 435.....	2361
Crown v. Orr, 140 N. Y. 450.....	1501, 1541
Crozier v. Boston &c. Steamboat Co., 43 How. Pr. 466.... (608)	
Crozier v. Reed, 10 App. Div. 626.....	2360
Crudup v. Schreiner, 98 Ill. App. 337.....	4
Crumley v. Cincinnati &c. R. Co., 12 Oh. C. C. 164.....	1095, 1776
Cuddeback v. Jewett, 20 Hun, 187.....	817
Cuddy v. Horn, 46 Mich. 596.... (730)	
Cuddy v. Szepansky, 19 Oh. C. C. 356.....	1661
Culbertson v. Holliday, 50 Neb. 229.....	668
Culbertson v. Metropolitan Street R. Co., 140 Mo. 35.....	1235, 1520, 2287, 2299
Culhane v. N. Y. C. &c. R. Co., 60 N. Y. 133.....	1115, 1163
Cullar v. Missouri &c. R. Co., 84 Mo. App. 340.... (465)	936
Cullen v. Baltimore &c. R. Co., 8 App. D. C. 69.... (661)	
Cullen v. National S. M. R. Co., 114 N. Y. 45.....	1554
Cullen v. Norton, 126 N. Y.....	1593
Cullen v. State, (Ind. App.) 62 N. E. Rep. 759.....	56
Cullison v. Baltimore &c. R. Co., 4 Oh. N. P. 360.....	2205
Cullman v. McMinn, 109 Ala. 614.....	1840, 2044
Cullom v. McKelvey, 26 App. Div. 46.....	641
Cully v. Louisville &c. R. Co., 101 Ky. 319.....	890
Culp v. Atchison &c. R. Co., 17 Kan. 475.... (793)	
Culp v. Delaware &c. R. Co., 9 Nulp, (Pa.) 174.....	2155

## TABLE OF CASES.

LXXV

	PAGE
Culpepper v. International &c. R. Co., 90 Tex. 627.....	1729, 1803
Culver v. Alabama &c. R. Co., 108 Ala. 330.....	1215, 1802
Culver v. Streator, 130 Ill. 238.....	1986
Culverson v. Maryville, 67 Mo. App. 343.....	1876
Cumberland v. Lotting, (Md.) 51 Atl. Rep. 841.....	1062
Cumberland Coal Co. v. Hoffman Coal Co., 30 Barb. 159.... (69)	
Cumberland County v. Central Wharf &c. Co., 90 Me. 95.....	2029, 2208
Cumberland &c. R. Co. v. Hughes, 11 Penn. St. 141.....	2337
Cumberland Coal &c. Co. v. Sherman, 80 Barb. 553.... (70)	
Cumberland &c. R. Co. v. State, 37 Md. 156.....	682, 1642
Cumberland T. Co. v. Brown, 104 Tenn. 56.....	2430, 2433
Cumberland &c. Telegraph Co. v. Texas &c. R. Co., 52 La. Ann. 1850.....	209
Cumberland T. & T. Co. v. United Elec. R. Co., 93 Tenn. 492.... (1058)	
Cumming v. The Brooklyn City R. Co., 104 N. Y. 669.....	705, 709, 868, 1167
Cunningham v. Fort Worth &c. R. Co., (Tex. Civ. App.) 66 S. W. Rep. 467..	452
Cummings v. Chicago &c. R. Co., 89 Ill. App. 199.....	1519
Cummings v. Collins, 61 Mo. 523.....	1683
Cummings v. Hartford, 70 Conn. 115.....	1863, 1940
Cummings v. Helena &c. Co., (Mont.) 68 Pac. Rep. 852.. 256, 658, 1090, 1701,	2054
Cummings v. National Furnace Co., 60 Wis. 603.....	1103
Cummings v. New Rochelle, 38 App. Div. 583.....	1880
Cummings v. Syracuse, 100 N. Y. 637.....	2250
Cummings v. Toledo, 12 Oh. C. C. 650.....	1961
Cummings v. Wood, 44 Ill. 416.....	1104
Cummings v. Worcester &c. Street R. Co., 166 Mass. 220.....	540, 677
Cummins v. McLain, 2 Pike, (Ark.) 402.....	2180
Cummins v. Summuduwot Lodge No. 3, 9 Kan. App. 153.....	1963
Cunne v. Warren Chemical &c. Co., 36 N. Y. 53.... (656)	658
Cundy v. Lindsay, 3 App. Cas. 459.....	2419
Cuney v. Campbell, 76 Minn. 59.....	975, 979
Cunningham v. Bath Iron Works, 92 Me. 501.... 1091, 1444, 1448, 1538, 1542,	1674
Cunningham v. Belknap, (Ky.) 60 S. W. Rep. 837.....	2365
Cunningham v. Bucky, 42 W. Va. 671.....	142, 154
Cunningham v. B. S. S. & L. Co., 93 N. Y. 481.....	634
Cunningham v. Denver, 23 Colo. 18.....	1823
Cunningham v. Dry Dock &c. R. Co., 31 Misc. 471.....	470
Cunningham v. Fairhaven &c. R. Co., 72 Conn. 244.....	1237
Cunningham v. Ft. Pitt Bridge Works, 197 Pa. St. 625.....	1490, 1542
Cunningham v. International R. Co., 51 Tex. 503.....	1614
Cunningham v. Los Angeles R. Co., 115 Cal. 561.....	2046, 2291
Cunningham v. Lynn &c. Street R. Co., 170 Mass. 298.....	1720
Cunningham v. Pell, 5 Paige, 607.... (69)	
Cunningham v. Sicilian &c. P. Co., 49 App. Div. 380.....	1677
Cunningham v. Syracuse Imp. Co., 20 App. Div. 171.....	1603
Cunningham v. Wabash R. Co., 79 Mo. App. 524.....	214, 1156
Cunningham v. Wright, 28 Hun. 178.....	2235
Cupps v. Consolidated T. Co., 13 Pa. Super. Ct. 630.....	2332
Curley v. Electric Vehicle Co., 68 App. Div. 18.....	2344
Curley v. Hoff, 62 N. J. L. 758.....	1415, 1559, 1622
Curson v. Railway Co., 21 Or. 450.....	1405
Curran v. Flammer, 49 App. Div. 293.....	1332, 1353
Curran v. Manufacturing Co., 130 Mass. 374.....	1536
Curran v. Merchants Man. Co., 130 Mass. 374.....	1752
Curran v. New York Cent. &c. R. Co., 30 Misc. Rep. 787.....	697
Curran v. Stange Co., 98 Wis. 598.....	1521, 1578
Curran v. Warren Chemical & Man. Co., 36 N. Y. 153.....	1562
Curran v. Weiss, 6 Misc. 138.....	1361
Currey v. Butcher, 37 Or. 380.....	2178
Currie v. Mendenhall, 77 Minn. 179.... (497)	
Currier v. Boston Music Hall Assn., 135 Mass. 414.....	2127
Currier v. Concord, 68 N. H. 294.....	2015, 2018
Curry v. Chicago &c. R. Co., 43 Wis. 665.....	1040, 1043
Curry v. City of Buffalo, 135 N. Y. 366.....	1797, 2020

	PAGE
Curry v. Rochester R. Co., 90 Hun, 230.....	2310
Curtin v. Somerset, 48 Phila. L. J. 96.....	653
Curtin v. Metropolitan Street R. Co., 22 Misc. 83.....	2320
Curtis v. Chicago &c. R. Co., 95 Wis. 460.....	1434, 1588, 1590, 1679, 1709
Curtis v. D., L. & W. R. Co., 74 N. Y. 116.....	610, 616, 620, 624
Curtis v. De Coursey, 176 Pa. St. 446.....	2167
Curtis v. Detroit &c. R. Co., 27 Wis. 158..... (444).....	446
Curtis v. Lyman, 24 Vt. 338.... (83)	
Curtis v. Mills, 5 C. & P. 489.... (986)	
Curtis v. Rochester &c. R. Co., 18 N. Y. 534.....	1096, 1100, 1224
Curtiss v. Railway Co., 54 N. W. Rep. 339.....	2454
Cushing v. Adams, 18 Pick. 110.....	2238
Cushing v. Bedford, 125 Mass. 526.....	1914
Cushing v. Pires, 124 Cal. 663.....	2083
Cushman v. Carbondale Fuel Co., (Iowa) 88 N. W. Rep. 817. 1235, 1485, 1623, 1701	
Cushman v. Cushman, 179 Mass. 601.....	1495, 1720
Cusick v. Adams, 115 N. Y. 55.....	2106
Custer v. Baltimore &c. R. Co., 19 Pa. Super. Ct. 365.....	777
Custer v. New Philadelphia, 20 Oh. C. C. 177.....	1814, 1867, 1988
Cutler v. Bonney, 30 Mich. 259.....	142
Cutting v. Marlor, 78 N. Y. 454.....	127, 128
Cutting v. Seabury, 1 Sprague (U. S.) 522.... (943)	
Cuttingham v. Denver, 23 Colo. 18.....	2010
Cutts v. Brainard, 42 Vt. 566.... (337).....	96
Cutts v. W. U. T. Co., 71 Wis. 46.....	2439
Cuyler v. Rochester, 12 Wend. 165.....	2001
Czech v. Great Northern R. Co., 68 Minn. 38.....	815
Dacey v. New York &c. R. Co., 168 Mass. 479.....	1589
Dacy v. Old Colony R. Co., 153 Mass. 112.... (949)	
Dahl v. Milwaukee &c. R. Co., 62 Wis. 652.....	685
Dahlberg v. Minneapolis Street R. Co., 32 Minn. 404.... (540)	
Dahlstrom v. St. Louis &c. R. Co., 96 Mo. 99.....	2148
Dailey v. Burlington &c. R. Co., 58 Neb. 396.....	661, 1714
Dailey v. Western &c. R. Co., 53 App. Div. 551.....	2089
Dale v. Atchison &c. R. Co., 57 Kan. 601.....	962
Dale v. Brinckerhoff, 7 Daly, 45.....	112
Dale v. B. C. R. Co., 1 Hun, 146.....	469
Dale v. D. L. & W. R. Co., 73 N. Y. 468.....	1138
Dale v. See, 51 N. J. L. 378.... (103)	
Dale v. Syracuse, 71 Hun, 452.....	696
Daley v. Brown, 45 App. Div. 428.....	1530
Daley v. Norwich &c. R. Co., 26 Conn. 591.....	711, 714
Daley v. Port Jervis &c. R. Co., 80 Hun, 174.....	438
Daley v. Quick, 99 Cal. 179.....	1328
Daley v. Schaaf, 28 Hun, 314.....	1569
Daley v. Union Dry Dock Co., 9 Misc. 394.....	1468
Dalheim v. Lemon, 46 Fed. Rep. 225.....	841
Dallas v. Allen, (Tex. Civ. App.) 40 S. W. Rep. 324.....	889, 2007
Dallas v. Beeman, 12 Tex. Civ. App. 345.....	2007
Dallas v. Beeman, 23 Tex. Civ. App. 315.....	2006
Dallas v. Cooper, (Tex. Civ. App.) 34 S. W. Rep. 321.....	1962
Dallas v. Gulf &c. R. Co., 61 Tex. 196.....	1614, 1620
Dallas v. Jones, (Tex. Civ. App.) 53 S. W. Rep. 377.....	1870
Dallas v. Jones, (Tex. Civ. App.) 54 S. W. Rep. 606.....	1861
Dallas v. McAllister, (Tex. Civ. App.) 39 S. W. Rep. 173.....	1946
Dallas v. Meyers, (Tex. Civ. App.) 55 S. W. Rep. 742... 898, 1301, 1823, 1870, 1874	
Dallas v. Webb, 22 Tex. Civ. App. 48.....	1882, 1908, 1924
Dallas &c. R. Co. v. Spicker, 61 Tex. 427.....	953, 2054
Dallas &c. Street R. Co. v. Broadhurst, (Tex. Civ. App.) 68 S. W. Rep. 315	
.....	400, 412, 1105
Dallemand v. Saalfeldt, 175 Ill. 310.....	1461, 1597
Dalton v. South East R. Co., 93 Eng. C. L. 296.....	875, 884

	PAGE
Dalwight v. International &c. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 1009 ..... (755).....	761
Daly v. Alexander Smith & Sons Carpet Co., 69 Hun, 77.....	463
Daly v. Central B. Co., 26 App. Div. 200.....	1751
Daly v. Haller Man. Co., 48 La. Ann. 214.....	1697
Daly v. Lee, 39 App. Div. 188.....	1831
Daly v. New Haven, 69 Conn. 644.....	951
Daly v. N. J. &c. Co., 155 Mass. 1.....	2022
Daly v. St. Paul, 1 Minn. Dist. Rep. 6.....	1684
Daly v. Sang, 91 Wis. 336.....	1399
Dalyell v. Tyrer, 28 L. J. Q. B. 52.....	1829, 2013
D'Amico v. Boston, 176 Mass. 599.....	889, 1821
Dammann v. St. Louis, 152 Mo. 186.....	493
Damont v. New Orleans &c. R. Co., 9 La. Ann. 441.....	54
Dampier v. St. Paul Trust Co., 46 Minn. 526.....	719
Dan v. Citizen's Street R. Co., 99 Tenn. 88.....	1410, 1418
Dana v. Crown Point Iron Co., 67 Hun, 586.....	1522
Dana v. N. Y. C. &c. Co., 92 N. Y. 639.....	1958
Danaher v. Brooklyn, 119 N. Y. 241.....	1604
Dane v. Cochrane Chemical Co., 164 Mass. 453.....	819
Daneck v. Pennsylvania R. Co., 59 N. J. L. 415.....	73
Danforth v. Moore, 55 N. J. Eq. 127.....	556, 573
Dangerfield v. Atchison &c. R. Co., 62 Kan. 85.....	1374
Daniel v. Coal Co., 105 Tenn. 470.....	365
Daniel v. North &c. R. Co., 64 N. J. L. 603.....	
Daniel v. Railroad, 117 N. C. 592.... (384)	
Daniel v. Forsyth, 106 Ga. 568.....	1702
Daniel v. Ft. Worth &c. R. Co., (Tex. Civ. App.) 69 S. W. Rep. 198.....	2098
Daniell v. W. U. T. Co., 61 Tex. 452.....	2444
Daniels v. Clegg, 28 Mich. 32.... (711)	
Daniels v. Covington &c. Build. Co., (Ky.) 66 S. W. Rep. 187.....	1563, 1718
Daniels v. Florida &c. R. Co., 62 S. C. 1.....	265, 584, 1092
Daniels v. Hallenbeck, 19 Wend. 409.....	2202
Daniels v. N. Y. C. & H. R. R. Co., 154 Mass. 349.....	2134
Daniels v. Racine, 98 Wis. 649.....	2010
Daniels v. Railroad Co., 36 W. Va. 397.....	1609
Daniels v. S. I. R. T. R. Co., 125 N. Y. 407.....	748
Daniels v. Western &c. R. Co., 96 Ga. 786.....	439, 440
Daniel's Adm'r v. Railroad Co., 36 W. Va. 397.....	1655
Danseth v. Wade, 2 Seam. 285.... (300)	
Dansey v. Richardson, 25 Eng. L. & Eq. 90.... (105)	
Danville v. Makensom, 32 Ill. App. 112.....	2365
Danville v. Vangundy, 29 Ill. App. 187.....	1436
Danville Street Car Co. v. Payne, (Va.) 24 S. E. Rep. 904.... (413)	
Danville Street Car Co. v. Watkins, 97 Va. 713.....	662, 701, 1066
Danville Turnpike Co. v. Stewart, 2 Metc. (Ky.) 119.....	535, 730, 2028
Da Ponte v. N. O. Transp. Co., 42 La. Ann. 696.....	200
Dapper v. Milwaukee, 107 Wis. 88.....	1887
D'Arcy v. Long Island B. Co., 34 App. Div. 275.....	1428
Darling v. Bangor, 68 Me. 108.....	1813
Darling v. Boston &c. R. Co., 121 Mass. 118.... (1012)	
Darling v. Mayor, 18 Hun, 340.....	1889
Darling v. R. Co., 121 Mass. 118.....	1017
Darling v. Westmoreland, 52 N. H. 40.... (1131)	1138
Darlington v. Western Union Teleg. Co., 127 N. C. 448.....	2458
Darmstaetter v. Moynahan, 27 Mich. 188.....	650
Darnaby v. Watts, 13 Ky. L. Rep. 457.....	43, 72
Darracott v. R. Co., 83 Va. 288.....	1727
Darrahs's Estate, 6 Pa. Dist. 178.....	54
Darrigan v. N. Y. & N. E. R. Co., 52 Conn. 285.....	1610
Dashiell v. Washington Market Co., 10 App. D. C. 81.....	1075
Dater v. Fletcher, 14 Misc. 288.....	2358
Daubert v. Western Meat Co., 135 Cal. 144.....	1537, 1732

	PAGE
Daugherty v. Herzog, 145 Ind. 255.....	648
Daugherty v. Midland Steel Co., 23 Ind. App. 78.....	1580, 2055
Daughtry v. Am. U. T. Co., 75 Ala. 168.....	2441, 2444, 2450
Dausey v. Richardson, 3 E. & B. 165....(152)	
Davenport v. Brooklyn City R. Co., 100 N. Y. 632.....	447, 2231, 2308, 2313
Davenport v. Chicago &c. R. Co., 76 Mo. 399....(1048)	
Davenport v. Ledger, 80 Ill. 578....(828)	
Davenport v. Pennsylvania R. Co., 10 Pa. Super. Ct. 47.....	253, 1091, 1093
Davenport v. Reichman and the Mayor &c., 37 N. Y. 568.....	1928
Davenport v. Ruckman and the Mayor &c., 37 N. Y. 568.....	423, 702, 1316, 2232, 2233
Davenport Co. v. Pennsylvania R. Co., 173 Pa. St. 398.....	253, 301
Davey v. Greenfield &c. R. Co., 177 Mass. 106.....	473
Davey v. London & S. W. R. Co., [L. R.] 11 Q. B. Div. 213....(762)	
Davidow v. Pennsylvania R. Co., 85 Fed. Rep. 943.....	965
Davidson v. Central &c. R. Co., 75 Iowa, 22.....	1039
Davidson v. Cornell, 132 N. Y. 228.....	694, 1454, 1549, 1584
Davidson v. Graham, 2 Oh. St. 131.....	296
Davidson v. Lake Shore &c. R. Co., 179 Pa. St. 227....(762)	
Davidson v. Muskegon, 111 Mich. 454.....	2013
Davidson v. New York, 24 Misc. 560.....	1987
Davidson v. Nichols, 1 Allen, 519.....	1376
Davidson v. Pittsburg &c. R. Co., 41 W. Va. 407.....	2100
Davidson v. Schuylkill T. Co., 4 Pa. Super. Ct. 86.....	2284, 2333
Davidson v. Sloan, 49 N. Y. Super. Ct. 304.....	1074
Davidson v. So. Pac. R. Co., 44 Fed. Rep. 476.....	1545
Davidson v. Story, 106 Ga. 799.....	55
Davidson v. W. U. T. Co., (Ky.) 54 S. W. Rep. 830.....	2428, 2458
Davies v. Eastern Steamboat Co., 94 Me. 379.....	614
Davies v. Griffith, 27 Weekly L. Bull. (Ohio) 180.....	1637
Davies v. The Pelham Hod Elevating Co., 76 Hun, 289.....	1378
Davies v. People's R. Co., 159 Mo. 1.....	2287, 2336
Davis v. Ada County, (Id.) 47 Pac. Rep. 93.....	1830
Davis v. Atlanta &c. R. Co., 63 S. C. 370....(784)	
Davis v. Atlantic &c. R. Co., 63 S. C. 370.....	1399
Davis v. Austin, 22 Tex. Civ. App. 460.....	1867
Davis v. Bangor, 42 Me. 522.....	1915
Davis v. Burlington &c. R. Co., 26 Ia. 549.....	1017, 1053
Davis v. Campfield, 23 Vt. 236....(989)	
Davis v. Cayuga &c. R. Co., 10 How. Pr. 330.....	614
Davis v. Central &c. Society, 129 Mass. 367.....	2114
Davis v. Central R. &c., (N. J. L.) 52 Atl. Rep. 561.....	805
Davis v. Central Vt. R. Co., 55 Vt. 84.....	1405
Davis v. Chicago &c. R. Co., 40 Iowa, 292....(1036)	
Davis v. Chicago &c. R. Co., 83 Iowa, 744.....	296
Davis v. Chapman, 83 Va. 67....(52)	
Davis v. Chicago &c. R. Co., 18 Wis. 175....(474)	
Davis v. Chicago &c. R. Co., 58 Wis. 646.....	2114
Davis v. Chicago &c. R. Co., 93 Wis. 470.....	268, 402
Davis v. Concord &c. R. Co., 68 N. H. 247.....	776, 1123, 1196
Davis v. Detroit &c. R. Co., 20 Mich. 105.....	1519, 1563
Davis v. Ætna &c. Ins. Co., 67 N. H. 335.....	1312
Davis v. Ferris, 29 App. Div. 623.....	2120
Davis v. Forbes 171 Mass. 548.....	1752, 1771
Davis v. Garrett, 6 Bing. 716....(300)	
Davis v. George, 67 N. H. 393.....	1328
Davis v. Georgia R. &c. Co., 110 Ga. 305.....	530
Davis v. Guarnieri, 45 Ohio St. 470....(706)	
Davis v. Hill, 41 N. H. 333.....	883, 1379
Davis v. Houghtellin, 33 Neb. 582.....	1844, 1956
Davis v. Houston &c. R. Co., (Tex. Civ. App.) 59 S. W. Rep. 844.....	21, 23
Davis v. Houston &c. R. Co., (Tex. Civ. App.) 68 S. W. Rep. 733.....	387, 565
Davis v. Jackson, (Tenn.) 39 S. W. Rep. 1067.....	430
Davis v. Jackson, (Tenn.) 39 S. W. Rep. 1067.....	52
Davis v. Kansas &c. R. Co., 53 Mo. 317.....	554

## TABLE OF CASES.

lxxix

	PAGE
Davis v. Kerr, 3 App. Div. 322.....	49
Davis v. Lebanon, (Ky.) 57 S. W. Rep. 471.....	1853
Davis v. Lehigh Valley R. Co., 64 Hun, 492.....	498
Davis v. Longmeadow, 169 Mass. 551.....	1949
Davis v. Michigan Central Railroad Co., 22 Ill. 278.....	612, 613, 614, 619
Davis v. Miller, 109 Ala. 589.....	1710
Davis v. Muscogee Man. Co., 106 Ga. 126.....	1602
Davis v. N. Y. R. Co., 143 Mass. 301.....	963
Davis v. New York R. Co., 70 Minn. 37.....	249
Davis v. N. Y. C. & C. R. Co., 47 N. Y. 400.... (674).....	756
Davis v. Nuttallsburg & C. R. Co., 34 W. Va. 500.....	1728
Davis v. Omaha, 47 Neb. 836.....	1823, 1917, 1939, 2260
Davis v. Oregon & C. R. Co., 8 Ore. 172.... (439).....	440, 704, 1137
Davis v. Paducah & C. R. Co., (Ky.) 68 S. W. Rep. 140.....	396, 1102
Davis v. Pattison, 24 N. Y. 317.....	353
Davis v. R. Co., 26 Iowa, 554.... (1055)	
Davis v. R. Co., 45 Mo. 473.... (1055)	
Davis v. R. Co., 18 Wis. 175.....	493
Davis v. Railroad Co., 20 Mich. 105.....	1685
Davis v. Railroad Co., 55 Vt. 84.....	1614
Davis v. Rich, 180 Mass. 235.....	2237
Davis v. Rumney, 67 N. H. 591.....	2018
Davis v. St. Louis & C. R. Co., 53 Ark. 117.....	879, 947
Davis v. Snyder, 196 Pa. St. 273.....	1846, 1849
Davis v. Somerville, 128 Mass. 594.....	2377
Davis v. South Carolina & C. R. Co., 107 Ga. 420.....	573
Davis v. Spicer, 27 Mo. App. 279.....	2197
Davis v. State, 38 Md. 15.... (1220)	
Davis v. Staten Island & C. Co., 1 App. Div. 178.....	1488
Davis v. Talcott, 12 N. Y. 184.....	180
Davis v. Texas & C. R. Co., 91 Tex. 505.....	227
Davis v. Tribune & C. Co., 70 Minn. 95.....	108, 113
Davis v. W. U. T. Co., (Ky.) 54 S. W. Rep. 849.....	2410, 2428
Davis v. Western & Teleg. Co., 46 W. Va. 48.....	907, 2395, 2458
Davis v. Western R. Co., 107 Ala. 626.....	1737
Davis v. Whitney, 68 N. H. 66.....	2097
Davis v. Willan, 2 Stark, R 279.... (296)	
Davis v. Williams, 4 Ind. App. 487.....	2367
Davis Coal Co. v. Polland, 158 Ind. 607.....	2046, 2054
Davison v. Caswell, 132 N. Y. 234.....	1593
Davison v. Shanahan, 93 Mich. 486.....	638
Dawbert v. Western Meat Co., (Cal.) 69 Pac. Rep. 297.....	957
Dawkins v. Gulf & C. R. Co., 77 Tex. 282.... (21)	
Dawley v. Wagner Palace Car Co., 169 Mass. 315.....	600
Dawson v. Boston & C. R. Co., 156 Mass. 127.....	476
Dawson v. Buford, 70 Iowa, 127.....	2181
Dawson v. Champney, 8 Adolphus & Ellis, N. S. 164.... (137)	
Dawson v. Chicago & C. R. Co., 114 Fed. Rep. 870.....	1713
Dawson v. Louisville & C. R. Co., 11 Am. & E. R. Cas. (Ky.) 134.... (473)	
Dawson v. New York & C. Bridge Co., 31 App. Div. 537.....	456
Day v. Achron, (R. I.) 50 Atl. Rep. 654.....	1564
Day v. H. C. Akeley & C. Co., 54 Minn. 522.....	1247
Day v. B. C. R. Co., 12 Hun, 435.....	6
Day v. Citizen's R. Co., 81 Mo. App. 471.....	2283
Day v. Crossman, 1 Hun, 570.....	1840
Day v. Highland Street R. Co., 135 Mass. 113.....	2375, 2377
Day v. Owen, 5 Mich. 520.....	367, 1731
Day v. Railroad Co., 42 Mich. 523.....	1610
Day v. Saunders, 3 Keyes, 347.... (520)	
Day v. Stickney, 14 Allen, 255.... (1797)	
Day v. Toledo & C. R. Co., 42 Mich. 523.....	1552, 1685
Dayharsh v. Railroad Co., 103 Mo. 570.....	1642, 1644
Dayton v. Taylor, 62 Oh. St. 11.....	1940, 1951

	PAGE
Deaderick v. Bank of Commerce, 100 Tenn. 457.....	74
Dean v. Charleston &c. R. Co., 50 S. C. 504.....	1253
Dean v. Church, 3 Lack. L. News, 224.....	114
Dean v. Murphy, 169 Mass. 413.....	1137
Dean v. Newcastle, 201 Pa. St. 51.....	1893
Dean v. Penn. R. Co., 129 Penn. St. 514.... (730)	
Dean v. Sharron, 72 Conn. 667.....	1221, 1945, 2018, 2020
Dean v. Smith, 169 Mass. 569.....	1464
Dean v. Third Ave. R. Co., 34 App. Div. 220.....	469
Deane v. Buffalo, 42 App. Div. 205.....	1462
Dearborn v. Dearborn, 15 Mass. 316.....	2174
Dearborn Nat. Bank v. Security Bank, (Minn.) 91 N. W. Rep. 257.....	179
Deavers v. Spencer, 70 Fed. Rep. 480.....	1667
Debevoise v. N. Y., L. E. & W. R. Co., 98 N. Y. 377.....	960
De Blois v. Great Northern R. Co., 71 Minn. 45.....	436
De Boise v. Decker, 130 N. Y. 325.....	2196
De Camp v. Chicago &c. R. Co., 62 Minn. 207.....	1114
De Camp v. Hanna, 29 Oh. St. 467.... (172)	
De Camp v. M. & M. R. Co., 12 Iowa, 348.....	31
Decatur v. Boston, 169 Ill. 340.....	1828, 1870, 1872
Decatur v. Hamilton, 89 Ill. App. 561.....	1937, 1941
Decatur v. Simpson, 115 Iowa, 348.....	2053
Decatur v. Stoops, 21 Ind. App. 397.....	1936, 1954
Decatur Cereal Mill Co. v. Boland, 95 Ill. App. 601.....	1509
Dechert v. Municipal &c. Co., 39 App. Div. 490.....	1195
Decker v. Atchison &c. R. Co., 3 Okla. 553.....	547
Decker v. Brooklyn Heights R. Co., 64 App. Div. 430.....	2312
Decker v. Gammon, 44 Me. 322.... (980)	2364
Decker v. Holgate, 5 Lack. L. News, 56.....	991
Decker v. Lehigh Valley R. Co., 181 Pa. St. 465.... (756)	
Decolange v. The Chateau Margaux, 37 Fed. Rep. 157.....	834
De Costa v. Hargraves Mills, 170 Mass. 375.....	1509
Dedericks v. Salt Lake C. R. Co., 14 Utah, 137.....	1239
Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392.....	40
Dedmon v. Brooklyn City R. Co., 8 Misc. 610.....	916
De Douglass v. Union Trac. Co., 198 Pa. St. 430.....	2205
Deeds v. Chicago &c. R. Co., 69 Iowa, 164.....	1730
Deen v. Seaboard &c. R. Co., 78 Va. 645.... (541)	
Deep Min. &c. Co. v. Fitzgerald, 21 Colo. 533.....	931, 1666
Defiance Water Co. v. Olinger, 54 Ohio St. 532.....	1323
Defoe v. St. Paul City R. Co., 65 Minn. 319.....	492
DeForest v. Jewett, 88 N. Y. 264.....	1439, 1493, 1494, 1548, 1549, 1584, 1597
De Forest v. United States, 11 App. D. C. 458.... (1200)	
De Forge v. New York &c. R. Co., 178 Mass. 59.....	1238
Defrier v. The Nicaragua, 81 Fed. Rep. 745.....	401, 610, 612
Degenhart v. Gent, 97 Ill. App. 145.....	1411
Degg v. M. R. Co., 1 Hurl. & N. 773.....	1397
De Gintner v. New Jersey Home &c. 58 N. J. L. 354.....	1364
Degnan v. Brooklyn City R. Co., 14 Misc. 408.....	922, 2271
DeGraff v. N. Y. C. & H. R. R. Co., 76 N. Y. 125.....	
.....	1408, 1426, 1475, 1478, 1482, 1702
De Graffenried v. Wallace, (Ind. Terr.) 53 S. W. Rep. 452.....	699, 1333, 2126
DeGraun v. Supervisors of Queens Co., 13 Hun, 381.....	1990
Dehanitz v. St. Paul, 73 Minn. 385.....	1956
De Hart v. Chesapeake &c. R. Co., (Ky.) 68 S. W. Rep. 647.....	1429
Dehning v. Detroit &c. Works, 46 Neb. 556.....	1595
Dehority v. Whitcomb, 13 Ind. App. 558.....	1401
DeHoven v. Kinsington Bank, 81 Pa. St. 95.....	108
Dehring v. Comstock, 78 Mich. 153.....	2267
Deihl v. Ottenville, 14 Lea (Tenn.) 191.... (32)	
Deinbauld v. Thompson, 109 Iowa, 199.....	2190
De Iola v. Metropolitan Street R. Co., 37 App. Div. 455.....	2293
Deisenrieter v. Kraus Merkel Malting Co., 92 Wis. 164.....	1540



## TABLE OF CASES.

lxxxii

	PAGE
Deisenrieter v. Kraus-Merkel Malting Co., 97 Wis. 279.....	670, 678
De Kalb v. Ashley, 61 Ill. App. 647.....	919
De Kay v. Chicago &c. Co., 41 Minn. 178.....	386
De La Grange v. S. W. T. Co., 25 La. Ann. 383.....	2413
Delammatyr v. Milwaukee &c. R. Co., 24 Wis. 578.... (446).....	487
Delaney v. Hilton, 50 N. Y. Super. Ct. 341.....	1481
Delaney v. Bowman, 82 Mo. App. 252.....	2101
Delaney v. Penn. R. Co., 78 Hun, 393.....	2118
Delaney v. Rochereau, 34 La. Ann. 1123.....	1767
Delano v. Curtis, 7 Allen, 470.....	624
Delapp v. Kansas City &c. R. Co. Mo. App. 572.....	2090
De La Torre v. Metropolitan Street R. Co., 48 App. Div. 126.....	928
De La Vergne &c. Mach. Co. v. McLeroth, 60 Ill. App. 529. 380, 841, 931, 1592, 1682.....	1312
Delaware Ins. Co. v. Harris, (Tex. Civ. App.) 64 S. W. Rep. 867.....	1669
Delaware &c. Co. v. Carroll, 89 Pa. St. 374.....	852
Delaware &c. R. Co. v. Devore, 114 Fed. Rep. 155.....	574
Delaware &c. R. Co. v. Frank, 110 Fed. Rep. 689.....	1400, 1603
Delaware &c. R. Co. v. Hardy, 59 N. J. L. 35.....	884
Delaware &c. R. Co. v. Jones, 128 Pa. St. 308.....	2110, 2137
Delaware &c. R. Co. v. Reich, 61 N. J. L. 635.....	1255, 1261, 1268
Delaware, L. & W. R. Co. v. Salmon, 10 Vroom. 209.....	(99)
De Lemos v. Cohen, 28 Misc. 579.... (99).....	894
De Leon v. McKernan, 25 Misc. 182.....	1083
Delfosse v. Metropolitan Nat. Bank, 98 Ill. App. 123.....	2051
Delhi v. Chicago &c. R. Co., 51 Wis. 400.....	1702
Delisle v. Ward, 168 Mass. 579.....	1963
Dell Rapids Mer. Co. v. Dell Rapids, 11 S. D. 116.....	629
Dellinger v. Gillespie, 118 N. C. 737.....	5, 8
Dells v. Stollenwerk, 78 Wis. 339.....	1582
Dells Lumber Co. v. Erickson, 80 Fed. Rep. 257.....	2273, 2315, 2326
De Lon v. Kokomo City Street R. Co., 22 Ind. App. 377.....	2203
Delong v. Curtis & Wait, 35 Hun, 94.....	1404
Del Sejnore v. Hallman, 153 N. Y. 274.....	(1013)
Delta Electric Co. v. Whitecamp, 58 Ill. App. 141.... (1013).....	(546)
DeLucas v. New Orleans &c. R. Co., 38 La. Ann. 930.... (546).....	508
Demahy v. R. Co., 45 La. Ann. 1329.....	737, 787
Demaine v. Washington &c. R. Co., (Va.) 27 S. E. Rep. 437.....	507
Demann v. Eighth Ave. R. Co., 10 Misc. 191.....	1752
Demars v. Glen Man. Co., 67 N. H. 404.....	2023
Dement v. De Kalb County, 97 Ga. 733.....	1720
Demees v. Marshall, 172 Mass. 548.....	1418, 1492, 1698, 1720
Demers v. Marshall, 178 Mass. 9.....	1621
Demers v. Deering, 93 Me. 272.....	2204
Demerite R. Co. v. Sullivan, 21 Colo. 302.....	572
Demille v. Texas &c. R. Co., 91 Texas, 215.....	442, 465, 854, 867
Deming v. Chicago &c. R. Co., 80 Mo. App. 152.....	254
Deming v. Merchants' Cotton-Press Co., 90 Tenn. 306.....	642, 922
Deming v. Terminal R. Co., 49 App. Div. 493.....	4
Dempsy v. Chambers, 154 Mass. 330.....	1396
Dempsy v. N. Y. C. & H. R. R. Co., 81 Hun, 156.....	2244, 2267
Denby v. Willer, 59 Wis. 240.....	1447
Denne v. Arnold Print Works, 181 Mass. 560.....	1332
Denenfeld v. Baumann, 40 App. Div. 502.....	963
Deni v. Pennsylvania R. Co., 181 Pa. St. 525.....	1863
Denison v. Warren, (Tex. Civ. App.) 36 S. W. Rep. 296.....	1201
Denison &c. R. Co. v. Foster, (Tex. Civ. App.) 68 S. W. Rep. 299.....	1160, 2072
Denken v. Canavan, 17 Misc. 392.....	2359
Denman v. Johnston, 85 Mich. 387.....	2147
Denman v. St. Paul R. Co., 26 Minn. 357.....	1080
Dennerlein v. Dennerlein, 111 N. Y. 518.....	963, 964
Dennick v. R. Co., 103 U. S. 11.....	1700
Danning v. Midvale Steel Co., 192 Pa. St. 182.....	1244
Dennis v. Harris, 46 N. Y. S. R. 535.....	

	PAGE
Dennis v. Louisville &c. R. Co., 116 Ind. 42.... (1032)	
Dennis v. North Jersey Street R. Co., 64 N. J. L. 439.....	2274
Dennis v. Sipperly, 17 Hun, 59.....	2241
Dennison v. Minor, 1 Cent. 927.....	1145, 2356
Dennison v. N. Y. C. R. R. Co., 3 Lansing, 265.....	235
Denniston v. Philadelphia Co., 1 Pa. Super. Ct. 599.....	1385
Denny v. N. Y. C. R. Co., 5 Daly, 50.... (7).....	559
Densmore Commission Co. v. Duluth &c. R. Co., 101 Wis. 563.....	230, 258, 1099
Denton v. Great Northern R. Co., 5 El. & Bl. 860.... (575)	
Denton v. Ordway, 108 Iowa, 487.....	844, 849
Denver v. Cochran, (Colo. App.) 67 Pac. Rep. 23.....	1161, 1827
Denver v. Girard, 21 Colo. 447.....	2002
Denver v. Hickey, 9 Colo. App. 137.....	1827
Denver v. Hyatt, 28 Colo. 129.... (896).....	1864, 1871
Denver v. Johnson, 8 Colo. App. 384.....	1829
Denver v. Moewes, 15 Colo. App. 28.....	1819, 1921, 1946
Denver v. Myers, (Neb.) 88 N. W. Rep. 191.....	816
Denver v. Sherret, 88 Fed. Rep. 226.....	842, 1882, 1939, 2248
Denver v. Stein, 25 Colo. 125.....	1825
Denver T. Co. v. Crumbaugh, 23 Colo. 363.....	1629
Denver Tramway Co. v. Nesbit, 22 Colo. 408.....	1445, 1685
Denver Tramway Co. v. O'Brien, 8 Colo. App. 74.....	1592, 1626
Denver Tramway Co. v. Reid, 22 Colo. 349.....	659, 681
Denver &c. Electric Co. v. Simpson, 21 Colo. 371.....	1060, 1105
Denver &c. R. Co. v. Andrews, 11 Colo. App. 204.....	394
Denver &c. R. Co. v. Divebliss, 13 Colo. App. 304.....	1024
Denver &c. R. Co. v. Fotheringham, (Colo. App.) 68 Pac. Rep. 978.....	463, 1103
Denver &c. R. Co., v. Harris, 3 Johns. (N. M.) 109.....	23, 29
Denver &c. R. Co. v. Iles, 25 Colo. 19.....	1771
Denver &c. R. Co. v. Lorentzen, 79 Fed. Rep. 291.....	862
Denver &c. R. Co. v. McComas, 7 Colo. App. 121.....	1107
Denver &c. R. Co. v. Nye, 9 Colo. App. 94.... (1015)	
Denver &c. R. Co. v. Pickard, 9 Colo. 163.....	482
Denver &c. R. Co. v. Pilgrim, 9 Colo. App. 86.....	394
Denver &c. R. Co. v. Priest, 9 Colo. App. 103.... (1092)	
Denver &c. R. Co. v. Roller, 100 Fed. Rep. 738.....	864, 868, 1235, 1239
Denver &c. R. Co. v. Sipes, (Colo.) 55 Pac. Rep. 1093.....	1527, 1672
Denver &c. R. Co. v. Smock, 23 Colo. 456.....	1473, 1675, 1733, 2048
Denver &c. R. Co. v. Spencer, 25 Colo. 9.....	661, 883
Denver &c. R. Co. v. Spencer, 27 Colo. 313.....	383, 934
Denver &c. R. Co. v. Stewart, 1 Colo. App. 227.... (1013)	
Denver &c. T. C. v. Riley, 14 Colo. App. 132.....	846
Denvy v. N. Y. &c. R. Co., 5 Daly, (N. Y.) 50.....	564
De Palacios v. Rio Grande &c. R. Co., (Tex. Civ. App.) 45 S. W. Rep. 612...	
.....	382, 421
Department of Buildings v. Field, 12 App. Div. 258.....	1363
Depere v. Hibbard, 104 Wis. 666.....	1866, 1897
Derman v. Johnston, 85 Mich. 387.....	2230
Dern v. Kellogg, 54 Neb. 560.....	41
De Rozas v. Metropolitan Street R. Co., 13 App. Div. 296.....	469
Derrenbacher v. Lehigh Valley R. Co., 87 N. Y. 636.....	1757
De Rutte v. N. Y. &c. T. Co., 1 Daly, 547.....	
.....	2390, 2391, 2396, 2413, 2426, 2427, 2431, 2439, 2440, 2448
Deserant v. Cerrillos C. R. Co., 9 N. M. 495.....	1092, 1645
Deslottes v. Balt. Co., 40 La. Ann. 183.....	2419
Des Moines Ice Co. v. Niagara &c. Ins. Co., 99 Iowa, 193.....	1309
De Soucey v. M. R. Co., 41 St. R. 71.... (463)	
De Steiger v. Hannibal &c. R. Co., 73 Mo. 33.... (941)	
De Tarr v. The Ferd. Heim Brewing Co., 62 Kan. 188.....	2112
De Tarr v. Ferd. Heimm Brewing Co., (Kan.) 61 Pac. Rep. 689....	1333, 1344, 1360
Detrich v. Balt. &c. R. Co., 58 Md. 347.....	509
Detroit v. Beckman, 34 Mich. 125.....	1812
Detroit v. Blakely, 21 Mich. 106.....	1960

## TABLE OF CASES.

lxxxiii

	PAGE
Detroit Crude Oil Co. v. Grable, 94 Fed. Rep. 73.....	1449, 1684
Detroit Daily Post Co. v. McArthur, 16 Mich. 447.....	582
Pettmering v. English, 64 N. J. L. 16.....	1401, 2078
Detwiler v. Bish, 44 Ind. 70.....	172
Detzur v. Stroh Brew. Co., 119 Mich. 282.....	910, 2267
Deuber v. Northern P. R. Co., 100 Fed. Rep. 424.....	954
Deufel v. Long Island City, 19 App. Div. 620.....	1825
Deutch v. Abeles, 15 Mo. App. 398.....	1356
DeVau v. Pennsylvania &c. R. Co., 130 N. Y. 632.....	1095, 1116
Deveaux v. Clemens, 17 Oh. C. C. 33.....	1118
Devenbagh v. Devenbagh, 5 Paige, 554.....	2032
Devenish v. Spokane, 21 Wash. 77.....	1872
Derville v. So. Pac. R. Co., 50 Cal. 383.....	2361
Devine v. Brooklyn &c. R. Co., 1 App. Div. 237.....	2243
Devine v. Brooklyn &c. R. Co., 34 App. Div. 248.....	2285, 2298
Devine v. Fond du Lac 113 Wis. 61.....	1879
Devine v. Tarrytown &c. Gas Light Co., 22 Hun, 26.....	1640
Deritt v. Pacific R. Co., 50 Mo. 302.....	1439, 1551
Devlin v. Gallagher, 6 Daly, 494.....	1172, 2379
Devlin v. Smith, 89 N. Y. 470.....	1466
Devlin v. Phoenix Iron Co., 182 Pa. St. 109.....	1722
Devlin v. Smith et al., 89 N. Y. 470.....	1487
Devo v. N. Y. C. R. Co., 34 N. Y. 13.... (673).....	543
Devoe v. New York &c. R. Co., 70 App. Div. 495.....	1397, 1727
Devoe v. New York &c. R. Co., (N. J. L.) 43 Atl. Rep. 899.....	2163
De Voe v. Van Vranken, 29 Hun, 201.....	938
Devoxy v. New York &c. R. Co., 26 App. Div. 538.....	1189
Dewalt v. Houston &c. R. Co., 22 Tex. Civ. App. 403.....	1157, 1160, 1398
De Wardner v. Metropolitan Street R. Co., 1 App. Div. 240.....	931
De Went v. Wiltse, 9 Wend. 325.... (827)	
Dewey v. Chicago &c. R. Co., 99 Wis. 455.... (739)	
Dewey v. Detroit R. Co., 97 Mich. 329.....	1473, 1553
Dewey v. Whitney, 93 Fed. Rep. 538.....	629
Dewire v. Bailey, 131 Mass. 169.....	697
Dewire v. Boston &c. R. Co., 148 Mass. 443.....	509
DeWitt v. Pacific R. Co., 50 Mo. 305.....	1474
Dexter v. McCready, 54 Conn. 171.....	2361, 2363
Dexter v. Syracuse R. R. Co., 42 N. Y. 326.....	608, 615, 625
Deyer v. Ackley, 6 N. J. L. J. 283.....	116
Devo v. N. Y. C. R. Co., 34 N. Y. 9.... (656).....	1170
Devo v. Stewart, 4 Denio, 101.... (1001).....	1007
Devoe v. Saratoga Springs, 1 Hun, 341.....	1992
De Young v. Irving, 5 App. Div. 499.....	1783
Diamond v. Brooklyn, 91 Hun, 640.....	1864
Diamond v. Northern R. Co., 6 Mont. 580.....	1253, 1259
Diamond v. Smith, (Tex. Civ. App.) 66 S. W. Rep. 141.....	2031
Diamond Block Coal Co. v. Edmonson, 14 Ind. App. 594.....	1137, 1215
Diamond &c. Brick Co. v. N. Y. &c. R. Co., 55 Hun, 605.... (1045).....	1047, 1048
Diamond State Iron Co. v. Bell, 2 Marv. (Del.) 303.....	1530
Diamond State Iron Co. v. Giles, 7 Houst. (Del.) 556.....	2125
Diamant v. Long Island R. Co., 30 Misc. 444.....	321
Diappalo v. Third Ave. R. Co., 55 App. Div. 566.....	2323
Dibble v. Brown, 12 Ga. 217.... (616)	
Diblin v. Murphy, 3 Sandf. 19.....	929
Dicken v. Liverpool Salt &c. Co., 41 W. Va. 511.... (712).....	708, 2136
Dickens v. N. Y. C. R. R. Co., 1 Keyes, 23.... (448).....	678
Dickens v. N. Y. C. R. R. Co., 23 N. Y. 158.....	881
Dickenson v. Northeastern R. Co., 2 Hurl. & Colt. (Exch.) 734.... (953)	
Dicker v. Goodman, 44 Me. 322.... (1006)	
Dickert v. Salt Lake City R. Co., 20 Utah, 394.....	401
Dickey v. Northern P. R. Co., 19 Wash. 350.... (1040)	
Dickins v. N. Y. C. R. Co., 23 N. Y. 158.... (945)	
Dickinson v. Mayor, 92 N. Y. 584.....	1366, 1890

	PAGE
Dickinson v. Mayor, 28 Hun, 254.....	2016
Dickinson v. Port Huron &c. R. Co., 53 Mich. 43.... (504).....	540
Dickinson v. West End Street R. Co., 177 Mass. 365.....	376, 1604
Dickson v. Hollister, 123 Pa. St. 42.....	2233
Dickson v. McCoy, 39 N. Y. 400.....	673, 1012, 2230, 2359, 2363
Dickson v. Missouri Pac. R. Co., 104 Mo. 491.... (730)	
Dickson v. R. Co., 100 N. Y. 170.....	2338
Dickson v. Reuters' Tel. Co., L. R., 2 C. P. D. 62.....	2426
Dick's Estate, 183 Pa. St. 647.....	61
Diebold v. Penn. R. Co., 50 N. J. L. 478.....	2129
Diebold v. Sharp, 19 Ind. App. 474.....	873
Dieboldt v. U. S. Packing Co., 72 Hun, 403.....	1749
Dieck v. New Orleans City &c. R. Co., 51 La Ann. 262.....	2315
Dieffenbach v. New York &c. R. Co., 5 App. Div. 91.....	916
Diehl v. Roberts, 134 Cal. 164.....	2347
Diemmer v. Milwaukee &c. R. Co., 108 Wis. 589.....	2274
Dieter v. Zbaren, 81 Mo. App. 612.....	2345
Dieters v. St. Paul Gaslight Co., (Minn.) 91 N. W. Rep. 15.....	1402, 1679
Dietrich v. Hannibal &c. R. Co., 89 Mo. App. 36.....	937, 1038
Dietrich v. Northampton, 138 Mass. 14.....	951
Dietrich v. Penn. R. Co., 71 Pa. St. 432.... (7).....	559, 569, 571
Dilberto v. Harris, 95 Ga. 571.....	100
Dill v. Homrighausen, 79 Wis. 634.....	1600
Dill v. Oglesbee, 5 Oh. N. P. 271.....	2084
Dilleber v. Home Life Ins. Co., 87 N. Y. 79.....	1233
Dilleber v. Knickerbocker Ins. Co., 76 N. Y. 567, 572.....	1147
Dillenberger v. Weingartner, 64 N. J. L. 292.....	1652
Dillingham v. Anthony, 73 Tex. 47.....	528, 907
Dillman v. Hamilton, 14 Mont. Co. L. Rep. 92.....	1493, 1496, 1753
Dillon v. Allegheny &c. Light Co., 179 Pa. St. 482.....	1064
Dillon v. Forty-second Street &c. R. Co., 28 App. Div. 404.....	392, 506
Dillon v. Lindell R. Co., 71 Mo. App. 631.....	561
Dillon v. Nassau Electric R. Co., 59 App. Div. 614.....	2274
Dillon v. Raleigh, 124 N. C. 184.....	1144, 1924, 1946
Dillon Union Pacific R. Co., 3 Dillon, 319.....	1531
Dimick v. Chicago &c. R. Co., 80 Ill. 338.... (737).....	810
Dimock v. Suffield, 30 Conn. 129.....	1913
Dimmey v. Wheeling R. Co., 27 W. Va. 32.....	843
Dingee v. Unrue, 98 Va. 247.....	2048
Dingle v. Trask, 7 Colo. App. 16.....	627
Dingley v. S. K. Co., 134 N. Y. 552.....	1417, 1445
Dinsmore v. Abbott, 89 Me. 373.....	102, 109
Dinsmore v. Wolber, 85 Ill. App. 152.....	28
Di Pietro v. Empire Portland Cement Co., 70 App. Div. 501.....	1742
Dipper v. Milford, 167 Mass. 555.....	1897
Direct Nav. Co. v. Anderson, (Tex. Civ. App.) 69 S. W. Rep. 174.....	1596
Disano v. New England &c. Brick Co., 20 R. I. 452.....	1704
Disbrow v. Tenbroeck, 4 E. Smith, (N. Y.) 397.... (114)	
Dise v. Metropolitan Street R. Co., 22 Misc. 97.....	2320
Disher v. N. Y. C. & H. R. R. Co., 94 N. Y. 622.....	1426, 1475
Distler v. Long Island R. Co., 151 N. Y. 424.....	463, 666, 679
District of Columbia v. Armes, 107 U. S. R. 519.....	1131
District of Columbia v. Brewer, 7 App. D. C. 113.....	1897
District of Columbia v. Crumbaugh, 13 App. D. C. 553.....	1878
District of Columbia v. Dempsey, 13 App. D. C. 533.....	1937, 2269
District of Columbia v. Sullivan, 11 App. D. C. 533.....	1992
Ditchett v. S. D. & P. M. R. Co., 67 N. Y. 425.... (1334)	
Ditberner v. Chicago &c. R. Co., 47 Wis. 138.....	1439
Dittman v. Keokuk R. Co., 59 N. W. (Iowa) 257.....	620
Diveny v. Elmira, 50 N. Y. 512.....	693, 1856
Dix v. Ridge Ave. Pass. R. Co., 15 Pa. Super. Ct. 350.....	2336
Dixev v. Philadelphia Trac. Co., 180 Pa. St. 401.....	1118
Dixie Cigar Co. v. Southern Ex. Co., 120 N. C. 348.... (240)	

	PAGE
Dixon v. Brooklyn City &c. R. Co., 100 N. Y. 170.....	457, 1886
Dixon v. Butler, 4 Po. Dict. Rep. 754.....	1831, 1832, 1851, 1924
Dixon v. Central &c. R. Co., 110 Ga. 173.....	207
Dixon v. Scott, 181 Ill. 116.....	931, 1868
Dixon v. Western &c. Teleg. Co., 71 Fed. Rep. 143.....	1598
Diäühi v. St. Louis &c. R. Co., 139 Mo. 291.... (736)	
Doak v. Saginaw, 119 Mich. 680.....	1849
Doan v. St. Louis &c. R. Co., 38 Mo. App. 408.....	250
Doan v. Willow Springs, 101 Wis. 112.....	1949
Dobbin v. R. Co., 81 N. C. 446.....	1657
Dobbins v. Brown, 119 N. Y. 188.....	1095, 1107, 1115, 1117, 1445, 1451
Dobbins v. Lang, 181 Mass. 397.....	1544
Dobbins v. Missouri &c. R. Co., 91 Tex. 60.....	2110, 2115
Dobbins v. West End Street R. Co., 168 Mass. 556.....	2339
Dobert v. Troy City R. Co., 91 Hun, 28.....	2281, 2310
Dobieck v. Sharp, 88 N. Y. 203.....	384, 432
Dobson v. New Orleans &c. R. Co., 52 La. Ann. 1127.....	376, 1607
Dobson v. Philadelphia &c. R. Co., 7 Pa. Dist. 321.....	1239
Dochtermann v. Brooklyn &c. R. Co., 32 App. Div. 13.....	469
Dockerty v. Hutson, 125 Ind. 122.... (983)	
Docks v. Gibbs, 11 H. L. Cases, 712.....	2117
Dodd v. Bell, 15 App. Div. 258.....	1446
Dodd v. Jones, 137 Mass. 322.....	1306
Dodd v. Rothschild, 31 Misc. 721.....	1332
Dodd Grocery Co. v. Postal Tel. C. Co., 112 Ga. 685.....	2427, 2447
Dodge v. B. C. &c. R. Co., Iowa, 276.... (753)	
Dodge v. Granger, 17 R. I. 664.....	1987
Dodson v. Mock, 4 Dev. & Bat. 146.....	989
Doe v. Northwestern Coal &c. Co., 78 Fed. Rep. 627.....	195
Doeg v. Cook, 126 Cal. 213.....	1992
Doggett v. Illinois Cent. R. Co., 34 Iowa, 284.....	482, 1711
Doggett v. Richmond &c. R. Co., 78 N. C. 305.....	1264, 1268, 1269
Doggett v. Richmond &c. R. Co., 81 N. C., 459.... (1013)	
Doherty v. Detroit Citizens' Street R. Co., 118 Mich. 209.....	2316
Doherty v. Lord, 8 Misc. (N. Y.) 227.....	2051
Doherty v. Sweetser, 82 Hun, 556.....	2230, 2360, 2363
Doherty v. Waltham, 4 Gray, 595.....	1932
Dohn v. Dawson, 90 Hun, 271.....	2265
Doing v. New York &c. R. Co., 151 N. Y. 579.....	1523
Dolan v. D. & H. Canal Co., 71 N. Y. 285.....	757, 806
Dolan v. Hubinger, 109 Iowa, 408.....	19
Dolan v. McLoughlin, 33 App. Div. 628.....	1484
Dolan v. Mutual &c. Asso., 173 Mass. 197.....	1238
Dolan v. N. D. & C. R. Co., 120 N. Y. 571.....	1051, 1052
Dolan v. Sierra R. Co., 135 Cal. 435.....	914, 1538, 1548
Dolan's Estate, 15 Pa. Super. Ct. 20.....	61
Dolittle v. Walpole, 67 N. H. 554.....	1984
Dollar v. Union R. Co., 7 App. Div. 283.....	2335
Dollard v. Roberts, 130 N. Y. 269.....	869, 1317, 1318, 1319
Dolph v. Ferris, 42 Am. Dec. 246.... (1005)	
Dolph v. New York &c. R. Co. (Conn.) 51 Atl. 525.... (810)	
Dolphin v. Plumley, 167 Mass. 167.....	1134, 1720
Dominick v. Randolph, 124 Ala. 557.....	627, 1203
Dompier v. Lewis, (Mich.) 91 N. W. Rep. 152.....	1159, 1421
Donahoe v. Kansas City, 136 Mo. 657.....	1403, 1566
Donahue v. Boston &c. R. Co., 178 Mass. 251.....	1438, 1692
Donahue v. Kelly, 181 Pa. St. 93.....	2130
Donahue v. Kendall, 18 J. & S. 386; 98 N. Y. 635.... (1319)	
Donahue v. Kettell, 1 Cliff, 135.... (204)	
Donahue v. New York, 112 N. Y. 143.....	2106, 2221
Donahue v. St. Louis &c. R. Co., 83 Mo. 560.... (691)	
Donahue v. St. Louis &c. R. Co., 91 Mo. 357.....	792
Donahue v. Washburn &c. Man. Co., 169 Mass. 574.....	1448, 1720

	PAGE
Donald v. Elliott, 11 Misc. 120.....	1362
Donk Brothers Coal &c. Co. v. Peton, 192 Ill. 41.....	963
Donlan v. Clark, 23 Nev. 233.... (106)	
Donlan v. Provident Institution &c., 127 Mass. 183.....	164
Donnegan v. Erhardt, 119 N. Y. 468.....	1043, 1167, 1465
Donnelly v. Booth Bros. &c. Granite Co., 90 Me. 110.....	1629
Donnelly v. Brooklyn City R. Co., 109 N. Y. 16.....	2341
Donnelly v. Brown, 43 Hun, 470.....	1593
Donnelly v. Cowen, 20 Misc. 100.....	2244, 2260
Donnelly v. Fitch, 136 Mass. 558.....	1216
Donnelly v. Jenkins, 9 Daly, 41.....	1074
Donnelly v. N. Y. &c. R. Co., 3 App. Div. 408.....	1434, 1596
Donnelly v. Railroad Co., 109 N. Y. 16.....	2346
Donnelly v. San Francisco Bridge Co., 117 Cal. 417.....	1629, 1664
Donnelly's Estate, 8 Pa. Dist. 182.....	61
Donner v. Ogilvie, 49 Hun, 229.....	1353
Donnerberg v. Oppenheimer, 15 Wash. 290.....	181
Donohue v. Brooklyn &c. R. Co., 53 App. Div. 348.....	1176
Donohue v. St. Louis &c. R. Co., 6 West. 848.... (785)	
Donohue v. Warren, 95 Wis. 367.....	1915
Donovan v. Board of Education, 85 N. Y. 117.....	80
Donovan v. Ferris, 128 Cal. 48.....	1801
Donovan v. Harlan &c. Co., 2 Penn. (Del.) 190.....	1108, 1117, 1742, 1746
Donovan v. Laing &c. 1 Q. B. 629.....	638
Donovan v. L. I. R. Co., 67 Hun, 73.....	795
Donovan v. Mc Alpin, 85 N. Y. 185.....	79
Donovan v. Main, 77 N. Y. Supp. 229.....	2053
Donovan v. Mann, Rd. Co., 1 Misc. 368.... (906)	
Donovan v. Oakland, 36 Pac. (Cal.) 516.....	638
Donovan v. Oswego, 42 App. Div. 539.....	2020
Donovan v. Standard Oil Co., 155 N. Y. 112.....	274
Dood v. Bell, 15 App. Div. 258.....	1749
Dood v. Rothschild, 31 Misc. 721.....	1355
Dooley v. Sullivan, 112 Ind. 451.....	1814
Doolittle v. Southern R. Co., 62 S. C. 130.....	400, 502
Doom v. Howard, (Ky.) 64 S. W. Rep. 469.....	59
Dooner v. Delaware &c. Canal Co., 171 Pa. St. 581.....	1419, 1474, 1712
Doorman v. Jenkins, 2 Ad. & Ell. 256.... (124)	
Doran v. Avoca Coal Co., 9 Kulp. 479.....	953
Doran v. Cedar Rapids &c. R. Co., (Iowa) 90 N. W. Rep. 815.....	1189
Doran v. East River Ferry Co., 3 Lansing, 106.....	368
Doran v. R. Co., 73 Iowa, 115.... (1014)	
Dorlon v. Christie, 39 Barb. 610.... (177)	
Dorman v. Broadway R. Co., 117 N. Y. 655.....	2304
Dorney v. O'Neil, 34 App. Div. 497.....	1459
Dorr v. McCullough, 8 App. Div. 327.... (1089)	
Dorr v. N. J. Steam Navigation Co., 11 N. Y. 485.....	198, 209, 238, 275, 278, 298
Dorrah v. Illinois &c. R. Co., 55 Miss. 14.....	849
Dorris v. Miller, 105 Iowa, 564.....	53
Dorrity v. Rapp, 72 N. Y. 307.....	2098
Dorsch v. Brooklyn Heights R. Co., 68 App. Div. 222.....	2313
Dorsey v. Atchison &c. R. Co., 83 Mo. App. 528.....	416, 903
Dorsey v. Construction Co., 42 Wis. 196.....	1567, 1693
Dorsey v. Const. Co., 42 Wis. 583.....	1470
Dorsey v. Kansas City &c. R. Co., 104 La. 478.....	2151
Dorsey v. P. &c. Co., 42 Wis. 583.....	1694
Doss v. Missouri &c. R. Co., 59 Mo. 27.....	384, 487
Dotty v. Atlantic City R. Co., 64 N. J. L. 710.... (751)	
Doty v. Detroit Citizen's Street R. Co., (Mich.) 88 N. W. Rep. 1050.....	2314
Dougan v. Champlain Tr. Co., 56 N. Y. 1.... (605).....	405, 604, 968, 1128, 1141
Dougherty v. Horseheads, 159 N. Y. 154.....	1926
Dougherty v. Horseheads, 73 Hun, 443.....	1927
Dougherty v. Milliken, 26 App. Div. 386.....	1628

## TABLE OF CASES.

lxxxvii

	PAGE
Dougherty v. Mo. &c. R. Co., 81 Mo. 325.....	1102
Dougherty v. Railroad Co., 18 N. Y. Supp. 841.....	1473
Doughty v. Penobscot R. Co., 76 Me. 145.....	1661
Douglas v. Railroad, 106 N. C. 65.....	510
Douglas v. Chicago &c. R. Co., 100 Wis. 405.... (792)	
Douglas v. Matting, 29 Iowa, 498.....	172
Douglas v. Monongahela City Water Co., 172 Pa. St. 435.....	1950
Douglas v. Murphy, 16 U. C. Q. B. 113.....	1304
Douglas v. People's Bank, 86 Ky. 176.....	317
Douglas County v. Taylor, 50 Neb. 535.....	2013
Douglas Co. v. Minnesota &c. R. Co., 62 Minn. 288.....	249
Dovaston v. Payne, 2 H. Bl. 527.... (1010).....	1008
Dover v. Winchester, 70 Vt. 418.....	1136, 1145
Dovey v. Plattsmouth, 52 Neb. 642.....	2013
Dovey v. Port Jervis, 23 Misc. 313.....	1986
Dow v. Weare, 68 N. H. 345.....	1134
Dow v. Winnepesaukee Gas &c. Co., 69 N. H. 312.... (1383)	
Dowd v. Albany R. Co., 47 App. Div. 202.....	545, 591
Dowd v. Chicago &c. R. Co., 84 Wis. 105.....	385
Dowd v. Delaware &c. R. Co., (Pa.) 52 Atl. Rep. 249.... (787)	
Dowd v. Chicopee, 116 Mass. 93.... (711)	
Dowdy v. W. U. T. Co., 124 N. C. 522.....	2425
Dowell v. Guthrie, 99 Mo. 653.....	1292
Dowling v. Allen, 74 Mo. 13.....	1503, 1599, 1600
Dowling v. Allen, 88 Mo. 293.....	708, 721
Dowling v. N. Y. Central &c. R. Co., 90 N. Y. 670.... (674).....	710
Dowling v. Neubling, 97 Wis. 350.....	1325
Downend v. Kansas City, 156 Mo. 60.....	1825, 1826
Downer v. Metropolitan Street R. Co., 54 App. Div. 315.....	930
Downes v. Hopkinton, 67 N. H. 456.....	1822
Downey v. Gemini Min. Co., 24 Utah, 431.....	1404, 1453, 1702
Downey v. Hendrick, 46 Mich. 498.... (511).....	510, 516
Downey v. Low, 22 App. Div. 460.....	641, 1875
Downey v. R. Co., 28 W. Va. 732.....	907
Downing v. Elliott, (Mass.) 64 N. E. Rep. 201.....	2097
Downing v. Missouri &c. R. Co., 70 Mo. App. 657.....	787
Downing v. Morgan's &c. R. Co., 104 La. 508.... (788).....	796
Downs v. N. Y. C. R. R. Co., 47 N. Y. 83.....	713
Downs v. N. Y. &c. R. Co., 36 Conn. 287.....	548, 564
Downs v. St. Paul City R. Co., 75 Minn. 41.....	2316
Downs v. Smyrna, 2 Penn. (Del.) 132.....	1819, 1872
Downy v. R. Co., 28 W. Va. 732.....	670
Doyle v. Albany R. Co., 5 App. Div. 601.....	450
Doyle v. Boston &c. R. Co., 145 Mass. 386.....	805
Doyle v. Duluth, 74 Minn. 157.....	2022
Doyle v. Fitchburg R. Co., 166 Mass. 492.....	263, 376
Doyle v. Kiser, 6 Ind. 242.....	610, 612
Doyle v. L. I. R. Co., 33 Hun, 37.....	807
Doyle v. Metropolitan Street R. Co., 29 Misc. 331.....	470
Doyle v. Missouri &c. Trust Co., 140 Mo. 1.....	1415, 1567, 1682
Doyle v. N. Y. Eye & Ear Infirmary, 80 N. Y. 631.....	2184
Doyle v. New York &c. R. Co., 66 App. Div. 398.....	945
Doyle v. Penn. & N. Y. Canal &c. R. Co., 139 N. Y. 637.....	763
Doyle v. Sycamore, 193 Ill. 501.....	1092, 1371
Doyle v. Union Pac. R. Co., 147 U. S. 413.....	1329
Doyle v. White, 9 App. Div. 521.....	1129, 1420
Doyle v. White, 14 Misc. 417.....	1420
Doyle v. Wragg, 1 F. & F. 7.....	2353
Drain v. St. Louis &c. R. Co., 10 Mo. App. 531.... (753).....	769
Draithwaite v. Hall, 168 Mass. 38.....	839
Drake v. Dartmouth, 25 N. S. 177.....	606
Drake v. Gilmore, 52 N. Y. 389.... (945)	
Drake v. Kiely, 93 Pa. St. 492.... (895)	

	PAGE
Drake v. N. Y. C. & H. R. R. Co., 80 Hun, 490.....	1536
Draper v. Commercial Ins. Co., 4 Duer, 234.... (202)	
Drekson v. Hollister, 123 Pa. St. 421.....	896
Drennen v. Smith, 115 Ala. 396.....	1805
Dressel v. Kingston, 32 Hun, 533.....	1932, 1945, 2010
Dressler v. Citizens' Street R. Co., 19 Ind. App. 383.....	496, 1103
Dressler v. Davis, 7 Wis. 527.....	2363
Drew v. Central Pac. R. Co., 51 Cal. 425.... (569)	
Drew v. New River Co., 6 Carr. & Payne, 754.....	2337
Drew v. Sixth Ave. R. R. Co., 26 N. Y. 49.....	715, 869
Drinkout v. Eagle Machine Works, 90 Md. 423.....	1669
Drinkwater v. Brigg Spartan. 1 Ware. 149.... (204)	
Drinkwater v. Dinsmore, 80 N. Y. 390.....	939
Driscoll v. Ansonia, 73 Conn. 743.....	1885, 1887
Driscoll v. Chicago &c. R. Co., 97 Ill. App. 668.....	1634
Driscoll v. Mayor, 11 Hun, 101.....	695, 696
Driscoll v. Newark &c. Co., 37 N. Y. 637.....	2104, 2111
Driscoll v. Scanlon, 165 Mass. 348.....	23
Driscoll v. Towle, (Mass.) 63 N. E. Rep. 922.....	650
Driver v. Atchison &c. R. Co., 59 Kan. 773.... (774)	
Drommie v. Hogan, 153 Mass. 29.....	1673
Drury v. Butler, 171 Mass. 171.....	2178
Drury v. Hervey, 126 Mass. 521.....	590
Drummond v. Southern Pac. R. Co., 7 Utah, 118.....	574
Dryburg v. Mercur &c. Min. Co., 18 Utah, 410.....	1453, 1801
Dryburgh v. N. Y. &c. T. Co., 35 Pa. St. 298.....	2427
Drymala v. Thompson, 26 Minn. 40.....	1014, 1466
Dube v. Gay, 69 N. H. 670.....	1480
Dublin v. Taylor &c. R. Co., (Tex. Civ. App.) 50 S. W. Rep. 120.... (819)	
Dublin v. Taylor &c. R. Co., 92 Tex. 535.... (653)	
Dublin Cotton Oil Co. v. Jarrard, 91 Tex. 289.....	911, 2135
DuBoise v. Decker, 130 N. Y. 325.....	2185
Dubois v. Kingston, 102 N. Y. 219.....	1925
Ducktown Sulphur &c. Co. v. Barnes, (Tenn.) 60 S. W. Rep. 593.....	2097
Dudley v. Boltes, 24 Wend. 464.....	2346
Dudley v. Front Street &c. R. Co., 73 Fed. Rep. 128.....	476
Dudley v. Westcott, 18 N. Y. Supp. 130.....	2230, 2358
Duff v. R. Co., 91 Pa. St. 458.....	421, 718
Duffy v. Duncan, 32 Barb. 587.... (69)	
Duffy v. Kivilin, 195 Ill. 630.....	1623
Duffy v. Mason, 4 E. D. Smith, (N. Y.) 178.... (613)	
Duffy v. Missouri R. Co., 19 Mo. App. 380.... (711)	
Duffy v. N. Y. &c. R. Co., 2 Hilt. 496.... (1045)	
Duffy v. Thompson, 4 E. D. Smith, 178.... (612)	
Duffy v. Upton, 113 Mass. 544.....	1702, 1743
Duggan v. Baltimore &c. R. Co., 159 Pa. St. 248.....	533
Duggins v. Watson, 15 Ark. 118.....	28
Duke v. Ferry Co., 9 Misc. 268.....	605
Duke v. Railroad Co., 99 Mo. 347.....	2051
Dukes v. Eastern Distilling Co., 51 Hun, 605.....	1761
Du Laurens v. St. Paul &c. R. Co., 15 Minn. 49.....	553
Dull v. Cleveland &c. R. Co., 21 Ind. App. 571.....	661, 676, 771, 2147, 2159
Dumas v. Northwestern Ins. Co., 12 App. D. C. 245.....	1311
Dummer v. Milwaukee Electric R. &c. Co., 108 Wis. 589.....	671
Dumois v. New York, 37 Misc. 614.....	2098
Dun v. R. Co., 78 Va. 645.... (540)	
Dun v. Railway, 68 Mo. 278.... (940)	
Dun v. Seaboard &c. R. Co., 78 Va. 645.....	537
Dunbar v. Boston &c. R. Co., 110 Mass. 26.....	2419
Dunbar v. Boston, 112 Mass. 75.....	1990
Dunbar v. Charleston &c. R. Co., (S. C.) 40 S. E. Rep. 884.....	253
Duncan v. Berlin &c., 46 N. Y. 685.....	1079
Duncan v. Blundell, 3 Stark, R. 6.....	2173



## TABLE OF CASES.

lxxxix

	PAGE
Duncan v. Findlater, 6 Cl. & F. 894....(655)	
Duncan v. Maine C. R. Co., 113 Fed. Rep. 508.....	417
Duncan v. Missouri Pac. R. Co., 46 Mo. App. 198.....	663
Duncan v. Philadelphia, 173 Pa. St. 550.....	1820, 1869
Duncan v. Roberts Co., 194 Pa. St. 563.....	1602
Duncan v. St. Louis &c. R. Co., 51 La. Ann. 1775.....	1094
Dunckle v. Kocker, 11 Barb. 387....(1005).....	1004
Duncklee v. Butler, 30 Misc. 58....(45)	
Dundas v. Lansing, 75 Mich. 499.....	2017
Dundon v. New York &c. R. Co., 67 Conn. 266.....	681
Dunham v. B. & A. R. R. Co., 46 Hun, 245.....	313
Dunham v. Power, 77 N. Y. 76.....	1080
Dunican v. Union R. Co., 39 App. Div. 497.....	2285
Dunkirk &c. R. Co. v. Mead, 90 Pa. St. 454....(1043)	
Dunlap v. Edin. &c. R. Co., 16 Jurist. pt. 2, 407-8....(575)	
Dunlap v. Hamilton, 1 Bell, 320....(36)	
Dunlap v. International Steamboat Co., 98 Mass. 371....(623).....	613
Dunlap v. Snyder, 17 Barb. 561....(991)	
Dunlay v. United Traction Co., 18 Pa. Super. Ct. 206.....	400
Dunleavy v. Stockwell, 45 Ill. App. 230.....	1245
Dunkman v. Wabash &c. R. Co., 59 Mo. 232.....	2148
Dunn v. Ballantyne, 5 App. Div. 483.....	2119
Dunn v. Branner, 13 La. Ann. 452.....	600
Dunn v. Cedar Rapids R. Co., 35 Minn. 73.....	2049
Dunn v. Connell, 20 Misc. 727.....	1677
Dunn v. Connell, 21 Misc. 295.....	1507
Dunn v. Durant, 9 Daly, 389.....	2122
Dunn v. Grand Trunk R. R. Co., 58 Me. 187.....	377, 381
Dunn v. McNamee, 59 N. J. L. 498.....	1752
Dunn v. N. H. &c. Co., 58 Hun, 461....(615).....	610
Dunn v. Northeast &c. R. Co., 81 Mo. App. 42....(850)	
Dunn v. Wilmington &c. R. Co., 124 N. C. 252.....	739
Dunnican v. Union R. Co., 39 App. Div. 497.....	2272
Dunning v. Bird, 24 Ill. App. 270.....	989
Dunton v. Niles, 95 Cal. 494.....	645
Dupre v. Childs, 52 App. Div. 306.....	9
Dupree v. Alexander, (Tex. Civ. App.) 68 S. W. Rep. 739.....	1469, 2054
Dupree v. Tumboirilla, (Tex. Civ. App.) 66 S. W. Rep. 595.....	1135, 1469
Durand v. Acken, 7 Misc. 440.....	1880
Durango v. Chapman, 27 Colo. 169.....	2096
Durango v. Luttrell, 18 Colo. 123.....	1934
Durant v. Palmer, 5 Dutcher, 544.....	2255
Durbin v. Napoleon, 21 Oh. C. C. 160.....	1867, 1876, 1877, 1882
Durden v. Barnett, 7 Ala. 169....(977).....	983
Durfee v. Johnstown &c. R. Co., 71 Hun, 279.....	469, 1334, 2023
Durham v. Spokane, 27 Wash. 615.....	915, 2023
Durham v. Wilmington &c. R. Co., 82 N. Car. 352....(1023)	
Durkee v. Central R. Co., 69 Cal. 533.....	1145
Durkee v. Delaware &c. R. Co., 88 Hun, 471.....	757, 783
Durkin v. Sharp, 88 N. Y. 225.....	1467
Durkin v. Troy, 61 Barb. 437.....	695
Durose v. St. Paul City R. Co., 80 Minn. 512.....	930
Durr v. Village of Green Island, 71 Hun, 260.....	1886
Durst v. Carnegie Steel Co., 173 Pa. St. 162.....	1416, 1634
Dutch v. Bodwell Granite Co., 94 Me. 34.....	1126
Dutcher v. Philadelphia, 202 Pa. St. 1.....	1870
Dutton v. Amesbury Nat. Bank, (Mass.) 63 N. E. Rep. 405.....	650
Dutton v. Landsdowne, 10 Pa. Super. Ct. 204.....	1870, 2261
Dutzi v. Geisel, 23 Mo. App. 676....(688)	
Duval v. Barnaby, 75 App. Div. 154.....	976
Duverniet v. Morgan's &c. S. Co., 49 La. Ann. 484.....	428
Dwight v. Brewster, 1 Pick. 50....(295).....	198
Dwight v. Germania Life Ins. Co., 103 N. Y. 359.....	1115, 1120

	PAGE
Dwight v. The Elmira C. & N. R. Co., 132 N. Y. 199.....	586
Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117.....	523, 586
Dwyer v. Am. Ex. Co., 82 Wis. 307.....	1662, 1671
Dwyer v. Buffalo General Electric Co., 20 App. Div. 184.....	1056
Dwyer v. Gulf &c. R. Co., 69 Tex. 707....(319)	
Dwyer v. McLaughlin, 31 Misc. 510.....	2136
Dwyer v. Salt Lake City, 19 Utah, 521.....	1851
Dwyer v. Shaw, 22 R. I. 648.....	1411, 1479
Dyche v. Vicksburg &c. R. Co., 79 Miss. 361.....	2152
Dye v. Virginia Midland &c. R. Co., 9 Mackey, (D. C.) 63.....	389
Dyer v. Erie R. Co., 71 N. Y. 228.....	686, 724, 795, 806, 1163
Dyer v. Riley, 51 N. J. Eq. 124.....	73
Dyer v. Robinson, 110 Fed. Rep. 99.....	1357, 1358
Dygart v. Schenck, 23 Wend. 446....(659).....	1097, 2237
Dykman v. Keeney, 10 App. Div. 610.....	74
Dynen v. Leach, 40 Iowa, 491.....	1547
Dy Puy v. Cook, 90 Hun, 43.....	923
Dysart v. Kansas City &c. R. Co., 145 Mo. 83.....	1519, 1655
E. T. &c. R. Co. v. White, 5 Lea, (Tenn.) 540.....	797
Eads v. Louisville &c. R. Co., (Ky.) 42 S. W. 1135....(738)	
Eads v. Metropolitan Street R. Co., 43 Mo. App. 536.....	367
Eads v. Orcutt, 79 Mo. App. 511.....	73
Eagan v. Tucker, 18 Hun, 347.....	1516
Eagle &c. Co. v. Defries, 94 Ill. 598.....	1101, 1181
Eames v. Cararoc, 1 Newb. 528.....	204
Eames v. Salem R. Co., 98 Mass. 560....(1013).....	1017, 1044
Eames v. Texas &c. R. Co., 63 Texas, 660....(1026).....	411
Ean v. Chicago &c. R. Co., 95 Wis. 69.....	1801
Earhart v. Youngblood, 27 Pa. St. 331.....	975, 979
Earing v. Lansingh, 7 Wend. 184.....	2345, 2346
Earl v. Chicago &c. R. Co., 109 Iowa, 14.....	419
Earl v. Crouch, 16 N. Y. Supp. 770.....	2238, 2267
Earl v. Topper, 45 Vt. 275....(1179)	
Earle v. Arbogast, 180 Pa. St. 409.....	1357, 2068
Earle v. Consolidated T. Co., 64 N. J. L. 573.....	2272
Earle v. Earle, 93 N. Y. 104....(44).....	43, 64, 65
Early v. Lake Shore &c. R. Co., 66 Mich. 349.....	700
Easler v. Southern R. Co., 59 S. C. 311.....	1208, 1222
Eason v. Railway Co., 65 Tex. 578.....	14
East Chicago Foundry Co. v. Ankeny, 19 Ind. App. 150.....	1701, 2045, 2048
East Chicago Iron &c. Co. v. Williams, 17 Ind. App. 573.....	1572, 1683
East Chicago &c. R. Co. v. McGinnis, 49 Neb. 649.....	1683
East Dubuque v. Burbute, 173 Ill. 553.....	1199, 1875
Easterly v. Irwin, 99 Iowa, 694.....	1986
Eastern K. R. Co. v. Powell, 33 S. W. Rep. 629.....	19, 1660, 2146, 2163
East Jersey Water Co. v. Bigelow, 60 N. J. L. 201.....	2065
Eastland v. Clarke, 165 N. Y. 420.....	1487, 1595
East Line &c. R. Co. v. Cushing, 69 Tex. 306.....	414
East Line R. Co. v. Scott, 72 Tex. 70.....	1735
Eastman v. Boston &c. R. Co., 165 Mass. 342.....	1159
Eastman v. Grant, 34 Vt. 390.....	2202, 2206
Eastman v. Maine C. R. Co., 70 N. H. 240.....	573
Eastman v. Sanborne, 3 Allen, 594.....	111, 113, 898
East Omaha &c. R. Co. v. Godola, 50 Neb. 906....(398).....	510
East River Gas Light Co. v. Donnelly, 93 N. Y. 557.....	80
East St. Louis v. Donohue, 77 Ill. App. 574.....	1877
East St. Louis v. Dougherty, 74 Ill. App. 490.....	914, 1949
East St. Louis v. Murphy, 89 Ill. App. 22....(647)	
East St. Louis &c. R. Co. v. Eggman, 170 Ill. 538.....	1169, 1442
East St. Louis &c. R. Co. v. O'Hare, 59 Ill. App. 649.....	1755
East St. Louis &c. R. Co. v. Reames, 173 Ill. 582.....	11, 775, 1169, 2170
East St. Louis &c. R. Co. v. Sculley, 63 Ill. App. 147.....	1454

	PAGE
East St. Louis &c. Street R. Co. v. Burns, 77 Ill. App. 529.....	2299
East St. Louis &c. Street R. Co. v. Wachtel, 63 Ill. App. 181.....	2288
East Tenn. &c. R. Co. v. Baylis, 77 Ind. 429.....	1028
East Tenn. &c. R. Co. v. Bayliss, 74 Ala. 150.....	
East Tenn. &c. R. Co. v. Cargill, 105 Tenn. 628.....	2133
East Tenn. &c. R. Co. v. Collins, 85 Tenn. 227.....	1647
East Tenn. &c. R. Co. v. Duffield, 12 Lea, (Tenn.) 63.....	698
East Tenn. &c. R. Co. v. Fain, 12 Lea, (Tenn.) 35.....	2148
East Tenn. &c. R. Co. v. Feathers, 10 Lea, (Tenn.) 103.... (785)	
East Tenn. &c. R. Co. v. Fleetwood, 90 Ga. 23.....	901
East Tenn. &c. R. Co. v. Green, 95 Ga. 736.....	463
East Tenn. &c. R. Co. v. Hale, 85 Tenn. 69.... (824)	
East Tenn. &c. R. Co. v. Humphreys, 12 Lea, (Tenn.) 200.....	2148
East Tenn. &c. R. Co. v. Johnson, 85 Ga. 497.....	353, 824
East Tenn. R. Co. v. King, 81 Ala. 177.....	2113
East Tenn. &c. R. Co. v. King, 88 Ga. 443.....	560
East Tenn. &c. R. Co. v. Lilly, 90 Tenn. 563.....	946
East Tenn. &c. R. Co. v. Lockhart, 79 Ala. 315.....	576
East Tenn. &c. R. Co. v. Maloy, 77 Ga. 237.....	
East Tenn. &c. R. Co. v. Markens, 14 Law. Rep. Annot. 281.... (730)	
East Tenn. &c. R. Co. v. Massengill, 15 Lea, (Tenn.) 328.... (498)	
East Tenn. &c. R. Co. v. Miller, 95 Ga. 738.....	394
East Tenn. &c. R. Co. v. Ruah, 15 Lea, (Tenn.) 145.....	1020
East Tenn. &c. R. Co. v. Scalca, 2 Lea, (Tenn.) 688.... (1023)	
East Tenn. &c. R. Co. v. Selcer, 7 Lea, (Tenn.) 557.... (1014).....	1024
East Tenn. &c. R. Co. v. Smith, 89 Tenn. 114.....	1607, 1611, 1727
East Tenn. &c. R. Co. v. Watson, 98 Ala. 634.... (432)	
East Tenn. Teleg. Co. v. Simms, 99 Ky. 404.....	873, 1122, 1159, 1162
Eaton v. D. L. &c. R. Co., 57 N. Y. 382.....	377
Eaton v. Erie R. Co., 51 N. Y. 544.....	2229, 2308
Eaton v. Fitchburg R. Co., 129 Mass. 364.....	808
Eaton v. New York &c. R. Co., 163 N. Y. 391.....	1428
Eaton v. McNeil, 31 Or. 128.....	1033
Eaton v. New York &c. R. Co., 163 N. Y. 391.....	1612, 1631
Eaton v. Oregon &c. R. Co., 19 Ore. 371.... (1034)	
Eau v. Chicago &c. R. Co., 95 Wis. 69.....	2046
Eaves v. People's &c. Bank, 27 Conn. 229.....	164
Eberhardt v. Harkless, 115 Fed. Rep. 816.....	2179
Eberhardt v. Metropolitan Street R. Co., 69 App. Div. 560.....	928
Eberle v. Heaton, 124 Mich. 205.....	628
Ebersol v. Trainer, 81 Ill. App. 645.....	1332
Ebert v. Gulf &c. R. Co., (Tex. Civ. App.) 49 S. W. Rep. 1105.....	503
Eccles v. Darragh, 48 N. Y. Supr. Ct. 528.....	2263
Eccles v. Union Pacific R. Co., 7 Utah, 335.....	2208
Eck v. Hocker, 75 Ill. App. 641.....	1009
Eckensberger v. Amend., 7 Misc. 452.....	2230, 2357
Eckensberger v. Amend., 10 Misc. 145.....	2230, 2369
Eckert v. L. I. R. Co., 43 N. Y. 502.....	690
Eckert v. St. Louis &c. R. Co., 13 Mo. App. 352.....	785, 1122
Eckles v. Missouri P. R. Co., 72 Mo. App. 296.....	350
Eckles v. Norfolk &c. R. Co., 96 Va. 69.....	1663, 2044, 2046
Eckman v. Atlantic Lodge, (N. J. L.) 52 Atl. Rep. 293.....	1359
Ecliff v. Wabash &c. R. Co., 64 Mich. 196.....	711, 721
Economy Light &c. Co. v. Stephen, 87 Ill. App. 220.....	925, 1061
Edall v. New England &c. R. Co., 18 App. Div. 216.....	1428
Eddy v. Aurora &c. Co., (Mich.) 46 N. W. 17.....	1469
Eddy v. Cedar Rapids &c. R. Co., 98 Iowa, 626.....	2286, 2323
Eddy v. Ellicottville, 35 App. Div. 256.....	1984
Eddy v. Livingston, 35 Mo. 487.... (417)	
Eddy v. Syracuse &c. R. Co., 50 App. Div. 109.....	560, 591, 900
Eden v. Drey, 75 Ill. App. 102.....	141, 154
Eden v. Lexington &c., 14 B. Mon. (Ky.) 204.... (943)	
Edgar v. Castello, 14 S. C. 20.... (943).....	948

	PAGE
Edgar v. Walker, 106 Ga. 454.....	1332, 2053
Edge v. Third Ave. R. Co., 67 N. Y. Supp. 1002.....	827
Edgerley v. Long Island R. Co., 46 App. Div. 284.....	783, 800
Edgerly v. Union Street R. Co., 67 N. H. 312.....	365, 532
Edgerton v. N. Y. & C. R. Co., 39 N. Y. 227.....	379, 1090, 2040
Edgerton v. O'Neil, 4 Kan. App. 73.....	688, 864
Edington v. Aetna Ins. Co., 77 N. Y. 564.....	1183, 1184, 1186, 1190
Edington v. Mut. Life Ins. Co., 67 N. Y. 185.....	1182, 1185
Edlund v. St. Paul C. R. Co., 78 Minn. 434.....	410
Edmonson v. Kentucky C. R. Co., (Ky.) 49 S. W. Rep. 200.....	1647, 1798
Edmunson v. Pullman Palace Car Co., 92 Fed. Rep. 824.....	602
Edson v. Pennsylvania R. Co., 70 Ill. App. 654.... (610)	
Edson v. Weston, 7 Cowen, 278.... (129).....	102
Edward Hines Lumber Co. v. Ligas, 172 Ill. 315.....	1415, 1606, 1626, 1629, 1676
Edwards v. Atlantic & C. R. Co., 129 N. C. 78.....	1119
Edwards v. Bonner & Campbell, 12 Tex. Civ. App. 237.. (1106).....	1113, 1257, 1264
Edwards v. Carr, 13 Gray, 234.... (111).....	113
Edwards v. Chicago & C. R. Co., (Mo. App.) 67 S. W. Rep. 950.... (808).....	742
Edwards v. Foote, (Mich.) 88 N. W. Rep. 404.....	2333
Edwards v. Gimbel, 202 Pa. St. 30.....	958
Edwards v. Lake Shore & C. R. Co., 81 Mich. 364.... (555)	
Edwards v. Lamb, 69 N. H. 599.....	2193
Edwards v. N. Y. & C. R. Co., 98 N. Y. 245.....	1316, 1317, 1334, 1346
Edwards v. Simbel, 202 Pa. St. 30.....	1195
Edwards v. Southern R. Co., 63 S. C. 271.... (791)	
Edwards v. Tilton Mills, 70 N. H. 574.....	1699
Edwards v. Worcester, 172 Mass. 104.....	1219
Effingham v. Surralls, 77 Ill. App. 460.....	1965
Efroymsen v. Smith, (Ind. App.) 63 N. E. Rep. 328.....	848
Egan v. Berkshire Apartment Association, (C. P.) 31 N. Y. S. R. 545.....	1073
Egan v. Clark, 87 Ill. App. 246.....	50
Egan v. Dry Dock & C. R. Co., 12 App. Div. 556.....	
..... 1118, 1228, 1229, 1465, 1467, 1476, 1627, 1628	
Egan v. Montana & C. R. Co., 24 Mont. 569.....	2138, 2141, 2142, 2161, 2163
Egener v. New York & C. R. Co., 3 App. Div. 157.....	2088
Egerer v. New York & C. R. Co., 39 App. Div. 652.....	2243
Eggleston v. Columbia Turnpike Co., 82 N. Y. 278.....	1914, 1926, 2366
Eginoire v. Union County, 112 Iowa, 558.....	863, 908, 1835
Egmann v. East St. Louis & C. R. Co., 65 Ill. App. 345.....	1613
Ehmeke v. Porter, 45 Minn. 338.....	1581
Elmer v. Title Guarantee & C. Co., 156 N. Y. 10.....	823
Ehrgott v. Mayor & C., 96 N. Y. 264.. 80, 835, 836, 843, 891, 1054, 1998, 2004, 2041	
Ehrhard v. Metropolitan Street R. Co., 69 App. Div. 124.....	1154
Ehrmann v. Nassau Electric R. Co., 23 App. Div. 21.....	716, 2160
Ehui v. National Tube Works Co., (Pa. St.) 52 Atl. Rep. 166.....	1486
Eicheler v. Hanggi, 40 Minn. 263.....	1403
Eichengreen v. Louisville, & C. R. Co., 96 Tenn. 229.....	14
Eickhof v. Chicago & C. Street R. Co., 77 Ill. App. 196.....	515, 1061
Eichholz v. Niagara Falls & C. Co., 68 App. Div. 441.... (893).....	
..... 922, 1484, 1488, 1622, 1737, 2051	
Eidson v. Southern R. Co., (Miss.) 23 South Rep. 369.....	582
Eikins v. R. Co., 3 Foster, 275.... (339)	
Eilenberger v. Nelson, 64 Ill. App. 277.....	2111
Eilert v. Green Bay & C. R. Co., 48 Wis. 606.....	755
Eingartner v. Illinois Steel Co., 94 Wis. 70.....	1633
Einseidler v. Whitman County, 22 Wash. 388.....	1835, 1836, 1839
Einsfeld v. Niagara Junction R. Co., 49 App. Div. 470.....	768
Einstein v. Dunn, 61 App. Div. 195.....	83
Eisenberg v. Mo. Pac. R. Co., 33 Mo. App. 85.....	2114
Eislein v. Palmer, 5 Oh. N. P. 325.....	2191, 2193, 2198
Ela v. French, 11 N. H. 356.....	1307
Elberhardt v. Metropolitan Street R. Co., 69 App. Div. 560.....	507
Eldred v. Mackie, 178 Mass. 1.....	2127

	PAGE
Eldredge v. Eldredge, 79 Hun, 511.....	1132
Eldridge v. Atlas S. S. Co., 134 N. Y. 187.....	1583
Eldridge v. Minn. &c. R. Co., 32 Minn. 223.....	1112
Eldorado v. Drapeere, 5 Kan. App. 631.....	1872, 1877
Electric Power Co. v. The Metropolitan &c. Co., 75 Hun, 68.....	26
Electric R. Co. v. Carson, 98 Ga. 652.....	1101, 1158
Electric R. Co. v. Lawson, 101 Tenn. 406.....	1740
Electric R. Co. v. Shelton, 89 Tenn. 423.....	1065
Elenz v. Conrad, 115 Iowa, 183.....	2055
Elevator Co. v. Carlson, 69 Ill. App. 212.....	1742
Elgin v. Anderson, 89 Ill. App. 527....(838)	
Elgin v. Nofs, 96 Ill. App. 291.....	1137
Elgin v. Riordan, 21 Ill. App. 600.....	898
Elgin v. Thompson, 98 Ill. App. 358.....	1914
Elgin &c. R. Co. v. Bates Mach. Co., 98 Ill. App. 311.....	209, 282, 340
Elgin &c. R. Co. v. Docherty, 66 Ill. App. 17.....	1412
Elgin &c. R. Co. v. Duffy, 191 Ill. 489.....	735, 736
Elgin &c. R. Co. v. Eselin, 68 Ill. App. 96.....	912, 1428
Elgin &c. R. Co. v. Maloney, 59 Ill. App. 114.....	1443, 1608
Elias v. Rochester, 44 App. Div. 597.....	1942, 2013
Elias v. Sutherland, 18 Abb. (N. C.) 126.....	2244
Elkins v. Boston &c. R. R. Co., 115 Mass. 190....(711)	
Elkins v. McKean, 79 Penn. St. 493....(1154)	1780
Ell v. North Pac. R. Co., 1 N. D. 336.....	1405, 1661
Ellegard v. Ackland, 43 Minn. 352....(13)	
Ellick v. Metropolitan Street R. Co., 15 App. Div. 556.....	2285, 2302
Ellick v. Wilson, 58 Neb. 584.....	689
Ellicott v. Martin, 6 Md. 509....(182)	
Ellinger v. Philadelphia &c. R. Co., 153 Pa. St. 213.....	531
Elliot v. Carter White Lead Co., 53 Neb. 458.....	1593
Elliot v. Herz, 29 Mich. 202....(883)	
Elliot v. Louisville &c. R. Co., (Ky.) 52 S. W. Rep. 833.....	2152
Elliott v. N. Y. &c. R. Co., 53 Hun, 78.....	557
Elliott v. Porter, 5 Dana, 299.....	2208
Elliott v. Pray, 10 Allen, 378.....	2128
Ellis v. Am. T. Co., 13 Allen, 232.... 2389, 2395, 2398, 2399, 2411, 2412, 2414, 2426	
Ellis v. Boston &c. R. Co., 169 Mass. 600....(804)	
Ellis v. Erie R. Co., 66 N. J. L. 451....(739)	
Ellis v. Esson, 50 Wis. 138.....	2202, 2203, 2209
Ellis v. Leonard, 107 Iowa, 487....(1103)	
Ellis v. Lowville, 7 Lansing, 434.....	1823
Ellis v. McCormick, 1 Hilt. 313.....	629
Ellis v. Mabry, (Tex. Civ. App.) 60 S. W. Rep. 751.....	2053
Ellis v. Mississippi &c. R. Co., 89 Mo. App. 241.....	1005, 1033
Ellis v. N. Y. &c. R. Co., 95 N. Y. 546.....	1426, 1672
Ellis v. Northern Pac. R. Co., 103 Fed. Rep. 416.....	1487, 1488, 1499
Ellis v. Pacific &c. R. Co., 48 Mo. 231....(1046)	
Ellis v. Pacific &c. R. Co., 55 Mo. 278.....	1004
Ellis v. Pierce, 172 Mass. 220.....	1162
Ellis v. Pitzer, 2 Ohio, 89.....	2203
Ellis v. Portsmouth R. Co., 2 Ired. L. R. 138.....	1256
Ellis v. Sheffield Gas &c. Co., 2 E. & B. 767.....	648, 649, 655, 2250
Ellis v. Stime, (Tex. Civ. App.) 55 S. W. Rep. 758.....	2031
Ellis v. Waldron, 19 R. I. 369.....	1079, 1105, 2050
Ellsbury v. New York &c. R. Co., 172 Mass. 130.....	1428
Ellsworth v. Ellingson, 96 Iowa, 154.....	1246
Ellsworth v. Metheney, 104 Fed. Rep. 119.....	1397, 1416
Ellsworth v. Tartt, 26 Ala. 733....(342)	
Elmer v. Locke, 135 Mass. 575.....	1433, 1490
Elmore v. Sands, 54 N. Y. 512.....	569, 791
Elmore v. Seaboard Air Line Co., 130 N. C. 506.....	1479
Elmas v. Second Ave. R. Co., 56 Hun, 161.....	1228
Elster v. Seattle, 18 Wash. 304.....	1136, 1873

	PAGE
Elze v. Baumann, 2 Misc. 72.....	2230, 2233
Elwood v. Addison, 26 Ind. App. 28.....	880, 1803, 2054
Elwood v. Chicago City R. Co., 90 Ill. App. 397.....	395, 666, 1103
Elwood v. N. Y. &c. R. Co., 4 Hun, 808.....	447
Elwood v. W. U. T. Co., 45 N. Y. 549.....	1202, 2390, 2391, 2424, 2426
Elwood Electric R. Co. v. Ross, 26 Ind. App. 258.....	2054
Elwood &c. R. Co. v. Ross, 26 Ind. App. 258.....	951
Ely v. Parsons, 55 Conn. 83.....	76, 84
Ely v. St. Louis &c. R. Co., 77 Mo. 34.....	1147
Ely v. San Antonio &c. R. Co., 15 Tex. Civ. App. 511.....	1547
Ely v. Wilber, 49 N. J. L. 685.....	2191
Elyton Land Co. v. Mingea, 89 Ala. 521.... (731)	
Embler v. Walkill, 132 N. Y. 222.....	1951
Embry v. Louisville &c. R. Co., (Ky.) 36 S. W. Rep. 1123.....	2146
Emerald &c. Brew. Co. v. Leonard, 22 Misc. 120.....	99
Emerson v. Bleakley, 2 Abb. Ct. App. 22.... (158)	
Emerson v. Fay, 94 Va. 60.....	654
Emerson v. Gas Co., 3 Allen, 410.....	1382
Emerson v. Lebanon, 67 N. H. 579.....	1137
Emerson v. Niagara &c. R. R. Co., 2 Ont. 528.....	529
Emerson v. Peteler, 35 Minn. 481.....	1937
Emery v. Boston &c. R. Co., 67 N. H. 434.... (861)	
Emery v. Boston &c. R. Co., 173 Mass. 136.... (751)	
Emery v. Chicago &c. R. Co., 77 Minn. 465.....	428
Emery v. Raleigh &c. R. Co., 109 N. C. 589.....	2091
Emery v. Waterville, 90 Me. 485.....	1871
Emig v. Barnes, 77 Ill. App. 616.....	92
Emmerling v. First National Bank, 97 Fed. Rep. 739.....	108
Empire Laundry Mach. Co. v. Brady, 164 Ill. 58.....	1378, 1399, 1605
Empire &c. Co. v. McIntosh, 82 Ky. 554.... (674)	
Emporia v. Schmidling, 33 Kan. 485.... (697)	
Empson Packing Co. v. Vaughn, 27 Colo. 66.....	1447
Engel v. Eureka Club, 137 N. Y. 100.....	636, 645
Engel v. Standard Lighting Co., 12 Oh. C. C. 489.....	1573, 1581
Engelbach v. Ibert, 10 Misc. 535.....	2351, 2362
Engesether v. Great Northern R. Co., 65 Minn. 168.... (240)	
England v. Boston &c. R. Co., 153 Mass. 490.....	492
Englehardt v. D., L. & W. R. Co., 78 Hun, 588.....	1518
Engleman v. Lake Shore &c. R. Co., 8 Oh. C. D. 583.....	2137
English v. Brennan, 60 N. Y. 609.....	1345
English v. Galveston &c. R. Co., 22 Tex. Civ. App. 3.....	1404
English v. Horn, 102 Ga. 972.....	50
English v. Missouri P. R. Co., 73 Mo. App. 232.....	894
English v. Southern P. R. Co., 13 Utah, 407 .. (736)...	796, 875, 800, 808, 875, 935
Engman v. Taylor, 46 W. Va. 669.....	628
Engner v. Ohio &c. R. Co., 142 Ind. 618.... (755)	
Engstad v. Syverson, 72 Minn. 188.... (1083)	
Engstrom v. Minneapolis, 78 Minn. 200.....	2013
Enix v. Iowa C. R. Co., 114 Iowa, 508.....	1048
Ennis v. Gray, 87 Hun, 355.....	1058
Enright v. Pittsburg Junction R. Co., 198 Pa. St. 166.....	2153
Enright v. San Francisco &c. R. Co., 33 Cal. 230.....	1046
Ensley R. Co. v. Chewaing, 93 Ala. 242.... (432)	
Ensley v. Mayor &c. 2 Baxter, (Tenn.) 144.... (888)	
Entwhistle v. Feigner, 60 Mo. 214.... (1154)	
Eperson v. Postal Teleg. &c. Co., (Mo.) 50 S. W. Rep. 795.....	1562
Ephland v. Missouri P. R. Co., 137 Mo. 187.....	486
Ephraim v. Pacific Bank, (Cal.) 69 Pac. Rep. 436.....	71
Eply v. Lehigh Valley R. Co., 3 Pa. Super. Ct. 509.....	777, 2153
Eppendorf v. B. C. & N. R. Co., 69 N. Y. 195.....	477, 1120
Equinoire v. Union County, 112 Iowa, 558.....	1915
Equitable Mortgage Co. v. Butler, 105 Ga. 555.....	1083
Erb v. Morasch, 8 Kan. App. 61.....	2154

## TABLE OF CASES.

xcv

	PAGE
Erb v. Popritz, 59 Kan. 264.....	1126
Erd v. Chicago &c. R. Co., 41 Wis. 65.....	1261
Erdman v. Gottshall, 9 Pa. Super. Ct. 295.....	1005, 1009, 1011
Erdman v. Illinois Steel Co., 95 Wis. 6.....	1542, 1579, 1700
Erickson v. Bronson, 81 Minn. 258.....	975
Erickson v. Great Northern R. Co., 82 Minn. 60.....	2134
Erickson v. Victoria Copper Min. Co., (Mich.) 90 N. W. Rep. 291.....	1637
Erie v. Magill, 101 Pa. St. 616.....	700
Erie v. Rubenstein, 72 Mo. App. 337.....	199
Erie v. Schwring, 10 Harris, (Pa.) 384.....	698
Erie Co. Iron Works v. Barker, 102 Pa. St. 156.....	2103
Erie R. Co. v. Salisbury, (N. J. L.) 50 Atl. Rep. 117.....	21
Erie R. Co. v. Wilcox, 84 Ill. 239....(349)	
Erie &c. R. Co. v. Schuster, 113 Pa. St. 412.....	714
Erie Teleg. Co. v. Grimes, 82 Tex. 89.....	2446
Ernst v. Brown &c. Co., 4 Misc. 450.....	1454
Ernst v. Hudson River R. Co., 35 N. Y. 9.....	673, 791, 805
Ernst v. Hudson River R. Co., 39 N. Y. 61....(805)	703
Erskine v. Chino Valley Beet-Sugar Co., 71 Fed. Rep. 270....	1456, 1479, 1684, 1745
Erslew v. New Orleans &c. R. Co., 49 La. Ann. 86.....	878, 1062, 1438, 1692
Ertz v. Pierson, (Mich.) 89 N. W. Rep. 680.....	1504
Ervin v. Evans, 24 Ind. App. 335.....	1720
Erwin v. Kansas &c. R. Co., (Mo. App.) 68 S. W. Rep. 88....(404)	
Erwin v. Neversink Steamboat Co., 23 Hun, 573, 577....(1180)	
Esberg-Gunst Cigar Co. v. Portland, 34 Or. 282.....	1996
Eschback v. Hughes, 7 Misc. 172.....	894, 1327
Esbridge v. Aneumati &c. R. Co., 11 Ky. L. R. 557.....	661
Eslava v. Jones, 83 Ala. 139.....	83
Essex County Electric Co. v. Kelley, 60 N. J. L. 306.....	1486
Estate of Armstrong, 125 Cal. 603.....	55
Estate of Fernandez, 119 Cal. 579.....	55
Estate of Marre, 127 Cal. 128.....	53
Estate of Merkle, 131 Pa. St. 584....(47)	
Estate of Smith, 118 Cal. 462.....	55
Estate of Young, 97 Iowa, 218.....	46
Estell v. Lake Crystal, 27 Minn. 243....(697)	
Estwood v. La Crosse City R. Co., 94 Wis. 163.....	2290
Etherington v. Prospect &c. R. Co., 88 N. Y. 641.....	876
Etson v. Ft. Wayne &c. R. Co., 110 Mich. 494.....	1104
Etson v. Ft. Wayne &c. R. Co., 114 Mich. 605.....	397, 473
Eureka v. Wilson, 15 Utah, 53.....	88
Eureka Block Coal Co. v. Wells, (Ind. App.) 61 N. E. Rep. 236.....	1801
Eustace v. Johns, 38 Cal. 3.....	2261
Evans v. Adams, 122 Ind. 362.....	2129
Evans v. Brookville, 5 Pa. Super. Ct. 298.....	1881
Evans v. Charleston &c. R. Co., 108 Ga. 270.....	816, 820
Evans v. Davidson, 53 Md. 245.....	12
Evans v. Fitchburg R. Co., 111 Mass. 142.....	225, 305
Evans v. Gas Co., 148 N. Y. 112.....	1382
Evans v. Goodrich, 46 Minn. 388.....	606
Evans v. Hoggatt, 9 Kan. App. 540.....	2067
Evans v. Joplin, 84 Mo. App. 296.....	2013
Evans v. Keystone Gas. Co., 148 N. Y. 112.....	1381
Evans v. L. S. & M. S. R. Co., 12 Hun, 289.....	1550
Evans v. Lake Erie &c. R. Co., 78 Fed. Rep. 782....(730)	
Evans v. McDermott, 49 N. J. L. 163....(980)	
Evans v. M. & C. R. Co., 56 Ala. 246....(553)	
Evans v. Meredith &c. L. Co., 69 N. H. 664.....	1544
Evans v. Murphy, 87 Md. 498.....	649, 1322
Evans v. Pittsburg &c. R. Co., 142 Ind. 264.....	2144
Evans v. St. Louis &c. R. Co., 11 Mo. App. 462....(571)	
Evans v. Sherman &c. R. Co., 14 Tex. Civ. App. 437....(1014)	1042
Evans v. Speer &c. Co., 65 Ark. 204.....	188

	PAGE
Evans v. Utica, 69 N. Y. 166.....	693, 1884
Evans v. Vogt & Brothers Man. Co., 5 Misc. 330.....	1569
Evans v. Western &c. Teleg. Co., 102 Iowa, 219.....	2445, 2452, 2460
Evans v. W. U. T. Co., (Tex. Civ. App.) 56 S. W. Rep. 609.....	2422
Evans Garden Cultivator Co. v. Missouri &c. R. Co., 64 Mo. App. 305.....	318
Evansich v. Gulf &c. Co., 57 Tex. 126.....	2133
Evansville v. Christy, (Ind. App.) 63 N. E. Rep. 867.....	1879, 2054
Evansville v. Frazer, 24 Ind. App. 628.....	1857, 1869
Evansville v. Guiton, 115 Ind. 450.....	1514
Evansville v. Senhenn, 151 Ind. 42.....	648, 714, 1939
Evansville S. R. Co. v. Meadows, 13 Ind. App. 155.....	2059
Evansville &c. R. Co. v. Carvener, 113 Ind. 5.....	697
Evansville &c. R. Co. v. Cates, 14 Ind. App. 172.....	564
Evansville &c. R. Co. v. Duncan, 28 Ind. 441.... (444).....	493
Evansville &c. R. Co. v. Gentry, 147 Ind. 408.....	2283, 2298
Evansville &c. R. Co. v. Griffin, 100 Ind. 221.....	2112
Evansville & R. R. Co. v. Henderson, 142 Ind. 596.....	1590
Evansville &c. R. Co. v. Lawdenwick, 15 Ind. 120.... (761)	
Evansville &c. R. Co. v. State, 149 Ind. 276.....	818
Evansville &c. R. Co. v. Tohill, 143 Ind. 49.....	1528, 1608, 1635
Evansville &c. R. Co. v. Welch, 25 Ind. App. 308.... (777)	
Evansville &c. R. Co. v. Willis, 93 Ala. 507.... (1053)	
Evansville &c. R. Co. v. Wilson, 20 Ind. App. 5.....	567
Everett v. Los Angeles Consol. &c. R. Co., 115 Cal. 105.....	2273, 2326, 2331
Everett v. Richmond &c. R. Co., 121 N. C. 519.... (793)	
Everett v. Salters, 15 Wend. 474.... (272)	
Everhard v. Diamond Match Co., 98 Fed. Rep. 555.....	1700
Everhart v. Terre Haute &c. R. Co., 78 Ind. 292.....	19
Evers v. H. R. Bridge Co., 18 Hun, 144.....	1891
Evers v. Pennsylvania T. Co., 176 Pa. St. 376.....	2304
Evers v. Philadelphia T. Co., 176 Pa. St. 376.....	2297
Evertson v. Frier, (Tex. Civ. App.) 45 S. W. Rep. 201.....	115
Ewald v. American News Co., 18 Misc. 468.....	2351
Ewald v. Chicago &c. R. Co., 70 Wis. 420.....	1614, 1618
Ewan v. Lippincott, 47 N. J. L. 192.....	1615, 1622
Ewen v. Chicago &c. R. Co., 38 Wis. 613.....	706, 875, 2053
Ewen v. Philadelphia, 194 Pa. St. 548.....	1847
Ewen v. Willbur, 99 Ill. App. 132.....	178
Ewing v. Goode, 78 Fed. Rep. 442.....	2193
Ewing v. Blount, 20 Ala. 694.... (829)	
Exchange Bank v. Gardner, 104 Iowa, 176.....	71
Exchange Bank v. Trimble, (Ky.) 56 S. W. Rep. 156.....	676
Exchange Nat. Bank v. Plate, 69 Ill. App. 489.....	171
Executors of Smedes v. Elmendorf, 3 Johns. 185.....	2173
Ex parte Bateman—In Re Routledge, 8 De Gex M. & G. 263.....	1304
Ex parte Estabrook, 2 Lowell, 517.... (182)	
Ex parte Johnson, 19 S. C. 492.....	1412
Ex parte Stell, 4 Hugh. C. C. (U. S.) 157.....	742
Express Co. v. Caldwell, 21 Wall. 264.....	2392, 2409
Exton v. Central R. Co., 62 N. J. L. 7.....	429, 536, 1134
Exton v. Central R. &c. 63 N. J. L. 356.....	371
Eyre v. Higbee, 15 How. 46.....	2427
Eyre v. Jordan, 111 Mo. 424.....	1317, 1356
F. &c. R. Co. v. Lull, 28 Mich. 510.... (1040).....	1041
Faber v. Chicago &c. R. Co., 62 Minn. 433.....	549
Faber v. Man. Co., 126 Pa. St. 387.....	1671
Faber v. St. Paul &c. R. Co., 29 Minn. 465.....	768, 2049
Factor &c. Ins. Co. v. Werlein, 42 La. Ann. 1046.....	2078
Fahn v. Reichart, 8 Wis. 105.....	1248
Fair v. London &c. R. Co., 21 Law Times Rep. 326.....	863
Fair v. Philadelphia, 88 Pa. Ct. 309.....	1905



	PAGE
Fairbank & Co. v. Cincinnati &c. R. Co., 81 Fed. Rep. 289.....	257
Fairbanks v. Kitteridge, 24 Vt. 12....(76).....	88
Fairbanks Canning Co. v. Innes, 24 Ill. App. 33.....	1105, 1772
Fairchild v. Bentley, 30 Barb. 147....(977)	
Fairchild v. Hedges, 14 Wash. 117.....	88
Fairchild v. Slocum, 19 Wend. 329....(354)	
Fairfax v. N. Y. C. & H. R. R. Co., 67 N. Y. 11....(310) ..	105, 109, 616, 624, 1104
Fairgrieve v. Marine Ins. Co., 94 Fed. Rep. 686.....	1300
Fairlawn v. Scranton, 148 Pa. St. 231.....	1905
Fairman v. Boston &c. R. Co., 169 Mass. 170.....	1803
Fairmount &c. R. Co. v. Stutler, 54 Pa. St. 375....(473)	
Fairmouth R. Co. v. Steetler, 54 Penn. St. 375....(372)	
Fake v. Addicks, 45 Minn. 37; 22 Amer. R. 716.....	973, 976, 983, 987
Fales v. Dearborn, 1 Pick. 345.....	2346
Falkenburg v. Erie R. Co., 28 Misc. 165....(240)	
Faulkenau v. Abrahamson, 66 Ill. App. 352.....	1142, 1481
Falkenau v. Rowland, 70 Ill. App. 20.....	873, 883, 908
Falker v. Third Ave. R. Co., 38 App. Div. 49.....	1103
Falkner v. Ohio &c. R. Co., 55 Ind. 369.....	579
Fall Brook Coal Co. v. Hewson, 153 N. Y. 150.....	1199
Fall River &c. R. Co. v. Pullman Palace Car Co., 6 Oh. D. 85.....	600, 1104
Fallon v. Central Park &c. R. Co., 64 N. Y. 13....(706).....	713
Falls v. Stewart, 3 Kan. App. 403.....	1091, 1838
Falotio v. Broadway &c. R. Co., 9 Daly, 243.....	2275, 2277
Famous Man. Co. v. Harmon, 28 Ind. App. 117.....	914
Fancher v. N. Y. &c. R. Co., 75 Hun, 350.....	1427, 1685
Fandel v. Third Ave. R. Co., 15 App. Div. 426.....	1639, 2305, 2310
Fannessey v. Western Union Tel. Co. and others, 6 Misc. 322.....	1562
Farber v. Missouri P. R. Co., 139 Mo. 272.....	32, 420, 1160
Faras v. Powell, 86 Ga. 800....(104).....	115
Faris v. Brooklyn City &c. R. Co., 46 App. Div. 231.....	514
Farley v. Chicago &c. R. Co., 56 Iowa, 337.....	798
Farley v. Harris, 186 Pa. St. 440....(740)	
Farley v. Lavary, (Ky.) 54 S. W. Rep. 840.....	200, 210
Farley v. New York, 152 N. Y. 222.....	679, 1596, 1941, 1945, 1954
Farley v. Picard, 78 Hun, 560.....	987
Farley v. Wilmington &c. R. Co., (Del.) 52 Atl. Rep. 543....	729, 2314, 2372, 2373
Farlow v. Kelly, 108 U. S. 288.....	541
Farm Inv. Co. v. Wyoming &c. School, (Wyo.) 68 Pac. Rep. 561.....	119
Farman v. Ellington, 46 Hun, 41.....	1946
Farmer v. Findlay Street R. Co., 60 Oh. St. 36.....	2339
Farmer v. Manhattan Savings Institution, 60 Hun, 462.....	159
Farmers' Fire Ins. Co. v. Bates & Co., 60 Ill. App. 39.....	1313
Farmer's Loan &c. Co. v. Fidelity Trust Co., 86 Fed. Rep. 541.....	196
Farmer's Loan &c. Co. v. Oregon &c., Co., 73 Fed. Rep. 1003.....	336
Farmers' L. &c. Co. v. Baltimore &c. R. Co., 102 Fed. Rep. 17.....	417
Farmers &c. Bank v. Butchers &c. Bank, 16 N. Y. 125....(7)	
Farmers &c. Bank v. Champlain Transp. Co., 23 Vt. 186.....	201, 345
Farmers' &c. Bank v. Cuyler, 9 Pa. Dist. R. 539.....	12
Farmers' &c. Bank v. Dreyfus, 82 Mo. App. 399.....	180
Farmers &c. Bank v. Erie R. Co., 72 N. Y. 188....(7).....	310
Farmers' &c. Bank v. Loyd, 89 Mo. 262.....	41
Farmers' &c. Bank v. Marshall, 9 Pa. Super. Ct. 621.....	181
Farmers' &c. T. Co. v. Northern P. R. Co., 112 Fed. Rep. 829.....	216
Farmington Mercantile Co. v. Chicago &c. R. Co., 166 Mass. 154.....	353
Farnham v. R. Co., 55 Penn. St. 53....(280).....	265
Farnon v. Boston &c. R. Co., 180 Mass. 212.....	397
Farquhar v. Alabama &c. R. Co., 78 Misc. 193.....	1607, 1799
Farrant v. Barnes, 11 C. B. (N. S.) 553.....	1376
Farrand v. Marshall, 19 Barb. 381.....	2073
Farrand v. Marshall, 21 Barb. 409.....	2061
Farrar v. Greene, 32 Me. 574....(799)	

	PAGE
Farrar v. New Orleans &c. R. Co., 52 La. Ann. 417.....	2305
Farrell v. Metropolitan Street R. Co., 51 App. Div. 456.....	1205
Farrell v. Middletown, 56 App. Div. 525.....	1451
Farrell v. Tatham, 36 App. Div. 319.....	1557
Farrington v. Rutland R. Co., 72 Vt. 24.....	1255
Farris v. Railway Co., 80 Mo. 325.....	2229, 2230, 2296, 2368
Farwell v. Boston &c. R. Co., 4 Met. 49.....	389, 1395, 1600, 1664, 1750
Fash v. Third Ave. R. Co., 1 Daly, 148.....	2337
Faucett v. The York &c. R. Co., 2 Eng. L. & E. R. 289..... (1043)	
Faucher v. Trudel, 71 N. H. 621.....	2095
Faucher v. Wilson, 68 N. H. 338.....	203, 231
Faulk v. Iowa County, 103 Iowa, 442.....	1133, 1840
Faulkenbury v. Wells, (Tex. Civ. App.) 68 S. W. Rep. 327.....	2095
Faulkner v. Erie R. Co., 49 Barb. 324.....	1408, 1475
Faulkner v. Hart, 82 N. Y. 413..... (313)	324, 355
Faulkner v. Kean, (Ky.) 32 S. W. Rep. 265.....	1113
Faulkner v. Mammoth Min. Co., 23 Utah, 437.....	1218, 1560, 1741
Faust v. Philadelphia &c. R. Co., 191 Pa. St. 420..... (784)	731, 791
Favo v. Remington Arms Co., 67 App. Div. 414.....	1375
Favor v. Railway Co., 114 Mass. 350..... (739)	
Favre v. L. & N. R. Co., 13 K. L. R. 116.....	541
Favro v. Troy &c. Bridge Co., 4 App. Div. 241.....	2251
Fawcett v. Bigley, 59 Pa. 411.....	1154
Fawcett v. Pittsburg &c. R. Co., 24 W. Va. 755.....	2031
Fawdrey v. Brooklyn &c. R. Co., 64 App. Div. 418.....	931
Fay v. Brooklyn Heights R. Co., 69 App. Div. 563.....	2330
Fay v. Chicago &c. R. Co., 72 Minn. 192.....	1444, 1685
Fay v. Kent, 55 Vt. 557.....	965, 2258
Fay v. McGuire, 20 App. Div. 569.....	2176
Fay v. Pacific Improvement Co., 93 Cal. 253.....	140
Fay v. R. Co., 30 Minn. 234.....	1532, 1733, 1800
Fayerweather v. Phoenix Ins. Co., 118 N. Y. 324.....	1307
Fearn v. West Jersey Ferry Co., 143 Pa. St. 122.....	606
Feary v. O'Neil, 149 Mo. 467.....	1200
Featherston v. Prest. &c. Newburgh &c. R. R. Co., 71 Hun, 109.....	2204
Fecker v. Cleveland &c. R. Co., 7 Oh. N. P. 600.....	2160
Feeback v. Missouri &c. R. Co., 167 Mo. 206.....	2141
Feehan v. Dobson, 10 Pa. Super. Ct. 6.....	722, 2109
Feeney v. L. I. R. Co., 116 N. Y. 375.....	799, 801, 1191, 2042
Feige v. Michigan C. R. Co., 62 Mich. 1.....	249
Feinberg v. D. L. & W. R. Co., 52 N. J. L. 451.....	233
Feingold v. Philadelphia Traction Co., 7 Pa. Dist. R. 445.....	421
Feinstein v. Jacobs, 15 Misc. 474.....	836, 1322
Feital v. R. Co., 11 Allen, 398..... (1101)	
Feldstein v. Old Dominion S. S. Co., 21 Misc. 60.....	314
Felice v. N. Y. &c. R. Co., 14 App. Div. 345.....	1496
Fell v. Rich Hill &c. Co., 23 Mo. App. 216.....	855
Felska v. N. Y. &c. R. Co., 152 N. Y. 339.....	1154
Felton v. Anderson, (Ky.) 66 S. W. Rep. 182.....	1017
Felton v. Aubrey, 74 Fed. Rep. 350.....	2143, 2147, 2154, 2163
Felton v. Bullard, 94 Fed. Rep. 781.....	1430, 1470, 1478, 1489, 1631
Felton v. Cincinnati, 95 Fed. Rep. 336.....	1325
Felton v. Clarkson, 103 Tenn. 457.....	227
Felton v. Girardy, 104 Fed. Rep. 127.....	1600, 1754
Felton v. Harbeson, 104 Fed. Rep. 737.....	1658, 1674
Felton v. Holbrook, (Ky.) 56 S. W. Rep. 506..... (1101)	
Felton v. Horner, 97 Tenn. 579.....	414
Felton v. McCreary &c. Stock Co., (Ky.) 59 S. W. Rep. 744.....	213
Felton v. Newport, 105 Fed. Rep. 332..... (796)	
Felton v. Spiro, 78 Fed. Rep. 576.....	933
Feneran v. Singer Man. Co., 20 App. Div. 574.....	17
Fenlon v. Duluth &c. R. Co., 108 Mich. 284.....	1493
Fenner v. Buffalo & State Line R. Co., 44 N. Y. 505.....	308

## TABLE OF CASES.

xcix

PAGE

Fenner v. Succession of McCan, 49 La. Ann. 600.....	56
Fenner v. Wilkesbarre & C. T. Co., 202 Pa. St. 365.....	2287, 2333
Fenneman v. Holden, 75 Md. 1.....	702
Fenstein v. Jacobs, 15 Misc. 474.....	1323
Fenton v. Bisel, 80 Mo. App. 135.....	991
Fenton v. Railway Co., 56 Hun, 99.....	2231, 2307
Fenton v. Robinson, 4 Hun, 252.....	169, 626
Fenton v. Second Ave. R. Co., 126 N. Y. 625.....	2304, 2340
Fenton v. Steam Packet Co., 8 Adol. & Ellis, 835.....	1399
Fenwick v. Illinois Cent. R. Co., 100 Fed. Rep. 247.....	1800, 1803
Ferguson v. Anglo-American Teleg. Co., 178 Pa. St. 377.....	2444
Ferguson v. Cent. Iowa R. Co., 58 Iowa, 293.....	1706
Ferguson v. Chicago & C. R. Co., 100 Iowa, 733.....	1711
Ferguson v. Columbus R. Co., 75 Ga. 637.....	1142, 2110
Ferguson v. Ehret, 10 Misc. 217.....	2350, 2351, 2362
Ferguson v. Ehret, 14 Misc. 454.....	922, 2351
Ferguson v. Hubbell, 97 N. Y. 507.....	1209, 1243, 1364
Ferguson v. Michigan Cent. R. Co., 98 Mich. 533.....	582
Ferguson v. Phoenix Cotton Mills, 106 Tenn. 236.....	1494, 1682, 1700
Ferguson v. Traction Co., 47 Leg. Intel. (Pa.) 494.....	691
Ferguson v. Virginia & C. R. Co., 13 Nev. 184.... (819)	
Fero v. Buff. & S. L. Co., 22 N. Y. 209.... (734).....	1041, 1254, 1261, 1270
Ferren v. Old Colony R. Co., 143 Mass. 197.....	1433
Ferrero v. Western Union Teleg. Co., 9 App. D. C. 455.....	2428, 2460
Ferrers v. Western Union Teleg. Co., 9 App. D. C. 455.....	2444
Ferries Co. v. White, 99 Tenn. 256.....	531, 915
Ferris v. Aldrich, 47 N. Y. S. R., 40.....	1073
Ferris v. Board, 122 Mich. 315.....	2102
Ferris v. Hershheim, 51 La. Ann. 178.....	1459, 1468, 1632, 1720
Ferris v. Union Ferry Co., 36 N. Y. 312.....	423, 459
Ferry v. M. R. Co., 118 N. Y. 497.....	468
Ferry v. Samson, 112 N. Y. 415.... (956)	
Ferryboat D. S. Gregory & C., 2 Benedict, (U. S.) 226.... (859)	
Feslire's Estate, 134 Pa. St. 67.....	74
Fibel v. Livingston, 64 Barb. 179.... (297)	
Fiek v. Jackson, Pa. 3 Super. Ct. 378.....	1418, 1542, 1752
Ficken v. Emigrants' Industrial Sav. Bank, 33 Misc. 92.....	164
Fickett v. Lisbon Falls Fibre Co., 91 Me. 268.....	920, 1564, 1730
Fickler v. Cleveland & C. R. Co., 6 Oh. N. P. 36.....	708, 2160, 2166
Fidelity Investment Co. v. Carico, 1 Col. App. 292.... (115)	104
Fidelity & C. Co. v. Sittig, 79 Ill. App. 245.....	1309
Field v. Chicago & C. R. Co., 14 Fed. Rep. 332.....	794
Field v. Cutler, 4 Lansing, 195.....	177
Field v. Davis, 27 Kan. 100.....	1133
Field v. Des Moines, 39 Iowa, 575.....	2001
Field v. French, 80 Ill. App. 78.....	1075
Field v. Kane, 99 Ill. App. 1.....	11
Field v. N. Y. & C. R. Co., 32 N. Y. 346.....	
..... 1106, 1130, 1256, 1258, 1259, 1260, 1265, 1271	
Fielders v. North Jersey Street R. Co., (N. J. L.) 50 Atl. Rep. 533.....	459
Fields v. Blane, (Ky.) 37 S. W. Rep. 850.....	133
Fields v. Hartford R. Co., 54 Conn. 9.....	2013
Fiero v. N. Y. C. & H. R. R. R. Co., 71 Hun, 213.....	1571
Fiseld v. Northern R. Co., 42 N. H. 225.....	1466, 1547
Fiseld v. Phoenix, (Ariz.) 24 L. R. A. 430.....	1291
Fisbeck v. Davies, 8 Col. App. 320.....	55
Filbert v. D. & H. C. Co., 121 N. Y. 207.....	1535, 1619, 1661
Filburn v. People's Palace & C. Co., (C. A.) L. R., 25 Q. B. D. 258.....	1012
Filders v. North Jersey & C. R. Co., (N. J. L.) 50 Atl. Rep. 533.....	1170
Filer v. N. Y. C. R. E. Co., 49 N. Y. 47.....	
..... 480, 481, 484, 673, 678, 686, 842, 843, 1177, 1224, 1231, 2025	
Files v. Boston & C. R. Co., 149 Mass. 204.....	381
Fulke v. Boston & C. R. Co., 53 N. Y. 549.....	1488, 1490, 1533

	PAGE
Filletown v. Grand Trunk R. Co., 55 Maine, 462....(279)	
F. Ins. Co. v. Jenkins, 3 Wend. 130....(68)	
Finance Co., &c. v. Charleston &c. R. Co., 46 Fed. Rep. 508.....	95
Findlay v. Russell Wheel & F. Co., 108 Mich. 286.....	1398, 1493, 1494, 1667
Finegan v. Moore, 46 N. J. L. 602.....	2232, 2257
Finigan v. Biehl, 30 Misc. 735.....	1332, 1355
Fink v. Albany & S. R. Co., 4 Lansing, 147.....	567
Fink v. Ash, 99 Ga. 106....(418)	
Fink v. Chambers, 95 Mich. 508....(182)	
Fink v. Des Moines, (Iowa) 89 N. W. Rep. 28.....	1866
Fink v. Evans, 95 Tenn. 413.....	1019, 1022
Fink v. Garman, 40 Pa. St. 95....(955)	
Fink v. Mo. Furnace Co., 10 Mo. App. 61.....	708, 719, 2133
Fink v. Nelson, (Ark.) 48 S. W. Rep. 897.....	1020
Fink v. Slade, 66 App. Div. 105.....	1425
Finkeldey v. Omnibus Cable Co., 114 Cal. 28.....	408, 478
Finken v. Elm City Brass Co., 73 Conn. 423.....	837
Finklestein v. N. Y. &c. R. Co., 41 Hun, 34.....	770, 1168
Finley v. Chicago &c. R. Co., 71 Minn. 471.....	731
Finley v. Hudson Electric R. Co., 64 Hun, 373.....	16
Finn v. Cassidy, 165 N. Y. 584.....	1214, 1722
Finn v. Delaware &c. R. Co., 42 App. Div. 524.....	722, 791, 2160
Finnegan v. Biehl, 61 N. Y. Supp. 1116.....	690
Finnegan v. Chicago &c. R. Co., 48 Minn. 378.....	386
Finnegan v. Gas Co., 159 Mass. 311.....	1384
Finnegan v. Sioux Falls, 112 Iowa, 232.....	1189, 1936, 1952
Finnel v. D., L. & W. R. Co., 122 N. Y. 669.....	1430
Finney v. Hall, 156 Mass. 225....(1317)	
Finseth v. Suburban R. Co., 32 Or. 1.....	429
Fiore v. Ladd, 22 Ore. 202.....	165
Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535.....	1312
Fireman's Fund Ins. Co. v. Norwood, 69 Fed. Rep. 71.....	1317
First Nat. Bank v. Arthur, 12 Colo. App. 90.....	84
First Nat. Bank v. Citizen's Savings Bank, 123 Mich. 336.....	40
First Nat. Bank v. City Nat. Bank, 12 Tex. Civ. App. 318.....	12
First Nat. Bank v. Craig, 3 Kan. App. 166.....	39
First Nat. Bank v. Dean, 137 N. Y. 110.....	1081, 1082
First Nat. Bank v. First Nat. Bank, 116 Ala. 520.....	112, 118, 126
First Nat. Bank v. First Nat. Bank, 55 Neb. 303.....	41
First Nat. Bank v. First Nat. Bank, 58 Oh. St. 207.....	12
First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320.....	36
First Nat. Bank v. Fourth Nat. Bank, 89 N. Y. 412.....	37
First Nat. Bank v. German Bank, 107 Ia. 543.....	39
First Nat. Bank v. Lake Erie &c. R. Co., 174 Ill. 36.....	1146, 1252, 1260, 1287
First Nat. Bank v. Linn &c. Bank, 30 Or. 296.....	181
First Nat. Bank v. Northern P. R. Co., (Wash.) 68 Pac. Rep. 965.....	321
First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 296.....	120, 124, 1138
First Nat. Bank v. Parsons, 45 W. Va. 688.....	182
First Nat. Bank v. Pennington, 57 Neb. 404.....	192
First Nat. Bank v. R. Co., 20 Oh. St. 259....(610)	
First Nat. Bank v. St. Charles Sav. Banks, (Tex. Civ. App.) 37 S. W. Rep. 768.....	12
First Nat. Bank v. Wallis, 150 N. Y. 455.....	186
First Nat. Bank v. Weston, 24 App. Div. 230.....	1199
First Nat. Bank v. Weston, 25 App. Div. 414....(186)	187
First &c. Bank v. Webster, 121 Mich. 149....(174)	
Fischer v. Bordelon, 52 La. Ann. 429.....	1911
Fischer v. Franke, 21 App. Div. 635.....	1881, 2260
Fischer v. Heitzberg Packing &c. Co., 77 Mo. App. 108.....	903
Fischer v. Langbein, 103 N. Y. 84, 89.....	2181
Fischer v. Lee, 98 Va. 159.....	119
Fish v. Clark, 49 N. Y. 122....(202)	

## TABLE OF CASES.

ci

	PAGE
Fish v. Dodge, 4 Denio, 311.....	1212, 2091
Fish v. Illinois C. R. Co., 96 Iowa, 702.....	1155, 1531, 1678
Fishbach v. Steinway R. Co., 11 App. Div. 152.....	2328
Fisher v. Badger, (Mo. App.) 69 S. W. Rep. 26.....	990
Fisher v. Boston, 104 Mass. 87.....	1990
Fisher v. Brooklyn Jockey Club, 50 App. Div. 446.....	18
Fisher v. Cambridge, 133 N. Y. 527.....	1850
Fisher v. Central Lead Co., 156 Mo. 479.....	884
Fisher v. Clisbee, 12 Ill. 344.... (199)	
Fisher v. Farmers' L. Co., 21 Wis. 73.... (1024).....	1014, 1041
Fisher v. Fisher, 129 N. Y. 654.....	1185
Fisher v. Flinn, 28 Pittsburg, L. J. (N. S.) 237.....	2097
Fisher v. Graves, 80 Fed. Rep. 590.....	1375
Fisher v. Jansen, 30 Ill. App. 91.....	2114
Fisher v. Kelsey, 16 Fed. Rep. 71.....	153
Fisher v. Lake Shore & C. R. Co., 17 Oh. C. C. 491.....	335
Fisher v. Met. Elevated R. Co., 34 Hun, 433.....	524, 899, 1331, 1334, 1335
Fisher v. Mt. Vernon, 41 App. Div. 293.... (729).....	1917, 1945, 2244
Fisher v. Nubian Iron Enamel Co., 60 Ill. App. 568.....	1136
Fisher v. Nutran Iron Enamel Co., 60 Ill. App. 568.....	1146
Fisher v. Paxon, 182 Pa. St. 457.....	578
Fisher v. Rankin, 78 Hun, 407.....	641, 1112
Fisher v. Ruch, 12 Pa. Super. Ct. 240.....	1098
Fisher v. Tryon, 15 Oh. C. C. 541.....	399
Fisher v. West Virginia & C. R. Co., 42 W. Va. 183.....	414, 603
Fishkill v. Plank Road Co., 22 Barb. 634.....	2220
Fisk v. Chicago & C. R. Co., 111 Iowa, 392.....	1728, 2143
Fisk v. Newton, 1 Denio, 45.... (307).....	308, 309, 322
Fisk v. R. Co., 158 Mass. 238.....	1492
Fiske v. Dodge, 38 Barb. 163.....	77
Fiske v. Enders, 73 Conn. 338.....	19
Fitch v. Casler, 17 Hun, 126.... (135).....	147
Fitch v. Central & C. Teleg. Co., 42 App. Div. 321.....	2244
Fitch v. Pacific R. Co., 45 Mo. 322.....	1257, 1261
Fitchburg & C. R. Co. v. Nichols, 85 Fed. Rep. 945.....	267, 404, 477
Fitchburgh & C. R. Co. v. Spencer, 98 Ind. 186.....	535
Fitzgerald v. Binghamton, 40 Hun, 332.....	1992
Fitzgerald v. Company, 155 Mass. 155.....	696
Fitzgerald v. Elsas Paper Co., 30 Misc. Rep. 438.....	1783
Fitzgerald v. Hedstrom, 98 Ill. App. 109.....	1238
Fitzgerald v. Honkomp, 44 Ill. App. 365.....	1639, 1666
Fitzgerald v. New York & C. R. Co., 154 N. Y. 263.... (658).....	674, 1119, 1589
Fitzgerald v. N. Y. & C. R. Co., 59 Hun, 225.....	695
Fitzgerald v. Paisley, 110 Iowa, 98.....	46
Fitzgerald v. Quann, 109 N. Y. 441.... (993)	
Fitzgerald v. Rodgers, 58 App. Div. 298.....	2136
Fitzgerald v. St. Paul & C. R. Co., 29 Minn. 336.....	705, 814
Fitzgerald v. Western & C. Teleg. Co., 15 Tex. Civ. App. 143.....	1374
Fitzgerald v. Weston, 52 Wis. 354.... (704).....	1145
Fitzgibbon v. Chicago & C. R. Co., 108 Iowa, 614.....	370
Fitzhenry v. Consolidated T. Co., 64 N. J. L. 674.....	2274
Fitzhenry v. Lamson, 19 App. Div. 54.....	1741, 1749
Fitzhugh v. Hackley, 70 Ark. 54.....	83
Fitzmaurice v. Puterbaugh, 17 Ind. App. 318.....	2067
Fitzpatrick v. Bloomington C. R. Co., 73 Ill. App. 516.....	1137
Fitzpatrick v. Cumberland Glass Man. Co., 61 N. J. L. 378.....	2114
Fitzpatrick v. Darby, 184 Pa. St. 645.....	1874
Fitzpatrick v. Fitchburg R. Co., 128 Mass. 13.....	1133
Fitzpatrick v. Garrison & West Point Ferry Co., 49 Hun, 288.....	2136
Fitzpatrick v. Montgomery, 20 Mont. 181.....	2096
Fitzpatrick v. Slocum, 89 N. Y. 358.....	1902, 2118
Fitzpatrick v. Tweddle, 73 Hun, 105.....	2118
Fivaz v. Nicholls, 2 M. G. & S. 500.....	2378

	PAGE
Fivey v. Pennsylvania R. Co., (N. J. L.) 52 Atl. Rep. 472.....	629
Flack v. Nassau &c. R. Co., 41 App. Div. 399..... (439)	
Flagg v. Manhattan R. Co., 49 N. Y. Supr. Ct. 251.....	424
Flagg v. Man. El. R. Co., 20 Blatch, (U. S.) 142.....	1336
Flaherty v. Harrison, 98 Wis. 559.....	1029
Flaherty v. New York &c. R. Co., 19 R. I. 604.....	925, 934
Flaherty v. Northern Pac. R. Co., 39 Minn. 328.... (730)	
Flaherty v. Union R. Co., 45 Mo. 70.... (711)	
Flanagan v. Atlantic &c. Co., 37 App. Div. 476.....	1397, 2120
Flanagan v. Metropolitan Street R. Co., 31 Misc. 820.....	470
Flanagan v. New York &c. R. Co., 70 App. Div. 505..... 729, 735, 791,	1215
Flanagan v. Philadelphia &c. R. Co., 181 Pa. St. 237.....	443
Flander v. Franklin, 70 N. H. 168.....	1962, 1965
Flanders v. R. Co., 51 Minn. 193.....	1438
Flangsbury v. Basin, 3 Ill. App. 531.....	976
Flanigan v. Guggenheim Smelting Co., 63 N. J. L. 647.....	1202
Flannagan v. Holloway, 11 Oh. C. D. 373.....	668
Flannegan v. St. Paul City R. Co., 68 Minn. 300.....	2282
Flatbank v. Haentzche, 73 Ill. 236.....	1447
Fleck v. Union R. Co., 134 Mass. 480.....	509
Fleckenstein v. Dry Dock &c. R. Co., 105 N. Y. 655.... (734)....	2229, 2270,
Fleet v. Hollenkemp, 13 Mon., (Ky.) 219.....	2185
Fleischner v. Pacific Postal Tel. Co., 55 Fed. Rep. 738.....	2417
Fleishman v. Neversink M. R. Co., 174 Pa. St. 510.....	2295
Fleming v. Anawonscott Mills, 22 R. I. 211.....	2365
Fleming v. B. C. R. Co., 1 Abb. N. C. 433.... (16)	
Fleming v. Buswell, 39 App. Div. 196.....	1719
Fleming v. Elston, 171 Mass. 187.....	1804
Fleming v. Kansas &c. R. Co., 89 Mo. App. 129..... 398, 453, 861,	927
Fleming v. Loan Agency, 87 Tex. 238.... (955).....	2113
Fleming v. Louisville &c. R. Co., 166 Tenn. 374.....	2165
Fleming v. St. Paul &c. R. Co., 27 Minn. 111.....	1544
Fleming v. Shenandoah, 67 Iowa, 508.....	849
Fletcher v. Baltimore &c. R. Co., 168 U. S. 135.....	2269, 2343
Fletcher v. Louisville &c. R. Co., 102 Tenn. 1.....	1542
Fletcher v. Philadelphia Traction Co., 190 Pa. St. 117.....	1712
Fletcher v. Rylands, L. R. 3, H. L. Cas. 330.....	2062, 2073
Fletcher v. South Carolina &c. R. Co., 57 S. C. 205.... (736)	
Flewelling v. Lewiston &c. R. Co., 89 Me. 585.....	2289
Flike v. Boston & Albany R. Co., 53 N. Y. 549..... 1487, 1514, 1534,	1627
Flinn v. N. Y. Cent. R. Co., 142 N. Y. 11. 1250, 1251, 1256, 1257, 1259, 1260,	1279
Flinn v. N. Y. Cent. R. Co., 67 Hun, 637.....	1106
Flinn v. Phila. &c. R. Co., 1 Houst. 469.....	245
Flinn v. World's Dispensary Med. Ass'n, 64 App. Div. 490.....	18
Flint v. Gas Co., 9 Allen, 552.....	1384
Flint v. Norwich &c. Co., 34 Conn. 554.... (532).....	533
Flint &c. R. Co. v. Lull, 28 Mich. 510.... (1039).....	1040
Flint &c. R. Co. v. Stark, 38 Mich. 714.....	473
Flippin v. Kimball, 87 Fed. Rep. 258.....	1668
Floettl v. Jonson &c. Co., 19 App. Div. 136.....	1719
Floettl v. Third Ave. R. Co., 10 App. Div. 308.....	1442
Flood v. Huff, 29 Misc. 351.....	1327
Flood v. W. U. T. Co., 131 N. Y. 603.....	1483
Florida Southern R. Co. v. Hirst, 30 Fla. 1.....	512
Florida v. Galveston County, (Tex. Civ. App.) 55 S. W. Rep. 540.....	1988
Florida &c. R. Co. v. Burney, 98 Ga. 1.....	1071
Florida &c. R. Co. v. Cain, 100 Ga. 472.....	380
Florida &c. R. Co. v. Foxworth, 41 Fla. 1.... (809).....	
..... 787, 856, 872, 873, 2140, 2169,	2342
Florida &c. R. Co. v. Katz, 23 Fla. 139.....	567
Florida &c. R. Co. v. Lucas, 110 Ga. 121.....	394
Florida &c. R. Co. v. Mooney, 40 Fla. 17.....	901, 1092, 1742, 1802
Florida &c. R. Co. v. Webster, 25 Fla. 394.....	374

# TABLE OF CASES.

ciii

	PAGE
Florida &c. R. Co. v. Williams, 37 Fla. 406.....	771, 2142
Florsheim v. Dullaghan, 58 Ill. App. 593.... (648)	
Flournoy v. Shreveport Belt R. Co., 50 La. Ann. 635.....	544
Flower v. Penn. R. Co., 69 Pa. St. 210.... (421).....	1397
Flower v. Trull, 1 Hun, 409.....	627
Flower v. Witkorasky, 69 Mich. 371.....	2349
Floyd v. Browne, 1 Rawle, 125.....	2268
Floyd v. Henderson &c. Road Co., (Ky.) 56 S. W. Rep. 6.....	1925
Floyd v. Kentucky Lumber Co., (Ky.) 66 S. W. Rep. 501.....	1751
Floyd v. Paducah R. &c. Co., (Ky.) 64 S. W. Rep. 653.....	2327
Fluhrer v. Lake Shore &c. R. Co., 121 Mich. 212.....	1485, 1532, 1588, 1733
Flutter v. New York &c. R. Co., 27 Ind. App. 511.....	1688, 1709
Flynn v. Boston &c. R. Co., 171 Mass. 395.....	1219, 1805
Flynn v. Boston &c. R. Co., 169 Mass. 305.....	794
Flynn v. Canton Co., 40 Md. 312.....	2261
Flynn v. Cent. R. Co. of N. J., 142 N. Y. 439.....	2117
Flynn v. Consolidated Traction Co., (N. J. L.) 52 Atl. Rep. 369.....	497, 540
Flynn v. Harlow, 46 N. Y. St. Rep. 872.....	1454
Flynn v. Hatton, 43 How. 333.... (1325)	
Flynn v. Kansas &c. R. Co., 78 Mo. 195.....	698
Flynn v. Manhattan R. Co., 1 Misc. 188.....	1121
Flynn v. Metropolitan Street R. Co., 10 App. Div. 258.....	2302
Flynn v. N. Y. C. &c. R. Co., 142 N. Y. 11.....	1250, 2008
Flynn v. San Francisco &c. R. Co., 40 Cal. 14.....	1261
Fockler v. Kansas City, 94 Mo. App. 464.....	1856
Foels v. Town of Tonawanda, 59 Hun, 567.....	893
Fogarty v. Bogert, 43 App. Div. 43.....	212, 1109
Fogarty v. Wanamaker, 60 App. Div. 433.....	17
Fogg v. Nahant, 98 Mass. 578.....	1954
Foggassi v. New York &c. R. Co., 17 App. Div. 286.....	460
Foland v. Paine Furniture Co., (Mass.) 61 N. E. Rep. 52.....	1143
Foley v. Brunswick Traction Co., (N. J. L.) 50 Atl. Rep. 340.....	459
Foley v. California Horseshoe Co., 115 Cal. 184.....	1633, 1754
Foley v. Manhattan Elev. R. Co., 89 Hun, 606.....	425
Foley v. Mayor, 1 App. Div. 586.....	1797, 2023
Foley v. Suburban R. Co., 98 Ill. App. 108.....	950, 1371
Foley v. Troy, 45 Hun, 396.....	1895
Folk v. Milwaukee, 108 Wis. 359.....	1987
Follett v. Shumway, 68 Vt. 68.....	88
Folman v. Mankato, 35 Minn. 522.... (730)	
Folsom v. Concord &c. R. Co., 68 N. H. 454.....	689, 736, 739, 1217
Folsom v. Parker, 31 Misc. 348.....	1356
Folsom v. Underhill, 36 Vt. 580.... (700)	
Foncannon v. Kirkville, 88 Mo. App. 279.....	1905
Fonda v. St. Paul City R. Co., 71 Minn. 438.....	2282, 2322
Fones v. Phillip, 39 Ark. 17.....	1502, 1503
Fonseca v. Cunard Steamship Co., 153 Mass. 553.....	263
Fontaine v. Bohn, (Tex. Civ. App.) 40 S. W. Rep. 637.....	181
Foot v. Great Northern R. Co., 81 Minn. 493.....	952
Foot v. American Product Co., 195 Pa. St. 190.....	2275, 2349, 2353
Foot v. American Product Co., 201 Pa. St. 510.....	2349
Foot v. Merrill, 54 N. H. 490.... (888)	
Foran v. N. Y. &c. R. Co., 64 Hun, 510.....	759
Forbell v. New York &c. R. Co., 26 Misc. 12.....	2085
Forbes v. Atlantic &c. R. Co., 76 N. C. 454.... (1642)	
Forbes v. Boone Valley Coal & R. Co., (Iowa) 84 N. W. Rep. 970.....	1594
Force v. Gregory, 63 Conn. 167.....	2194
Ford v. Charles Warner Co., 1 Marv. (Del.) 88.....	901, 2340, 2351, 2353
Ford v. Chicago &c. R. Co., 106 Iowa, 85.....	1708
Ford v. Des Moines, 106 Iowa, 94.....	1856, 1861
Ford v. Fitchburg R. Co., 110 Mass. 240.....	1466, 1487, 1490, 1572, 1578, 1731
Ford v. L. S. & M. S. R. Co., 117 N. Y. 638.....	1609
Ford v. L. S. & M. S. R. Co., 124 N. Y. 493.....	1522

	PA. E.
Ford v. Lyons, 41 Hun, 512.....	1457
Ford v. McGregor, 20 Nev. 446.....	5
Ford v. Mitchell, 21 Ind. 54.... (208)	
Ford v. Monroe, 20 Wend. 210.... (943)	
Ford v. Mt. Tom &c. Co., 172 Mass. 544.....	1126
Ford v. Postal Teleg. C. Co., 124 Ala. 400.....	2427
Ford v. Railroad Co., 117 N. Y. 638.....	1473
Ford v. Robinson-Pettett Co., (Ky.) 65 S. W. Rep. 793.....	1747
Ford v. Taggart, 4 Tex. 492.... (989)	
Ford v. Whiteman, (Del.) 45 Atl. Rep. 543.....	2353, 2359, 2365
Ford v. Williams, 13 N. Y. 577.....	2181
Fordham v. Gouverneur Village, 160 N. Y. 541.....	1868
Fordham v. London &c. R. Co., L. R. 3 C. P. 368.... (540)	
Fordsville v. Spencer, (Ky.) 65 S. W. Rep. 132.....	1877
Fordyce v. Edwards, 65 Ark. 98.....	1685
Fordyce v. Jackson, 56 Ark. 594.... (372)	
Fordyce v. Johnson, 56 Ark. 430.... (352)	
Fordyce v. Lowman, 62 Ark. 70.....	1218
Fordyce v. McCants, 51 Ark. 509.....	879
Fordyce v. McFlynn, 56 Ark. 424.....	304
Fordyce v. Withers, 1 Tex. Civ. App. 540.... (839)	
Foreman v. Pennsylvania R. Co., 195 Pa. St. 499.....	411
Foren v. Rodick, 90 Me. 276.....	1344
Forhmann v. Consolidated T. Co., 63 N. J. L. 391.....	903, 923
Forman v. Pennsylvania R. Co., 195 Pa. St. 499.....	373
Forrow v. Arnold, 22 R. I. 305.....	2178
Forsee v. Alabama &c. R. Co., 63 Miss. 66.....	553
Forske v. Commonwealth Lumber Co., (Minn.) 90 N. W. Rep. 532.....	1505
Forstall v. Fussell, 50 La. Ann. 256.....	179
Forster v. Second Nat. Bank, 61 Ill. App. 272.....	92
Forsyth v. Atlanta, 45 Ga. 152.....	1853
Forsyth v. Central Man. Co., 103 Tenn. 497.....	870
Forsyth v. Walker, 9 Barr. 148.... (308)	
Fort v. Whipple, 11 Hun, 586.....	1765
Ft. Scott &c. R. Co. v. Lightburn, 9 Kan. App. 642.....	838, 2049
Ft. Scott &c. R. Co. v. Page, 10 Kan. App. 362.....	2289
Ft. Wayne v. Coombs, 107 Ind. 75.....	1904
Ft. Wayne v. Christie, 156 Ind. 172.....	1482, 1642
Ft. Wayne &c. R. Co. v. Detroit, 34 Mich. 78.....	2337
Ft. Wayne v. Durnell, 13 Ind. App. 669.....	1957
Ft. Wayne R. Co. v. Gildersleeve, 33 Mich. 133.....	1546, 1685
Ft. Wayne &c. R. Co. v. Herbold, 99 Ind. 91.... (671)	
Ft. Wayne v. Millinger, 22 Ind. App. 191.....	1701
Ft. Wayne v. Patterson, 25 Ind. App. 547.....	1678
Ft. Wayne &c. R. Co. v. Woodward, 112 Ind. 118.....	1041, 1042
Ft. Wayree v. Christie, 156 Ind. 172.....	1705
Ft. Worth &c. R. Co. v. Beauchamp, (Tex.) 68 S. W. Rep. 502.....	2076
Ft. Worth &c. R. Co. v. Bowen, (Tex. 67 S. W. Rep. 408.....	1755
Ft. Worth &c. R. Co. v. Bowen, (Tex. Civ. App.) 68 S. W. Rep. 700.... (909)	
Ft. Worth &c. R. Co. v. Byers, (Tex. Civ. App.) 35 S. W. Rep. 1082.....	350
Ft. Worth v. Crawford, 74 Tex. 404.....	1997
Ft. Worth &c. R. Co. v. Enos, (Tex. Civ. App.) 50 S. W. Rep. 595.....	544
Ft. Worth &c. R. Co. v. Ferguson, 9 Tex. Civ. App. 610.....	2050, 2279
Ft. Worth &c. R. Co. v. Gary, (Tex. Civ. App.) 68 S. W. Rep. 200.....	1545
Ft. Worth &c. R. Co. v. Greathouse, 82 Tex. 104.....	254
Ft. Worth &c. R. Co. v. Hogsett, 67 Tex. 685.....	1254
Ft. Worth &c. R. Co. v. Hyatt, 12 Tex. Civ. App. 435.....	412, 873
Ft. Worth Transfer Co. v. Isaacs, (Tex. Civ. App.) 40 S. W. Rep. 39.....	320
Ft. Worth &c. R. Co. v. Kennedy, 12 Tex. Civ. App. 654.....	387, 847
Ft. Worth &c. R. Co. v. Kime, 21 Tex. Civ. App. 271.....	1499, 1510, 1586
Ft. Worth &c. R. Co. v. Masterson, (Tex.) 66 S. W. Rep. 833.....	350
Ft. Worth &c. R. Co. v. Morrison, (Tex. Civ. App.) 56 S. W. Rep. 931.....	879
Ft. Worth &c. R. Co. v. Neely, (Tex. Civ. App.) 60 S. W. Rep. 282.....	820



## TABLE OF CASES.

CV

	PAGE
Ft. Worth &c. R. Co. v. Peterson, 24 Tex. Civ. App. 548.....	584
Ft. Worth &c. R. Co. v. Rigers, (Tex. Civ. App.) 60 S. W. Rep. 61.....	404
Ft. Worth &c. R. Co. v. Rogers, 21 Tex. Civ. App. 605.....	265
Ft. Worth &c. R. Co. v. Rogers, Tex. Civ. App. 382.... (400)	
Ft. Worth v. Shero, 16 Tex. Civ. App. 487.....	2015, 2022
Ft. Worth &c. R. Co. v. Sivells, (Tex. Civ. App.) 67 S. W. Rep. 517.....	885
Ft. Worth &c. R. Co. v. White, (Tex. Civ. App.) 51 S. W. Rep. 855.....	2038
Ft. Worth &c. R. Co. v. Williams, 77 Tex. 121.....	343
Ft. Worth &c. R. Co. v. Wrenn, 20 Tex. Civ. App. 628.....	1600
Ft. Worth &c. R. Co. v. Wright, 24 Tex. Civ. App. 291.....	290
Ft. Worth Street R. Co. v. Allen, (Tex. Civ. App.) 39 S. W. Rep. 125.....	
Fortune v. Chesapeake &c. R. Co., (Ky.) 58 S. W. Rep. 711.....	1301, 2237, 2239
Fortune v. Missouri R. Co., 10 Mo. App. 252.....	1038
Forward v. Pittard, 1 Term. 27.... (323)	487
Foshay v. Glen Haven, 25 Wis. 288.....	1915
Foss v. Bigelow, 102 Wis. 413.....	1722
Foss v. Old Colony R. Co., 170 Mass. 168.....	1529
Fowsum v. Chicago &c. R. Co., 80 Minn. 9.....	2084
Foster v. Adler, 84 Ill. App. 654.....	2052
Foster v. Bank, 17 Mass. 478.....	108
Foster v. Cleveland C. C. & St. L. Ry. Co., 56 Fed. Rep. 434.....	831
Foster v. Essex Bank, 17 Mass. 470.... (19).....	32, 127
Foster v. International Paper Co., 71 App. Div. 47.....	1778
Foster v. Kansas Salt Co., 60 Kan. 859.....	1585, 1698
Foster v. McKinnon, L. R. (4 C. P.) 704.....	168, 173
Foster v. Minn. &c. R. Co., 14 Minn. 277.....	1610, 1620
Foster v. Portland Gold Min. Co., 114 Fed. Rep. 613.....	2113
Foster v. Wadsworth &c. Co., 168 Ill. 514.....	647
Fournet v. Morgan &c. R. Co., 43 La. Ann. 1202.....	846
Fourth Nat. Bank v. Blackwelder, 81 Mo. App. 428.....	180
Fow v. Roberts, 108 Pa. St. 489.....	1317
Fowle v. Alexandria, 3 Pet. 398.....	1957
Fowle v. Shirer, 70 Minn. 312.....	1199
Fowler v. Baltimore &c. R. Co., 18 W. Va. 579.... (766).....	1570
Fowler v. Buffalo Furnace Co., 41 App. Div. 84.....	1497
Fowler v. Dorlon, 24 Barb. 384.....	140, 154
Fowler v. Liverpool & G. W. S. Co., 23 Hun, 196.....	212
Fowler v. N. Y. C. & H. R. R. Co., 74 Hun, 141.....	754, 1165
Fowler v. Pleasant Valley Coal Co., 16 Utah, 348.....	1726
Fowler v. W. U. T. Co. 80 Me, 381.....	2387, 2391, 2408
Fowles v. Briggs, 116 Mich. 425.....	1444
Fowlkes v. Nashville R. Co., 5 Baxter, 663.....	1369
Fowlks v. Southern R. Co., 96 Va. 742.....	563
Fox v. Borkey, 126 Pa. St. 164.....	700
Fox v. Boston &c. R. Co., 148 Mass. 220.....	236
Fox v. Brooklyn City Railroad Co., 7 Misc. 285.....	507, 915
Fox v. Buffalo Park, 21 App. Div. 321.....	1214, 1340, 1365, 2077, 2120
Fox v. Chelsea, 171 Mass. 297.....	1920, 1939
Fox v. Port Edward, 48 Hun, 363.....	1886
Fox v. Glastonbury, 29 Conn. 204.... (699)	
Fox v. Ireland, 46 App. Div. 541.....	2078
Fox v. Iron Co., 89 Mich. 393.....	1405, 1489
Fox v. Jones, 26 Fla. 276.....	2177
Fox v. Kinney, 72 Conn. 404.....	2266
Fox v. La Compte, 2 App. Div. 61.....	1565, 1628
Fox v. Mayor, 70 Hun, 181.....	434
Fox v. New York, 5 App. Div. 349.....	679
Fox v. Oakland &c. R. Co., 118 Cal. 55.....	708, 934, 2295
Fox v. Peninsula &c. Works, 84 Mich. 676.....	1510
Fox v. Pennsylvania R. Co., 195 Pa. St. 538.... (752)	
Fox v. Porter, 6 Pa. Dist. 85.....	652
Fox v. Pruden, 3 Daly, 187.... (104).....	105, 109, 114

	PAGE
Fox v. Richmond, (Ky.) 40 S. W. Rep. 251.....	1986, 2009
Foy v. Chicago &c. R. Co., 63 Minn. 255.....	
Foy v. London &c. R. Co., 18 C. B. (N. S.) 225.... (142)	
Foy v. Troy &c. R. Co., 24 Barb. 382.....	2439
Foy v. Winston, 126 N. C. 381.....	1883, 1920, 1937
France v. N. Y., L. E. & W. R. Co., 143 N. Y. 182.....	1267, 1282
Fraier v. Georgia &c. R. Co., 101 Ga. 70.....	877
Fraker v. St. Paul R. Co., 32 Minn. 54.....	1610
Fraley v. Thomas, 98 Ga. 375.....	50
France v. Erie R. Co., 2 Hun, 513.....	517
France v. Rome &c. R. Co., 25 App. Div. 315.....	407
Francis v. Cockrell, L. R. 5 Q. B. 184.... (411).....	655, 1376
Francis v. Franklin, 179 Pa. St. 195.....	1830
Francis v. Kansas City R. Co., 110 Mo. 387.....	1532
Francis v. N. Y. Steam Co., 114 N. Y. 380.....	537, 2250
Francis v. R. Co., 110 Mo. 387.....	1727, 1728
Francis v. Schoellkopf, 53 N. Y. 152.... (827)	
Francisco v. Troy & Lansingburgh R. Co., 78 Hun, 13.....	506, 1204
Frank v. Bullion Beck &c. Co., 19 Utah, 35.....	1586, 1723, 1741
Frank v. Central R. Co., 9 Pa. Super. Ct. 129.....	234
Frank v. Chem. Nat. Bank, 37 N. Y. Supr. Ct. 26.....	163
Frank v. Metropolitan Street R. Co., 58 App. Div. 100.....	2303
Frank v. Head, (Ky.) 42 S. W. Rep. 913.....	1357
Frankford T. P. v. Phila. &c. R. Co., 54 Pa. St. 345.... (1250)	
Frankfort v. B. T. Co., 54 Pa. St. 345.... (1253)	
Frankfort v. Coleman, 19 Ind. App. 368.....	920, 1827, 1872, 1877, 2047
Franklin v. Durgee, (N. H.) 51 Atl. Rep. 911.....	2084
Franklin v. Fiske, 13 Allen, 211.....	1966
Franklin v. House, 104 Tenn. 1.....	1864
Franklin v. R. Co., 37 Minn. 409.....	1672
Franklin v. South East R. Co., 3 Hurl. & Nor. 211.... (875).....	885
Franklin Printing &c. Co. v. Behrens, 80 Ill. App. 313.....	1076, 2049
Franz v. Hilterbrand, 45 Mo. 121.... (903)	
Fraser v. Collier, 75 Ill. App. 194.....	1456, 1750
Fraser v. Freeman, 43 N. Y. 566.....	23
Fraser v. Schroeder, 163 Ill. 459.....	1635, 1639
Frassi v. McDonald, 122 Cal. 400.....	646
Frauenthal v. Laclede Gaslight Co., 67 Mo. App. 1.....	1063
Frauenthal v. W. U. T. Co., 50 Ark. 78.....	2437
Frawley v. Sheldon, 20 R. I. 258.....	1667
Fraysher v. Mississippi &c. R. Co., 66 Mo. App. 573.....	1053
Frazee v. Stott, (Mich.) 79 N. W. Rep. 896.....	1621
Frazer v. Bedford, (Tex. Civ. App.) 66 S. W. Rep. 573.....	1007
Frazer v. Kilmer, 2 Hun, 574.....	2353, 2359, 2362
Frazer v. Schroeder, 60 Ill. App. 519.....	922, 1658
Frazer v. South. &c. R. Co., 81 Ala. 185.... (741).....	797, 809
Frazier v. Butler, 172 Pa. St. 407.....	1857, 1941, 1945
Frazier v. Freeman, 43 N. Y. 566.... (16)	19
Frazier v. Georgia R. &c. Co., 96 Ga. 785.....	950
Frazier v. Georgia R. &c. Co., 101 Ga. 77.....	950, 1370, 1373
Frazier v. New York &c. R. Co., (Mass.) 62 N. E. Rep. 731.....	536
Frazier v. Nortinus, 34 Ia. 82.... (1007)	
Frazier v. Penn. R. Co., 38 Pa. St. 104.....	1519, 1547, 1643
Frazier v. Southern R. Co., 130 N. C. 355.....	777
Frazier v. W. U. T. Co., 84 Ala. 487.....	2427
Fredenborg v. N. C. R. Co., 114 N. Y. 582.....	1440
Frederick v. Columbus, 58 Oh. St. 538.....	1907
Frederick v. Louisville &c. R. Co., (Ala.) 31 South Rep. 968.....	330
Frederick v. M. H. &c. R. Co., 37 Mich. 342.....	564
Fredericks v. Northern Cent. R. Co., 157 Pa. St. 103.....	399
Freedom v. New York &c. R. Co., 24 App. Div. 306.....	364
Freel v. Market St. R. Co., 97 Cal. 40.....	1190
Freeland v. Brooklyn &c. R. Co., 54 App. Div. 90.....	836

## TABLE OF CASES.

cvii

	PAGE
Freeman v. Carter, (Tex. Civ. App.) 67 S. W. Rep. 527.....	879, 2079
Freeman v. Co., 70 Hun, 531.....	1782
Freeman v. Dennison Man. Co., 40 App. Div. 99.....	1556
Freeman v. Glens Falls Paper Mill Co., 61 Hun, 125.....	1071
Freeman v. Glens Falls Paper Mill Co., 70 Hun, 530.....	1071, 1727, 1782
Freeman v. Hutchinson, 15 Ind. App. 639.....	1290
Freeman v. Metropolitan Street R. Co., (Mo. App.) 68 S. W. Rep. 1057.....	846
Freeman v. Minneapolis & C. R. Co., 28 Minn. 443.....	1335
Freeport v. Isbell, 83 Ill. 440.....	1957
Freeport v. Isbell, 93 Ill. 381.....	1161
Freet v. Kansas City & C. R. Co., 63 Mo. App. 548.....	1038
Freidman v. Breslin, 51 App. Div. 268.....	152
Fremont & C. R. Co. v. French, 48 Neb. 638.....	923
Fremont & C. R. Co. v. Harlin, 50 Neb. 698.....	1369, 2047, 2089, 2207
Fremont v. Railway Co., 25 Neb. 138.... (941)	
Fremont & C. R. Co. v. Root, 49 Neb. 900.....	512
Fremont & C. R. Co. v. Waters, 50 Neb. 592.....	318, 346
French v. Aulls, 72 Hun, 442.....	1556
French v. Brooklyn & C. R. Co., 57 App. Div. 204.....	917, 2035
French v. Columbia Spinning Co., 169 Mass. 531.....	1558
French v. Donaldson, 57 N. Y. 496.....	633
French v. First Ave. R. Co., 24 Wash. 83.....	1559
French v. Vix, 143 N. Y. 90.....	637
French v. Western & C. R. Co., 72 Hun, 469.....	1046
Fresno Street R. Co. v. Southern P. R. Co., 135 Cal. 202.....	71
Frey v. Swartwout, 10 Pet. 81; P. B. Co. v. Brooks, 57 Pa. St. 339.... (907)	
Freyermuth v. South-Bound R. Co., 107 Ga. 31.....	1717
Frick v. St. Louis & C. R. Co., 75 Mo. 595.....	719, 776, 2141, 2152
Frieker v. Penn Bridge Co., 197 Pa. St. 442.....	1682
Friday v. Moorhead, 84 Minn. 273.....	1898
Frielenberg v. N. C. R. Co., 114 N. Y. 583.....	1429
Friedman v. Gold & Stock Tel. Co., 32 Hun, 4.....	2390
Friedman v. McGowan, 1 Penn. (Del.) 436.....	844
Friend v. Burleigh, 53 Neb. 674.... (659).....	952, 1129
Friend v. Chicago & C. R. Co., 104 Wis. 663.....	2154
Friess v. N. Y. C. & H. R. R. Co., 67 Hun, 205.....	783, 806, 820, 1228
Frink v. Coe, 4 Greene, (Iowa) 355.... (1148)	
Frink v. Potter, 17 Ill. 406.....	687
Frinkham v. Sawyer, 153 Mass. 485.....	1504
Frisbie v. Marshall, 119 N. C. 570.....	2013
Frischberg v. Hurter, 173 Mass. 22.....	1333, 1356
Fritz v. First Div. & C. R. Co., 22 Minn. 404.... (1025).....	101, 1013, 1607
Fritz v. Milwaukee & C. R. Co., 34 Iowa, 337.... (1040)	
Fritz v. Salt Lake & C. Light Co., 18 Utah, 493.....	1419, 1525, 1545
Prohisher v. Fifth Ave. Transp. Co., 151 N. Y. 431.....	406, 478, 2043
Prohle v. Brooklyn Heights R. Co., 41 App. Div. 334.....	2293
Prohs v. Dubuque, 109 Iowa, 219.....	1133, 1143, 1146, 1874
From v. Thomas, 70 Vt. 580.....	2366
Fronce v. Nichols, 22 Oh. C. C. 539.....	2196
Front v. R. Co., 23 Gratt. 623.... (1013).....	1015, 1019
Frost v. Benedict, 21 Barb. 47.... (177)	
Frost v. Grand Trunk R. Co., 10 Allen, 387.... (493).....	439, 440
Frost v. Josselyn, 180 Mass. 389.....	1292
Frost Man. Co. v. Smith, 98 Ill. App. 308.....	1487
Frost v. Oregon & C. R. Co., 69 Fed. Rep. 936.....	1499, 1658
Frost v. Waltham, 12 Allen, 85.... (697)	
Frostburg v. Dufty, 70 Md. 47.....	1904
Frostburg v. Hitchins, 70 Md. 56.....	1904
Frounfelker v. Delaware & C. R. Co., 48 App. Div. 206.....	940, 1727
Fry v. Hillan, (Tex. Civ. App.) 37 S. W. Rep. 359.....	2129
Frye v. Bath Gas & C. Co., 94 Me. 17.....	1406, 1490, 1564, 1675, 1678
Fryers' Case, 30 Md. 47.... (721)	
Fuchs v. St. Louis, 167 Mo. 620.....	1908

	PAGE
Fuchs v. Schmidt, 8 Daly. 317.....	1168, 1317
Fulcher v. Central &c. R. Co., 110 Ga. 327.... (736)	
Fulieu v. Muscatine, 57 Iowa, 457.....	2055
Fulkner v. Mammoth Min. Co., 23 Utah, 437.....	1679
Fulks v. St. Louis &c. R. Co., 111 Mo. 335.....	482
Fuller v. B. & A. R. Co., 133 Mass. 491.... (657)	
Fuller v. Coats, 18 Oh. St. 343.....	154
Fuller v. Jewett, 80 N. Y. 46.....	1487, 1533, 1612, 1619
Fuller v. Lake Shore &c. R. Co., 108 Mich. 690.....	1433, 1588, 1683
Fuller v. Naugatuck R. Co., 21 Conn. 557.... (846)	543
Fuller v. New York &c. R. Co., 175 Mass. 424.....	1656
Fuller v. Quesnel, 63 Minn. 302.....	191
Fullerton v. Fordyce, 144 Mo. 519.....	428, 918, 937
Fullerton v. Metropolitan Street R. Co., 37 App. Div. 386.....	680, 2231
Fullerton v. Metropolitan Street R. Co., 61 App. Div. 1.....	911
Fullerton v. Metropolitan Street R. Co., 63 App. Div. 1.....	2293
Fullerton v. St. Louis &c. R. Co., 84 Mo. App. 498.....	393
Fulliam v. Muscatine, 30 N. W. (Iowa) 861.... (699)	
Fullis v. Rankin, 6 N. D. 44.....	1221
Fulp v. Roanoke &c. R. Co., 120 N. C. 525.....	2143
Fulton v. Andrea, 70 Minn. 445.....	192
Fulton v. Matthews, 15 Johns. 433.... (177)	
Fulton Bag &c. Mills v. Wilson, 89 Ga. 318.....	1772
Fulton Fire Insurance Co. v. Baldwin, 37 N. Y. 648.....	77, 632, 638
Fulton Iron Works v. Kimball, 52 Mich. 146.....	1840
Fulton &c. Co. v. Baldwin, 37 N. Y. 648.....	77
Funk v. Electric Traction Co., 175 Pa. St. 559.....	2296
Funny v. Curtis, 78 Cal. 498.....	974
Funston v. Chicago &c. R. Co., 61 Iowa, 452.....	813
Furey v. New York &c. R. Co., 67 N. J. L. 270.....	2162
Furgason v. Citizen's Street R. Co., 16 Ind. App. 171.....	539
Furman v. Coe, 1 Caines Cases in Error, 96.... (57)	
Furness v. Union R. Co., 4 Pa. Dist. 784.... (1015)	
Furnish v. Missouri P. R. Co., 102 Mo. 669.....	846
Furst v. Second Ave. R. Co., 72 N. Y. 542.....	1138
Fye v. Chapin, 121 Mich. 675.....	883, 995
G. C. R. Co. v. Hewitt, 67 Tex. 473.....	2143
G. F. & M. Ins. Co. v. Marr, 46 Pa. St. 504.... (128)	
G. H. & C. R. Co. v. Donahue, 56 Tex. 162.....	527
G. H. & H. R. R. Co. v. Moore, 59 Tex. 64.... (714)	
Ga. Pac. R. Co. v. Davis, 92 Ala. 300.....	1732
Ga. Pac. R. Co. v. Mapp, 80 Ga. 631.....	1727
Ga. Pac. R. Co. v. Probst, 83 Ala. 518.....	1727
Ga. R. Co. v. Williams, 74 Ga. 723.....	1168
Ga. &c. R. Co. v. Rhodes, 56 Ga. 645.....	1746
Gaar v. Hughes, (Tenn.) 35 S. W. Rep. 1092.....	2175, 2179
Gable v. Kansas City, 148 Mo. 470.....	1868
Gabriel v. Long Island R. Co., 54 App. Div. 41.....	425, 434
Gaertner v. Schmitt, 21 App. Div. 403.....	1494
Gaffney v. Brooklyn City R. Co., 6 Misc. (N. Y.) 1.....	439
Gaffney v. Brown, 150 Mass. 479.....	2127
Gaffney v. N. Y. & N. E. R. Co., 15 R. I. 456.....	1611
Gaffney v. St. Paul &c. R. Co., 81 Minn. 459.....	370
Gagan v. Janesville, 106 Wis. 662.....	2044
Gage v. D., L. & W. R. Co., 14 Hun, 446.....	1481
Gage v. Illinois C. R. Co., 75 Miss. 17.....	577
Gage v. Pittsfield, 120 Mich. 436.....	1828
Gage v. Sharp, 24 Iowa, 15.... (182)	
Gage v. Steinson, 26 Minn. 64.....	2428
Gagen v. Janesville, 106 Wis. 662.....	2019
Gagne v. Minneapolis Street R. Co., 77 Minn. 171.....	2326, 2331
Gagnier v. Fargo, (N. D.) 88 N. W. Rep. 1030.....	1819

## TABLE OF CASES.

cix

	PAGE
Gagnon v. Dana, 69 N. H. 264.....	117, 2112
Gagnon v. Seaconnet Mills, 165 Mass. 221.....	1739
Gahagan v. Aeromotor Co., 67 Minn. 252.....	928
Gahagan v. Boston & C. R. Co., 70 N. H. 441. . . (751).....	791
Gahan v. Western Union Tel. Co., 59 Fed. Rep. 433.....	858
Gaines v. Union T. & I Co., 28 Oh. St. 144. . . (296).....	
Gaines v. Union Trans. & Ins. Co., 28 Oh. St. 418.....	279, 285, 288
Gainesville & C. R. Co. v. Edmonson, 101 Ga. 747.....	1257
Galasso v. National S. S. Co., 27 App. Div. 169.....	1627
Galaviz v. International & C. R. Co., 15 Tex. Civ. App. 61.....	382
Galbraith v. Yates, 79 Minn. 436.....	2083
Gale v. Birmingham, 64 Minn. 555.....	191
Gale v. D., L. & W. R. Co., 7 Hun. 670.....	569
Gale v. Dover, 68 N. H. 403.....	1936
Gale v. N. Y. C. & H. R. R. Co., 76 N. Y. 594.....	816, 909, 1197
Galen v. Plank Road Co., 27 N. Y. 543.....	2220
Galena & C. R. Co. v. Dill, 22 Ill. 264. . . (761).....	784
Galena & C. R. Co. v. Griffin, 31 Ill. 303. . . (1055).....	
Galena & C. R. Co. v. Yarwood, 17 Ill. 509. . . (687).....	
Galesburg v. Benedict, 22 Ill. App. 114.....	2036
Galesburg v. Hall, 45 Ill. App. 290.....	838
Galesburg Electric Motor & C. Co. v. Manville, 61 Ill. App. 490.....	2288
Galesburg & C. Co. v. Barlow, 98 Ill. App. 334.....	904
Gall v. Beckstein, 173 Ill. 187.....	1666
Gall v. Manhattan R. Co., 24 N. Y. S. Rep. 24.....	1105
Galliers v. Chicago & C. R. Co., (Iowa) 89 N. W. Rep. 1109.....	224, 1137
Galligan v. Metacomet & C. Co., 143 Mass. 527.....	2110
Gallagher v. Button, 73 Conn. 172.....	1328, 1329
Gallagher v. Edison Illum. Co., 72 Mo. App. 576.....	1098
Gallagher v. Kingston Water Co., 25 App. Div. 82.....	2081
Gallagher v. McMullin, 25 App. Div. 571.....	1418
Galloway v. Gleason, 61 Mo. App. 21.....	192
Galloway v. Western & C. R. Co., 57 Ga. 512.....	1772
Galpin v. Chicago & C. R. Co., 19 Wis. 637. . . (1012).....	
Galveston v. Barbour, 62 Tex. 172.....	857, 876
Galveston v. Brown, (Tex. Civ. App.) 67 S. W. Rep. 156.....	2008
Galveston v. Reagan, (Tex. Civ. App.) 43 S. W. Rep. 48.....	1937
Galveston O. Co. v. Morton, 70 Tex. 400.....	2106
Galveston & C. R. Co. v. Abbey, (Tex. Civ. App.) 68 S. W. Rep. 293.....	912
Galveston & C. R. Co. v. Adams, (Tex. Civ. App.) 55 S. W. Rep. 803.....	1687
Galveston & C. R. Co. v. Ball, 80 Tex. 602. . . (824).....	254
Galveston & C. R. Co. v. Bernard, (Tex. Civ. App.) 57 S. W. Rep. 686.....	930
Galveston & C. R. Co. v. Bohan, (Tex. Civ. App.) 47 S. W. Rep. 1050.....	1217, 1689, 2054
Galveston & C. R. Co. v. Botts, 22 Tex. Civ. App. 609.....	290
Galveston & C. R. Co. v. Brown, (Tex. Civ. App.) 63 S. W. 305.....	1696
Galveston & C. R. Co. v. Buch, (Tex. Civ. App.) 65 S. W. Rep. 681.....	149, 1480, 1488
Galveston & C. R. Co. v. Burnett, (Tex. Civ. App.) 37 S. W. Rep. 779.....	1113
Galveston & C. R. Co. v. Butchek, (Tex. Civ. App.) 66 S. W. Rep. 335.....	1744
Galveston & C. R. Co. v. Clark, 21 Tex. Civ. App. 167.....	856
Galveston & C. R. Co. v. Collins, 24 Tex. Civ. App. 143.....	915, 1095, 1530, 1684
Galveston R. Co. v. Cowdrey, 11 Wall. (U. S.) 478. . . (184).....	
Galveston & C. R. Co. v. Davis, 92 Tex. 372.....	1119, 1127
Galveston & C. R. Co. v. Davis, (Tex. Civ. App.) 45 S. W. Rep. 956.....	1800
Galveston & C. R. Co. v. Davis, (Tex. Civ. App.) 65 S. W. 217.....	924, 1157, 1469, 1484
Galveston & C. R. Co. v. Dehnisch, (Tex. Civ. App.) 57 S. W. Rep. 64.....	657, 913, 1095
Galveston & C. R. Co. v. Drew, 59 Tex. 10.....	1573
Galveston & C. R. Co. v. Dyer, (Tex. Civ. App.) 38 S. W. Rep. 218.....	1022, 1038
Galveston & C. R. Co. v. Dyer, (Tex. Civ. App.) 46 S. W. Rep. 841. . . (785).....	

	PAGE
Galveston &c. R. Co. v. Eaten, (Tex. Civ. App.) 44 S. W. Rep. 562.....	736, 786, 1124
Galveston &c. R. Co. v. Eckles, (Tex. Civ. App.) 60 S. W. Rep. 830.....	861, 1635, 1696
Galveston &c. R. Co. v. Efron, 38 S. W. Rep. 639.... (1113)	
Galveston &c. R. Co. v. Eitzen, (Tex. Civ. App.) 39 S. W. Rep. 625.....	797
Galveston &c. R. Co. v. Gormley, 91 Tex. 393.....	1111, 1404, 1465
Galveston &c. R. Co. v. Haas, 19 Tex. Civ. App. 645.... (792).....	769
Galveston &c. R. Co. v. Hampton, 24 Tex. Civ. App. 458.....	837, 864
Galveston &c. R. Co. v. Harris, 22 Tex. Civ. App. 16.....	739, 771, 788, 1124
Galveston &c. R. Co. v. Henning, 39 S. W. Rep. 302.....	1123
Galveston &c. R. Co. v. Herring, (Tex. Civ. App.) 36 S. W. Rep. 129....	227, 350
Galveston &c. R. Co. v. Hitzfelder, (Tex. Civ. App.) 66 S. W. 707....	1754, 2048
Galveston &c. R. Co. v. Houston, (Tex. Civ. App.) 40 S. W. Rep. 842....	255, 356
Galveston &c. R. Co. v. Huebuer, (Tex. Civ. App.) 42 S. W. Rep. 1021....	(756)..... 1207
Galveston &c. R. Co. v. Hughes, 22 Tex. Civ. App. 134.....	875, 1506, 1568
Galveston &c. R. Co. v. Hunt, (Tex. Civ. App.) 32 S. W. Rep. 549.....	322
Galveston &c. R. Co. v. Hynes, 21 Tex. Civ. App. 34.....	1696
Galveston &c. R. Co. v. Jackson, (Tex. Civ. App.) 37 S. W. Rep. 255.....	227
Galveston &c. R. Co. v. Jackson, (Tex. Civ. App.) 44 S. W. Rep. 1072....	1445
Galveston &c. R. Co. v. Jenkins, (Tex. Civ. App.) 69 S. W. Rep. 233.....	852
Galveston &c. R. Co. v. Johnson, 24 Tex. Civ. App. 180.....	885, 934
Galveston &c. R. Co. v. Johnson, (Tex. Civ. App.) 37 S. W. Rep. 243.....	356
Galveston &c. R. Co. v. Johnson, (Tex. Civ. App.) 58 S. W. Rep. 622.....	1539
Galveston &c. R. Co. v. Jones, (Tex. Civ. App.) 68 S. W. Rep. 190.....	841
Galveston &c. R. Co. v. Kief, (Tex. Civ. App.) 58 S. W. Rep. 625.....	841, 912
Galveston &c. R. Co. v. Kieff, (Tex. Civ. App.) 60 S. W. Rep. 543.....	743
Galveston &c. R. Co. v. Kutack, 72 Tex. 643.... (730)	
Galveston &c. R. Co. v. La Prelle, (Tex. Civ. App.) 65 S. W. Rep. 488.....	528
Galveston &c. R. Co. v. LeGierse, 51 Tex. 189.... (482).....	2046
Galveston &c. R. Co. v. Lester, (Tex. Civ. App.) 59 S. W. Rep. 946.....	2151
Galveston &c. R. Co. v. Long, 13 Tex. Civ. App. 664.....	531
Galveston &c. R. Co. v. Lynch, 22 Tex. Civ. App. 336.....	841, 1539
Galveston &c. R. Co. v. Masterson, (Tex. Civ. App.) 51 S. W. Rep. 1091....	14, 1609
Galveston &c. R. Co. v. Michalke, 90 Tex. 276.....	738, 749
Galveston &c. R. Co. v. Miller, (Tex. Civ. App.) 57 S. W. Rep. 702.....	934
Galveston &c. R. Co. v. Morris, (Tex. Civ. App.) 60 S. W. Rep. 813.....	554
Galveston &c. R. Co. v. Nass, (Tex. Civ. App.) 57 S. W. Rep. 910....	918, 1301, 1470
Galveston &c. R. Co. v. Newport, (Tex. Civ. App.) 65 S. W. Rep. 657.....	669, 911, 1463
Galveston &c. R. Co. v. Parrish, (Tex. Civ. App.) 40 S. W. Rep. 191.....	1521, 1568, 1714
Galveston &c. R. Co. v. Parsley, 6 Tex. Civ. App. 150.....	371
Galveston &c. R. Co. v. Patterson, (Tex. Civ. App.) 46 S. W. Rep. 848.....	350, 905, 936
Galveston &c. R. Co. v. Pitts, (Tex. Civ. App.) 42 S. W. Rep. 255.....	1127, 1633, 1675, 1689, 1734
Galveston &c. R. Co. v. Quay, (Tex. Civ. App.) 66 S. W. Rep. 219.....	1511
Galveston &c. R. Co. v. Robinett, (Tex. Civ. App.) 54 S. W. Rep. 263....	1217, 1647
Galveston &c. R. Co. v. Sanders, (Tex. Civ. App.) 65 S. W. Rep. 899.....	919
Galveston &c. R. Co. v. Scott, 21 Tex. Civ. App. 24.....	921
Galveston &c. R. Co. v. Sherwood, (Tex. Civ. App.) 67 S. W. Rep. 776....	1635, 1681, 2038
Galveston &c. R. Co. v. Simon, (Tex. Civ. App.) 54 S. W. Rep. 309.....	739, 741
Galveston &c. R. Co. v. Slinkard, 17 Tex. Civ. App. 585.....	911, 1433, 1532, 1677, 1735
Galveston &c. R. Co. v. Smith, 24 Tex. Civ. App. 127.....	1407, 1568, 1676, 1687, 1735
Galveston &c. R. Co. v. Smith, 59 Tex. 406.....	487
Galveston &c. R. Co. v. Smith, 81 Tex. 479.... (622)	
Galveston &c. R. Co. v. Smith, (Tex. Civ. App.) 24 S. W. Rep. 668....	(134)

	PAGE
Galveston &c. R. Co. v. Sneed, 4 Tex. Civ. App. 31.....	417
Galveston &c. R. Co. v. Sullivan, (Tex. Civ. App.) 42 S. W. Rep. 568.....	1207
Galveston &c. R. Co. v. Sweeney, 14 Tex. Civ. App. 216.....	1672, 1719, 1728
Galveston &c. R. Co. v. Templeton, (Tex.) 25 S. W. Rep. 135.....	2052
Galveston &c. R. Co. v. Thompson, (Tex. Civ. App.) 44 S. W. Rep. 8.....	825
Galveston &c. R. Co. v. Waldo, (Tex. Civ. App.) 32 S. W. Rep. 783.....	800, 921
Galveston &c. R. Co. v. Warnken, 12 Tex. Civ. App. 645.....	215
Galveston &c. R. Co. v. Wesendorf, (Tex. Civ. App.) 39 S. W. Rep. 132.....	1049
Galveston &c. R. Co. v. White, (Tex. Civ. App.) 32 S. W. Rep. 186.....	819, 1823
Galveston &c. R. Co. v. Worthy, (Tex. Civ. App.) 32 S. W. Rep. 557.....	1608
Galveston &c. R. Co. v. Zantzing, (Tex. Civ. App.) 49 S. W. Rep. 677.....	422, 661, 2144, 2151
Galvin v. Mayor &c., 112 N. Y. 223.....	1068, 1120, 2116
Gambert v. Hart, 44 Cal. 542.....	2174, 2179
Gamble v. Central &c. R. Co., 74 Ga. 586.....	1241
Ganiard v. R. C. &c. R. Co., 50 Hun, 22.....	1226
Ganley v. Hall, 168 Mass. 513.....	1356
Gann v. Chicago &c. R. Co., 72 Mo. App. 34.....	214, 276, 825
Gann v. Railroad, 101 Tenn. 380.....	1541, 1630
Gannon v. Laclede Gaslight Co., 145 Mo. 502.....	1063, 1105
Gannon v. Nelson, 69 Cal. 541.....	2356
Gannon v. New Orleans City &c. R. Co., 48 La. Ann. 1002.....	2291
Gannon v. New York &c. R. Co., 173 Mass. 40.....	397
Gannon v. Union Ferry Co., 29 Hun, 631.....	605
Gannon v. Wilson, 69 Cal. 541.....	1105
Gardiner v. Detroit St. R. Co., 99 Mich. 182.....	839
Gardinier v. N. Y. C. & H. R. R. Co., 103 N. Y. 674.....	1116
Gardner v. Baer, 26 Misc. 181.....	1202
Gardner v. Cohannet Mills, 165 Mass. 507.....	1751
Gardner v. Friederich, 163 N. Y. 568..... (673)	
Gardner v. Friederich, 25 App. Div. 521.....	1121, 2035, 2120
Gardner v. Newburgh, 2 Johns. Ch. 162.....	1966
Gardner v. R. Co., 58 Mich. 584.....	1708
Gardner v. St. Louis &c. R. Co., 135 Mo. 90.....	1411
Gardner v. Southern R. Co., 127 N. C. 293.....	252, 288
Gardner v. Wasco County, 37 Ore. 392.....	1948, 1949
Gardner v. Waycross Air-Line R. Co., 97 Ga. 482.....	369, 512, 1101
Gardner v. Wood, 37 Misc. 93.....	2177
Garety v. King, 9 App. Div. 443.....	1459, 1561
Gargan v. West End Street R. Co., 176 Mass. 106.....	2316
Garland v. Chicago &c. R. Co., 8 Ill. App. 571.....	737, 775
Garland v. Southern R. Co., 111 Ga. 852..... (403)	
Garland v. Towne, 55 N. H. 55.....	2233
Garlinghouse v. Jacobs, 29 N. Y. 207.....	77
Garman v. Gainesville, (Tex. Civ. App.) 41 S. W. Rep. 730.....	1941
Garner Citizens &c. Co., 198 Pa. St. 16.....	2068
Garner v. Trumbull, 94 Fed. Rep. 321.....	720, 2166
Garrett v. Phenix Bridge Co., 98 Fed. Rep. 192.....	1406, 1493, 1540, 1561
Garnier v. Porter, 90 Cal. 105.....	1245
Garrard v. Hadden, 67 Pa. St. 82..... (173)	174
Garrett v. Canandaigua, 16 N. Y. Supp. 717.....	1903
Garrett v. Chicago &c. R. Co., 36 Iowa, 121.....	1261, 1263
Garrett v. Jackson, 109 Mich. 408.....	1890
Garrett v. M. & L. R. Co., 16 Gray, 501..... (240)	
Garrett v. R. Co., 36 Iowa, 121..... (1256)	
Garrett v. Southern R. Co., 101 Fed. Rep. 102.....	1091
Garrett v. W. U. T. Co., 83 Iowa, 257.....	2397, 2408, 2416, 2451
Garretzen v. Duenckel, 50 Mo. 104..... (22)	
Garrick v. Florida &c. R. Co., 53 S. C. 448.....	904
Garrigan v. Atlantic R. Co., 186 Pa. St. 604.....	1144
Garrison v. Graybill, 52 Mo. App. 580.....	1248
Garrison v. McCullough, 28 App. Div. 467.....	1742
Garrity v. Detroit Citizens' Street R. Co., 112 Mich. 369.....	2298, 2319

	PAGE
Garrity v. Pennsylvania Casting &c. Co., 17 Pa. Super. Ct. 623.....	1498
Garrow v. Miller, 72 Vt. 284.....	1425
Garside v. Proprietors, (4 Term 581).... (323)	
Garten v. Meredith, 153 Ind. 16.....	2056
Gartey v. Meredith, 153 Ind. 16.....	2065
Gartley v. People, 28 Colo. 227.....	84
Gary v. Gulf &c. R. Co., 17 Tex. Civ. App. 129.....	371, 445
Gary v. Wells &c. Ex., (Tex. Civ. App.) 40 S. W. Rep. 845.....	320, 905
Garza v. Texas &c. R. Co., (Tex. Civ. App.) 41 S. W. Rep. 172....	2144, 2146, 2159
Garzo v. McManus, (Tex. Civ. App.) 44 S. W. Rep. 704.....	1199
Gas Co. v. Robinson, 99 Pa. St. 1.....	700
Gas Fuel Co. v. Andrews, 50 Oh. St. 695.....	1382
Gaskill v. Huffaker, (Ky.) 49 S. W. Rep. 770.....	191
Gaskins v. City of Atlanta, 73 Ga. 746.....	1957
Gasport v. Evans, 112 Ind. 133.....	699
Gasa v. R. Co., 99 Mass. 220.... (354)	342
Gastenhoper v. Clair, 10 Daly (N. Y.) 265.....	135, 148
Gaston v. Bailey, 14 Ind. App. 581.....	676, 2236, 2255
Gately v. Campbell, 124 Cal. 520.....	1323
Gates v. Fleischer, 67 Wis. 504.....	2192, 2197
Gates v. Latta, 117 N. C. 189.....	2073
Gates v. Madison Ins. Co., 1 Seld. 478.....	1309
Gates v. Preston, 41 N. Y. 113.....	1080
Gates v. State, 128 N. Y. 221.....	1501
Gaukler v. Detroit &c. R. Co., (Mich.) 90 N. W. Rep. 660.....	582
Gaul v. Rochester Paper Co., 72 Hun, 485.....	1571
Gaulden v. Kansas City &c. R. Co., 106 La. 409.....	1411, 1564
Gautret v. Egerton, L. R., 2 C. P. 371.....	2106
Gavett v. Manchester &c. R. Co., 16 Gray, 501.....	493, 509, 700
Gavigan v. Atlantic Ref. Co., 186 Pa. St. 604.....	2097
Gavigan v. Lake Shore &c. R. Co., 110 Mich. 71.....	1646
Gawlack v. Michigan C. R. Co., 11 Oh. C. C. 59.....	1709
Gaynon v. Durkee, 87 Fed. Rep. 302.....	1646
Gaynor v. Old Colony &c. R. Co., 100 Mass. 211.... (432)	
	432, 452, 805, 815, 1685
Gaysville Man. Co. v. Phoenix &c. Co., 67 N. H. 467.....	1315
Gearns v. Bowery Savings Bank, 135 N. Y. 557.....	156, 161
Geary v. Kansas City &c. R. Co., 138 Mo. 251.....	920
Geary v. Metropolitan Street R. Co., 73 App. Div. 441.....	936, 882, 2282, 2318
Gedney v. Kingsley, 41 N. Y. St. Rep. 794.....	2189
Gee v. Metropolitan R. Co., L. R., 8 Q. B. 161.... (460)	
Geelan v. Cooke, 23 Misc. 460.....	2124
Geer v. Darrall, 61 Conn. 220.....	646
Geesen v. Saguin, 115 Iowa, 7.....	1724
Gehbach v. Carlinville Nat. Bank, 83 Ill. App. 129.....	190
Gehlen v. Knorr, 101 Iowa, 700.....	2084, 2085
Geibel v. Elwell, 19 App. Div. 285.....	670
Geipel v. Steinway R. Co., 14 App. Div. 551.....	2288
Geiselman v. Scott, 25 Oh. St. 86.....	2197
Geiser v. St. Louis &c. R. Co., 61 Mo. App. 459.....	1004
Geismer v. L. S. & M. S. R. R. Co., 102 N. Y. 563.....	212, 217
Geist v. Pollack, 58 Ill. App. 429.....	100
Geist v. Rothschild, 90 Ill. App. 324.....	646, 647
Geitelsohn v. Citizens' Sav. Bank, 20 Misc. 84.....	163
Geitz v. Milwaukee &c. R. Co., 72 Wis. 307.....	512
Geloneck v. Dean Steam Pump Co., 165 Mass. 202.....	1779
Gembler v. Echterhoff, (Tex. Civ. App.) 57 S. W. Rep. 313.....	2084
Genenz v. De Forest, 49 Hun, 364.... (993)	
Geno v. Fall Mountain Paper Co., 68 Vt. 568.....	1418
Geogagn v. New York &c. R. Co., 10 App. Div. 454.....	490
Geoghegan v. The Atlas S. S. Co., 3 Misc. 224.....	968, 1116
Geoghegan v. Third Ave. R. Co., 51 App. Div. 369.....	850
George v. Clark, 85 Fed. Rep. 608.....	1597



	PAGE
George v. Depierris, 17 Misc. 400.....	140
George v. Los Angeles R. Co., 126 Cal. 357.....	2136
George v. Mobile &c. R. Co., 109 Ala. 245.....	1708
George v. St. Louis Man. Co., 159 Mo. 333.....	1721
George v. Skivington, L. R. 5 Exch. 1.....	1376
George Taylor Commission Co. v. Bell, 62 Ark. 26.....	1082
Georgia Cotton Oil Co. v. Jackson, 112 Ga. 620.....	837, 1142, 1705
Georgia Home Ins. Co. v. Holmes, 75 Miss. 390.....	1311
Georgia Northern R. Co. v. Ingram, 114 Ga. 639.....	2195
Georgia Southern &c. R. Co. v. Ashmore, 88 Ga. 529.....	552
Georgia &c. Co. v. Partee, 107 Ga. 789.....	786
Georgia &c. Co. v. Spinks, 111 Ga. 571.....	878
Georgia P. R. Co. v. Davis, 92 Ala. 300.....	1532
Georgia Pac. R. Co. v. Robinson, 68 Miss. 643.....	474
Georgia Pac. R. Co. v. Vanderwood, 90 Ala. 49.....	541
Georgia R. Co. v. Dougherty, 86 Ga. 744.... (560)	
Georgia R. Co. v. Garr, 57 Ga. 277.....	883
Georgia R. Co. v. Hayden, 71 Ga. 518.....	830
Georgia R. Co. v. Nelius, 83 Ga. 70.....	1479
Georgia R. Co. v. Olds, 77 Ga. 673.....	563, 849
Georgia R. Co. v. Rhodes, 56 Ga. 645.... (687)	
Georgia R. v. Williams, 74 Ga. 723.....	1195
Georgia R. &c. Co. v. Bohler, 98 Ga. 184.....	2089
Georgia R. &c. Co. v. Clarke, 97 Ga. 706.....	570, 2621
Georgia R. &c. Co. v. Clary, 103 Ga. 639.....	788, 2139
Georgia R. &c. Co. v. Hicks, 95 Ga. 301.....	1219, 1801
Georgia R. &c. Co. v. Hopkins, 108 Ga. 324.....	526
Georgia R. &c. Co. v. Richmond, 98 Ga. 495.....	526
Georgia R. &c. Co. v. Sawyer, 112 Ga. 346.....	950
Georgia &c. R. Co. v. Anderson, 33 Ga. 110.... (1046)	
Georgia &c. R. Co. v. Bigelow, 68 Ga. 219.....	571
Georgia &c. R. Co. v. Cook, 114 Ga. 760.... (785)	
Georgia &c. R. Co. v. Cosby, 97 Ga. 299.....	797, 1797
Georgia &c. R. Co. v. Eskew, 86 Ga. 641.... (892)	
Georgia &c. R. Co. v. Forrester, 96 Ga. 428.....	1099
Georgia &c. R. Co. v. Hughart, 90 Ala. 36.....	243
Georgia &c. R. Co. v. Hughes, 87 Ala. 610.... (730)	
Georgia &c. R. Co. v. Keating, 99 Ga. 308.....	911
Georgia &c. R. Co. v. McCurdy, 45 Ga. 288.....	443, 486
Georgia &c. R. Co. v. Neely, 56 Ga. 540.....	1000, 1015, 1016
Georgia &c. R. Co. v. Pound, 111 Ga. 6.....	330
Georgia &c. R. Co. v. Thompson, 111 Ga. 731.....	1165
Georgia &c. R. Co. v. Watkins, 97 Ga. 381.....	501
Geraty v. National Ice Co., 16 App. Div. 174.....	8
Gerdes v. Christofer &c. Co., (Mo.) 25 S. W. Rep. 557.....	2051
Gerety v. Philadelphia &c. R. Co., 81 Pa. St. 274.... (758)	
Gerlach v. Edelmeier, 15 J. & S. 292.... (3).....	1399
German State Bank v. Minneapolis &c. R. Co., 113 Fed. Rep. 414.....	210
German &c. Ins. Co. v. Standard Gaslight Co., 67 App. Div. 539.....	1244
German-American &c. Co. v. Farley, 102 Ga. 720.....	1311
Germania Bank v. La Follette, 72 Fed. Rep. 145.....	195
Germania Fire Ins. Co. v. The Memphis & Charleston R. Co., 72 N. Y. 90.....	280, 311
Germania Fire Ins. Co. v. Harraden, 90 Ill. App. 250.....	1305
Germania Safety Vault &c. Co. v. Driskell, (Ky.) 66 S. W. Rep. 610.....	60
Germania Sav. Bank v. Village of Suspension Bridge, 73 Hun, 590.... (184)	
Germantown &c. R. Co. v. Brophy, 105 Pa. St. 38.....	540
Germantown &c. R. Co. v. Walling, 97 Pa. St. 55.....	511
Gerner v. Mosher, 58 Neb. 135.....	73
Gerrard v. La Croase &c. R. Co., 113 Wis. 258.....	2319, 2340
Getman v. Delaware &c. R. Co., 162 N. Y. 21.....	768
Getty v. Town of Hamlin, 127 N. Y. 636.....	1139, 1938
Getzoff v. New York, 51 App. Div. 450.....	1864
Geveke v. Grand Rapids &c. R. Co., 56 Mich. 589.....	839

	PAGE
Gheens v. Golden, 90 Ind. 427.....	2055
Gibbins v. Kentucky C. R. Co., 89 Ky. 231.....	849
Gibbons v. Anderson, 80 Fed. Rep. 345.....	75
Gibbons v. British &c. Nav. Co., 175 Mass. 212.....	1704
Gibbons v. Vanderhoogt, 75 Ill. App. 106.....	2354
Gibbons v. Williams, 135 Mass. 333..... (705)	719
Gibbons v. Wisconsin &c. R. Co., 58 Wis. 335..... (1259)	
Gibbs v. Chicago &c. R. Co., 26 Minn. 427..... (793)	
Gibbs v. Coykendall, 39 Hun, 140.....	115
Gibbs v. Hannibal, 82 Mo. 143.....	946
Gibbs v. Linaburg, 22 Mich. 479..... (172)	
Gibbs v. Van Buren, 48 N. Y. 661.....	2
Giblin v. McMullen, L. R. 2 P. C. App. 317..... (108)	127
Giblin v. The National Steamship Co., 8 Misc. 22.....	206, 222
Gibney v. Lewis, 68 Conn. 392..... (854)	
Gibney v. State, 137 N. Y. 1.....	690
Gibson v. American Mer. Ex. Co., 1 Hun, 387.....	328
Gibson v. Burlington &c. R. Co., 107 Iowa, 596.....	1742
Gibson v. Culver, 17 Wend. 305..... (322)	
Gibson v. Denton, 4 App. Div. 198.....	2102
Gibson v. Erie R. Co., 63 N. Y. 449..... 1439, 1440, 1493, 1494, 1550, 1584,	1597
Gibson v. Glozozinski, 76 Ill. App. 400.....	910
Gibson v. International Trust Co., 177 Mass. 100.....	32, 1077
Gibson v. Huntington, 38 W. Va. 177.....	1817
Gibson v. Jackson, (Miss.) 22 South. Rep. 891.....	1838
Gibson v. Jörbert, 115 Iowa, 163.....	1379
Gibson v. Leonard, 37 Ill. App. 344.....	1075, 2111
Gibson v. Missouri &c. Ins. Co., 82 Mo. App. 515.....	1314
Gibson v. Northern C. R. Co., 22 Hun, 289.....	1612, 1631
Gibson v. Pacific R. Co., 46 Mo. 163.....	1408, 1429, 1478
Gibson v. Sullivan, 164 Mass. 557.....	682
Gibson v. Sziepienski, 37 Ill. App. 601.....	1075
Gibson v. Torbert, 115 Iowa, 163.....	2068
Giebel v. Elwell, 19 App. Div. 235.....	1604
Gier v. Los Angeles &c. R. Co., 108 Cal. 129.....	1513, 1518, 1742
Giese v. Hall, 37 Hun, 440.....	1760
Giffen v. Lewiston, (Id.) 55 Pac. Rep. 545..... 856, 1862, 1878, 1883,	2013
Gifford v. Rutland Savings Bank, 63 Vt. 108.....	165
Gift v. Reading, 3 Pa. Super. Ct. 359.....	1813, 1815, 1965
Gideens v. Western Union Teleg. Co., 111 Ga. 824.....	2458
Gilbert v. Boston, 139 Mass. 313.....	697
Gilbert v. Erie R. Co., 97 Fed. Rep. 747..... (755)	
Gilbert v. Finch, 76 N. Y. Supp. 143.....	2205
Gilbert v. Gallup, 76 Ill. App. 526.....	823
Gilbert v. Guild, 144 Mass. 601.....	1448, 1503
Gilbert v. Hoffman, 66 Iowa, 205.....	364
Gilbert v. Kolb, 85 Md. 627.....	47
Gilbert v. Mickle, 4 Sandf. Ch. (N. Y.) 57.....	2260
Gilbert v. Nagle, 118 Mass. 278.....	2128
Gilbert v. West End Street R. Co., 160 Mass. 403.....	497
Gilbertson v. Bangor &c. R. Co., 89 Me. 337..... (791)	
Gilbertson v. Patterson Mills Co., 174 Pa. St. 369.....	1160
Gilboy v. Detroit, 115 Mich. 121.....	1988
Gildersleeve v. Hammond, 109 Mich. 431.....	2100, 2101
Gile v. Libby, 36 Barb. 70..... (137)	152
Giles v. Boston &c. R. Co., 55 N. H. 552..... (1043)	1044
Giles v. Diamond &c. Co., (Del.) 6 Cent. 867.....	1106, 1454
Giles v. New Orleans &c. R. Co., 33 La. Ann. 154.....	2335
Giles v. Railway Co., 33 La. Ann. 154.....	2231
Giles v. Shenandoah, 111 Iowa, 83.....	2019
Gilkie &c. Co. v. Dawson &c. Gas Co., 46 Neb. 333.....	1084
Gill v. Atlantic &c. R. Co., 27 Oh. St. 240..... (1045)	
Gill v. Cubitt, 3 B. & C. 466..... (183)	

## TABLE OF CASES.

CXV

	PAGE
Gill v. Middleton, 105 Mass. 477.... (1317)	
Gill v. Oakland, 124 Cal. 335.....	2016
Gill v. P. R. R. Co., 37 Hun, 107.....	580
Gillam v. Sioux City R. Co., 26 Minn. 268.... (1046)	
Gillenwater v. Madison &c. R. Co., 5 Ind. 339.....	262, 389, 416
Gillespie v. Crawford, (Tex. Civ. App.) 42 S. W. Rep. 621.....	194
Gillespie v. Lincoln, 35 Neb. 34.... (3).....	1987
Gillespie v. McGowan, 100 Pa. St. 144.....	721, 2130
Gillespie v. Newburgh, 54 N. Y. 468.....	1489
Gillespie Co. v. Cumming, 62 N. J. L. 370.....	1123
Gillett v. Missouri &c. R. Co., (Tex. Civ. App.) 68 S. W. Rep. 61.....	230, 2053
Gillin v. Patten &c. R. Co., 93 Me. 80.....	1690, 1708, 1777
Gillingham v. Ohio R. Co., 33 W. Va. 588.....	30
Gillis v. Penn. R. Co., 9 P. F. Smith, (Pa.) 129.....	511
Gillis v. R. Co., 59 Pa. St. 143.... (384).....	815
Gillis v. Tel. Co., 61 Vt. 461.....	2389
Gillis v. W. U. T. Co., 61 Vt. 46.....	2397
Gillman v. Florida &c. R. Co., 53 S. C. 210.....	904
Gillman v. Sioux City &c. R. Co., 62 Iowa, 299.... (1031)	
Gillrie v. City of Lockport, 122 N. Y. 403.....	1129, 1888
Gillshannon v. Stony Brook Co., 10 Cush. 228.....	375, 1601, 1614, 1620
Gillum v. Sioux City R. Co., 26 Minn. 268.... (1034)	
Gillum v. Sisson, 53 Mo. App. 516.....	990
Gilman v. Eastern R. Co., 10 Allen, 233.....	1519, 1530
Gilman v. Noyes, 51 N. H. 629.... (1008)	
Gilman v. South &c. R. Co., 70 Ala. 268.....	30
Gilmartin v. Lackawanna Valley Rapid-Transit Co., 186 Pa. St. 193.....	2336
Gilmore v. Brooklyn Heights R. Co., 6 App. Div. 117.....	1101
Gilmore v. Mittineague Paper Co., 169 Mass. 471.....	1508
Giltz v. St. Louis &c. R. Co., 65 Mo. App. 445.....	1005
Ginfortune v. New Orleans, 61 Fed. Rep. 64.....	956
Ginn v. Ogdensburg Transit Co., 85 Fed. Rep. 985.... (240)	
Ginna v. Second Ave. R. Co., 67 N. Y. 596.....	504, 537
Ginther v. Yorkville, 3 Pa. Super. Ct. 403.....	2008
Giordano v. Brandywine Granite Co., (Del.) 52 Atl. Rep. 332.....	1524, 1570, 1598, 1665, 1717
Girard v. Griswold, 177 Mass. 57.....	1415
Girard Point Storage Co. v. Roy, 93 Fed. Rep. 574.....	2131
Giraudi v. Electric I. Co., 107 Cal. 120.... (1058)	
Girton v. Lehigh Valley R. Co., 17 Pa. Super. Ct. 143.....	454
Gisburn v. Hurst, 1 Salk. 249.... (198)	
Gisleson v. Minneapolis &c. R. Co., 85 Minn. 329.....	927
Givan v. Bank of Alexandria, (Tenn.) 52 S. W. Rep. 923.....	12
Given v. W. U. T. Co., 24 Fed. Rep. 119.....	2394, 2421
Gividen v. Louisville &c. R. Co., (Ky.) 32 S. W. Rep. 612.... (761)	
Glaciux v. Fogel, 88 N. Y. 434.... (45)	
Glading v. Philadelphia, 202 Pa. St. 324.....	1882
Gladmon v. Johnson, 36 J. L. (C. P.) 153.... (983)	
Gladwell v. Steggall, 88 Bing. (N. Y.) 733.....	2185
Glaholm v. Hays, 2 Man. & G. 257.... (575)	
Glantz v. South Bend, 106 Ind. 305.....	1864
Glasgow v. Gillenwaters, (Ky.) 67 S. W. Rep. 381.....	914, 1825, 1934
Glasier v. Town of Hebron, 131 N. Y. 447.....	1847
Glaas v. Coleman, 14 Wash. 635.....	154, 1333
Glasscock v. Central P. R. Co., 73 Cal. 137.... (751)	
Glasser v. Meyrovitz, 119 Ala. 152.....	1082
Glassey v. Hestonville, 57 Pa. St. 172.... (718)	
Gleadell v. Thompson, 56 N. Y. 194.....	5, 239, 309
Gleason v. Boehm, 58 N. J. L. 475.....	1356, 1357
Gleason v. Brennan, 50 Me. 222.....	931
Gleason v. Detroit &c. R. Co., 73 Fed. Rep. 647.....	1708
Gleason v. Goodrich L. Co., 32 Wis. 85.....	207, 614
Gleason v. Morrison, 20 Misc. 4.....	99, 112

	PAGE
Gleason v. Smith, 172 Mass. 50.....	1219, 1698
Gleason v. Transportation Co., 32 Wis. 85.... (208)	
Gledden v. Cincinnati, 4 Oh. Dec. 423.....	2030
Gleim v. Harris, 181 Pa. St. 587.... (751)	
Glendening v. Sharp, 22 Hun, 78.....	749
Glenn v. Jackson, 93 Ala. 342.....	155
Glenn v. Winters, 17 Misc. 597.....	111
Glenn v. Southern Exp. Co., 86 Tenn. 594.....	253
Glens Falls &c. Co. v. Travelers' Ins. Co., 162 N. Y. 399.....	1778
Glickson v. Shannon, 88 Ill. App. 240.....	2368
Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625.....	1098, 1158
Globe &c. Ins. Co. v. Lexington, 173 Mass. 6.....	1246
Glockner v. Wabash R. Co., 95 Ill. App. 550.....	742
Glover v. Charleston &c. R. Co., 57 S. C. 228.....	904
Glover v. Dwight &c. Co., 148 Mass. 22.....	1504
Glover v. Gray, 9 Ill. App. 329.....	721
Glover v. Meinrath, 133 Mo. 292.....	1699
Glover v. Savannah &c. R. Co., 107 Ga. 34.....	1370
Glover v. Scotton, 72 Mich. 369.....	1712
Glovinsky v. Cunard S. S. Co., 6 Misc. 388.....	295, 625
Glushing v. Sharp, 96 N. Y. 676.....	800, 803, 807
Gmaehle v. Rosenberg, 80 App. Div. 541.....	1797
Goble v. Dillon, 86 Ind. 327.... (1080)	
Gobrecht v. Sicking, 18 Oh. C. C. 881.....	1163
Godbold v. Branch Bank &c., 11 Ala. 191.....	70
Goddard v. Chicago &c. R. Co., 54 Wis. 548.... (1036)	1040
Goddard v. Grand Trunk R. Co., 57 Me. 202.....	522, 527, 902, 906
Goddard v. Harpswell, 88 Me. 228.....	1989
Goddard v. Merchants' Bank, 4 N. Y. 147.... (1079)	166
Godefroy v. Dalton, 6 Bing. 468.....	2174
Godfrey v. New York &c. R. Co., 161 N. Y. 565.....	2164
Godfrey v. Ohio &c. R. Co., 116 Ind. 30.....	563
Godfrey v. Streator R. Co., 56 Ill. App. 378.... (1064)	1058, 1066
Godley v. Haggerty, 20 Pa. St. 387.....	652, 1318, 1324, 1328
Goff v. Great Northern R. Co., 30 L. J. Q. B. 148.... (518)	
Goggin v. Osborne & Co., 115 Cal. 437.....	1461, 1737
Goldberg v. Ahnapee &c. R. Co., 105 Wis. 1.....	612
Goldberg v. N. Y. C. & H. R. R. Co., 133 N. Y. 561.....	447
Golden v. Chicago &c. R. Co., 84 Mo. App. 59.....	1915, 2247, 2368
Golden v. Newbrand, 52 Iowa, 59.... (19)	
Golden v. New York Health Dept., 21 App. Div. 420.....	1362
Golden v. Pennsylvania R. Co., 187 Pa. St. 635.....	788
Golden v. Romer, 20 Hun. 438.... (616)	
Golden v. Sieghardt, 33 App. Div. 161.....	1423
Goldreek v. Union R. Co., 20 R. I. 128.....	2273
Goldrick v. Bristol &c. Bank, 123 Mass. 320.... (164)	
Goldschmidt v. New York, 14 App. Div. 135.....	641, 2009
Goldthwait v. R. Co., 160 Mass. 554.....	1492
Goldwasser v. Metropolitan Street R. Co., 32 Misc. 682.....	470
Gold &c. Co. v. Todd, 17 Hun. 548.....	2436
Golob v. Pasinsky, 72 App. Div. 176.....	1322
Gomez v. Gomez, 33 App. Div. 379.....	57
Gonsior v. Railroad Co., 36 Minn. 385.....	1670
Gonzales v. N. Y. &c. R. Co., 38 N. Y. 440.... (674)	656, 703
Gonzales v. N. Y. C. & H. R. R. R. Co., 39 How. 407.... (448)	
Gonzales v. New York &c. R. Co., 50 How. (N. Y.) 126.....	493
Gooch v. Bowyer, 62 Mo. App. 206.....	1031
Gooch v. Parker, 16 Tex. Civ. App. 256.....	181
Goodall v. New York &c. R. Co., 89 Hun. 559.....	2168
Goodbar v. Wabash R. Co., 53 Mo. App. 434.... (622)	
Goode v. Martin, 57 Md. 606.....	983
Goodell v. New York &c. R. Co., 67 App. Div. 271.....	754
Goodfellow v. Boston &c. R. Co., 106 Mass. 461.....	657

	PAGE
Goodfellow v. Mayor &c., 100 N. Y. 15.....	424, 1818, 1882
Goodhart v. Pennsylvania R. Co., 177 Pa. St. 1.....	840, 850, 851, 861, 1204, 1223
Goodloe v. Memphis &c. R. Co., 107 Ala. 233.....	525
Goodman v. Crystal, 56 App. Div. 64.....	1719
Goodman v. Gay, 15 Pa. St. 188.....	1006, 2364
Goodman v. Harvey, 4 Ad. & El. 870.... (184).....	182, 183
Goodman v. Merchants' &c. Co., 3 Super. Ct. (Pa.) 282.....	289
Goodman v. Missouri &c. R. Co., 71 Mo. App. 460.....	251, 940
Goodman v. R. &c. R. Co., 81 Va. 576.....	1430
Goodman v. Simonds, 20 How. (U. S.) 343, 365.... (182).....	183
Goodman v. Taylor, 5 C. & P. 410.....	2363
Goodman v. Walker, 30 Ala. 482.....	2174
Goodnow v. Walpole Emery Mills, 146 Mass. 261.....	1483
Goodrich v. Burlington &c. R. Co., 97 Iowa, 521.....	688
Goodrich v. Burlington &c. R. Co., 103 Iowa, 412.... (771).....	2144, 2342
Goodrich v. Chippewa &c. R. Co., 108 Wis. 329.....	1741
Goodrich v. Kansas City &c. R. Co., 152 Mo. 222.....	1485
Goodrich v. N. Y. C. & H. R. R. Co., 116 N. Y. 398.....	1473, 1541
Goodrich v. P. & N. Y. C. &c. R. Co., 29 Hun, 50.....	500
Goodsell v. Taylor, 41 Minn. 207.... (1074).....	
Goodwell v. Montana C. R. Co., 18 Mont. 293.....	1646
Goodwin v. Cheveley, 28 L. J. Ex. 298.... (1011).....	
Goodwin v. Cheveley, 4 H. & N. 631.... (1010).....	
Goodwin v. Nickerson, 17 R. I. 478.....	949
Goodwin v. Smith, (Ky.) 66 S. W. Rep. 179.....	1399
Gould v. Chapin, 20 N. Y. 258.....	308, 323
Gourin v. Allegheny Traction Co., 179 Pa. St. 327, 333.....	344
Gout v. Dinsmore, 11 Mass. 45.....	1147
Gordon v. Fuson, (Ky.) 60 S. W. Rep. 293.....	2115
Gordon v. Cummings, 152 Mass. 513.....	1076
Gordon v. Hutchinson, 1 Watts. & S. (Pa.) 285.....	201
Gordon v. Louisville R. Co., (Ky.) 44 S. W. Rep. 972.....	1091
Gordon v. People, 33 N. Y. 501.....	1201, 1202
Gordon v. R. Co., 52 N. H. 596.....	575
Gordon v. Reynolds Card Man. Co., 47 Hun, 278.....	1409, 1410
Gordon v. Taunton, 126 id. 349.....	2007
Gordon v. West End St. R. Co., 175 Mass. 181.....	370
Gorby v. N. Y. &c. R. Co., 75 Md. 297.....	1728
Gore v. Norwich &c. Co., 2 Daly 254.... (609).....	
Gores v. Graff, 77 Wis. 174.... (948).....	
Gorham v. Cooperstown, 59 N. Y. 660.....	1818, 1914, 1939
Gorham v. Eastchester Electric Company, 80 Hu 290.....	2095
Gorham Man. Co. v. Fargo, 35 N. Y. Supr. 434.... (231).....	
Gorham v. Gross, 125 Mass. 232.....	1321, 2263
Gorman v. Des Moines Brick Man. Co., 99 Iowa, 257.....	1739, 1758
Gorman v. McArdle, 67 Hun, 484.....	1459
Gorman v. Minneapolis &c. R. Co., (Iowa) 90 N. W. Rep. 79.....	1587
Gorman v. Pacific &c. R. Co., 26 Mo. 441.... (1015).....	1034, 1045
Gorman v. White, 19 App. Div. 324.....	1325
Gorman v. Woodbury, 173 Mass. 180.....	1602
Gormley v. Ohio &c. R. Co., 72 Ind. 31.....	1613, 1614, 1620
Gormully &c. Man. Co. v. Olsen, 72 Ill. App. 32.....	1408
Gorr v. Mittelstaedt, 96 Wis. 296.....	2115
Gorton v. Erie R. Co., 45 N. Y. 660.... (780).....	
Gorz v. Metropolitan Street R. Co., 54 App. Div. 365.....	1161
Goshen v. Alford, 154 Ind. 58.....	1856, 2006, 2047
Goshorn v. Smith, 11 Nor. (Pa.) 435.... (700).....	
Goss Printing-Press Co. v. Lempke, 90 Ill. App. 427.....	1673
Gossens v. Matto Man. Co., 104 Wis. 250.....	1722
Gothard v. Alabama &c. R. Co., 67 Ala. 114.....	493, 662, 751
Gott v. Dinsmore, 111 Mass. 45.... (279).....	
Gottlieb v. Barton, 13 Colo. App. 147.....	1082
Gottlieb v. N. Y., L. E. & W. R. Co., 100 N. Y. 462.....	1471, 1473

	PAGE
Gottwald v. Bernheimer, 6 Daly, 212.....	2363, 2364
Goucher v. Sioux City, 115 Iowa, 639.....	1934
Gould v. Bangor &c. R. Co., 82 Maine, 122.... (1036)	
Gould v. Booth, 66 N. Y. 62.....	1961, 1966
Gould v. Chapin, 20 N. Y. 266.... (308)	
Gould v. Chicago &c. R. Co., 5 McCrary, (U. S.) 502.....	594
Gould v. Chicago &c. R. Co., 18 Fed. Rep. 155.....	588
Gould v. Great Northern R. Co., 63 Minn. 37.....	1054
Gould v. Palmer, 96 Ga. 798.....	1369, 2183
Gould v. Schermer, 101 Iowa, 582.....	1126, 1831, 1833, 1840, 2255
Gould v. Slater Woolen Co., 147 Mass. 315.....	1379
Gould v. Topeka, 32 Kas. 485.....	1914
Gould v. Union T. Co., 190 Pa. St. 198.....	2287
Goulin v. Bridge Co., 64 Mich. 190.....	1708
Gov. St. R. Co. v. Hanlon, 53 Ala. 70.....	691, 809
Gowen v. Bush, 76 Fed. Rep. 349.....	1160, 1499, 1631
Gr. Sr. R. Co. v. Hawk, 72 Ala. 112.... (493)	
Grabowski v. Pennsylvania Steel Co., 2 Dauph. Co. Rep. 118.....	1126, 1557
Grace v. Adams, 100 Mass. 508.....	283
Grace v. Gulf &c. R. Co., (Miss.) 25 South. Rep. 875.....	1057
Grace v. St. Louis R. Co., 156 Mo. 295.... (474)	
Grace & Hyde Co. v. Kennedy, 99 Fed. Rep. 679.....	1673
Grace &c. Co. v. Kennedy, 99 Fed. Rep. 679.....	1456
Graddert v. Chicago &c. R. Co., 109 Iowa, 547.....	370
Graddy v. Western &c. Teleg. Co., (Ky.) 43 S. W. Rep. 468.....	1162
Gradin v. St. Paul &c. R. Co., 30 Minn. 217.....	13
Grady v. Georgia R. &c. Co., 112 Ga. 668.....	815, 2141, 2142
Grady v. Southern R. Co., 92 Fed. Rep. 491.....	1531, 1621
Graeff v. Philadelphia &c. R. Co., 161 Pa. St. 231.....	531
Graesel v. Weber, 76 Mo. App. 677.....	1635
Graf v. Feist, 9 Misc. 479.....	844
Graff v. Detroit Citizens' Street R. Co., 109 Mich. 77.....	2316
Graham v. Consolidated T. Co., 64 N. J. L. 10.....	874, 934, 2287, 2295
Graham v. D. & H. C. Co., 46 Hun, 386.... (1029)	
Graham v. Davis, 4 Oh. St. 363, 376.....	285, 288, 1099
Graham v. McNeill, 20 Wash. 466.....	402, 503, 512
Graham v. Manhattan R. Co., 149 N. Y. 336.....	455, 500, 524
Graham v. Oxford, 105 Iowa, 705.....	1878
Graham v. Payne, 122 Ind. 403.....	973, 986
Graham v. Penn. R. Co., 139 Pa. St. 149.....	429
Graham v. Penn. R. Co., 39 Fed. Rep. 596.....	606
Graham v. Philadelphia, 19 Pa. Super. Ct. 292.....	1951
Graham v. Poughkeepsie, 68 App. Div. 262.....	1887
Graham v. Manhattan R. Co., 8 Misc. 305.....	501
Graham v. President &c. D. & H. C. Co., 46 Hun, 386.....	1051
Graham v. R. Co., 66 Mo. 536.... (903)	
Graham v. St. Charles Street R. Co., 47 La. Ann. 1656.....	31
Graham v. W. U. T. Co., 1 Col. 230.....	2391
Graham's Estate, 8 Pa. Dist. 479.....	67
Gramlich v. Wurst, 86 Pa. St. 74.....	2254
Grand v. Michigan &c. R. Co., 83 Mich. 564.....	1708, 1727, 1776
Grand Island &c. R. Co. v. Swimbank, 51 Neb. 521.....	1172
Grandorf v. Detroit Citizens' Street R. Co., 113 Mich. 496.....	1880
Grand Rapids R. Co. v. Diller, 110 Ind. 223.....	1145
Grand Rapids &c. R. Co. v. Huntley, 38 Mich. 537.....	1206, 1177, 1421
Grand Rapids &c. R. Co. v. Jones, 81 Ind. 523.... (1037)	
Grand Rapids &c. R. Co. v. Judson, Mich. 506.... (1036)	
Grand Rapids &c. R. Co. v. Monroe, 47 Mich. 152.... (1035)	1036
Grand Trunk R. Co. v. Baird, 94 Fed. Rep. 946.....	1716
Grand Trunk R. Co. v. Cobleigh, 78 Fed. Rep. 784.... (761)	
Grand Trunk R. Co. v. Jennings, 13 App. Cas. 800.... (886)	
Grand Trunk R. Co. v. McMillan, 16 Can. Supp. Ct. R. 543.... (349)	
Grand Trunk R. Co. v. Richardson, 91 U. S. 454.....	1255, 1258, 1259, 1264

## TABLE OF CASES.

cxix

	PAGE
Grand Valley Irr. Co. v. Pitzer, 14 Colo. App. 123.....	2086
Grandy v. Jubber, 5 Best & Smith, 76.....	1346
Graney v. St. Louis, 141 Mo. 180.....	1877
Graney v. St. Louis &c. R. Co., 140 Mo. 89.....	2157
Graney v. St. Louis &c. R. Co., 157 Mo. 666.....	1221
Grange v. Reigh, 93 Wis. 552.....	182
Granger v. Boston, 146 Mass. 276.....	792
Granger v. Seneca Falls, 45 Hun, 60.....	1811
Grant v. Brainerd, (Minn.) 90 N. W. Rep. 307.....	1832
Grant v. Brooklyn, 41 Barb. 381..... (836)	
Grant v. Enfield, 11 App. Div. 358.....	1821
Grant v. Green, 41 Iowa, 88..... (849)	
Grant v. McGrath, 56 Conn. 333.....	2382
Grant v. Newton, 1 N. Y. 195..... (613)	
Grant v. Omaha &c. R. Co., 94 Mo. App. 312.....	1246
Grant v. Penn. &c. R. Co., 133 N. Y. 657..... (1115)	
Grant v. Slater Co., 14 R. I. 380.....	1459
Grant v. Village of Groton, 77 Hun, 497.....	1204
Grant County Deposit Bank v. Littell, ( Ky.) 56 S. W. Rep. 669.....	72
Grath v. Iowa Barb Wire Co., 5 North. Co., Rep. ( Pa.) 359.....	1373
Grattan v. Metropolitan L. Ins. Co., 80 N. Y. 23.....	1182, 1183
Grattan v. Met. Life Ins. Co., 28 Hun, 430.....	1186
Grattis v. Kansas City &c. R. Co., 153 Mo. 380.....	1434, 1607
Gratton v. Williamston, 116 Mich. 462.....	1170, 1873
Graven v. McLeod, 92 Fed. Rep. 846..... (454)	
Graver Tank Works v. O'Donnell, 91 Ill. App. 524.....	1674
Graves v. Adams Ex. Co., 176 Mass. 280.....	284
Graves v. Battle Creek, 95 Mich. 266.....	2037
Graves v. Brewer, 4 App. Div. 327.....	1741
Graves v. Fitchburg R. Co., 29 App. Div. 591.....	623
Graves v. Kansas City &c. R. Co., 69 Mo. App. 574.....	2090
Graves v. Mattison, 67 Vt. 630.....	2102
Graves v. Santway, 6 N. Y. Supp. 892.....	2188
Graves v. Shattuck, 35 N. H. 257.....	2346
Graves v. Thomas, 95 Ind. 361.....	2125
Graves v. Tichnor, 6 N. H. 537.....	1104
Graville v. Manhattan R. Co., 105 N. Y. 525.....	588
Grau v. Brooklyn Heights R. Co., 76 N. Y. Supp. 20.....	1199
Gray v. Boston Gas Light Co., 114 Mass. 149.....	2263
Gray v. Boston &c. R. Co., 168 Mass. 20.....	584
Gray v. Brooklyn, 10 Abb. Pr. ( U. S.) 186.....	1902
Gray v. Central R. Co. &c., 89 Hun, 477..... (940)	
Gray v. Cincinnati Southern R. Co., 11 Fed. Rep. 683.....	368
Gray v. Commutator Co., 85 Minn. 463..... 909, 1411, 1484, 1498,	1680
Gray v. Farmer's Nat. Bank, 81 Md. 631.....	179
Gray v. Ft. Pitt Traction Co., 198 Pa. St. 184.....	454
Gray v. Goode, 72 Ill. App. 504.....	190
Gray v. Griffin, 111 Ga. 361..... 1809, 1906, 1984	
Gray v. Jackson, 51 N. H. 9..... (351).....	278, 350
Gray v. Little, 127 N. C. 304.....	903
Grayson v. Lynch, 163 U. S. 468.....	1207
Gray v. McDonald, 104 Mo. 303..... 903, 955	
Gray v. McDonald, 28 Mo. App. 477.....	944
Gray v. McLaughlin, 26 Iowa, 279..... (1176)	
Gray v. Metropolitan Street R. Co., 39 App. Div. 536.....	513
Gray v. Murray, 3 Johns. Ch. 167.....	1305
Gray v. Packet Co., 64 Mo. 50..... (940)	
Gray v. Pullin, 5 B. & S. 970.....	2250
Gray v. Railway Co., 65 N. Y. 561.....	2361
Gray v. R. & B. R. Co., 61 Hun, 212.....	538
Gray v. Red Lake Falls Lumber Co., 85 Minn. 24.....	1572
Gray v. Second Ave. R. Co., 65 N. Y. 561.....	2288, 2366
Gray v. Thompkins, 15 N. Y. Supp. 953.....	2364

	PAGE
Gray v. Washington Water Power Co., 27 Wash. 713.....	2349
Gray v. W. U. T. Co., 87 Ga. 350.....	2435
Graybill v. Chicago &c. R. Co., (Iowa) 84 N. W. Rep. 946.....	786
Gray's Harbor &c. Co. v. Continental Nat. Bank, 74 Mo. App. 633.....	941
Greaney v. Holyoke Water Power Co., 174 Mass. 437.....	1383
Greany v. Long Island R. Co., 101 N. Y. 419.....693, 747, 765, 778, 790,	1164
Graney v. St. Louis &c. R. Co., 157 Mo. 666.....	776
Great Northern R. Co. v. Bruyere, 114 Fed. Rep. 540.....	529
Great Northern R. Co. v. Coats, 115 Fed. Rep. 452.....	1112, 1254
Great Northern R. Co. v. Eastern &c. R. Co., 9 Hare (Ch.) 306.....	1334
Great N. W. R. Co. v. Harrison, 26 Eng. L. & Eq. 443....(381)	
Great Northern R. Co. v. Kasischki, 104 Fed. Rep. 440.....	2204
Great Northern R. Co. v. McLaughlin, 70 Fed. Rep. 669.....	1678
Great Northern R. Co. v. Shepherd, 8 Exch. 30....(618)	
Great Northern R. W. Co. v. Shepherd, 14 Engl. L. & Eq. 367....(268)	
Great Western R. Co. v. Blake, 7 Hurls. & Nor. (Exch.) 978....(355)	
Great Western Min. &c. Co. v. Harris, 111 Fed. Rep. 38.....	75
Great Western R. Co. v. Haworth, 39 Ill. 346.....	1262
Great Western R. Co. v. Miller, 19 Mich. 305.....	582
Greco v. Bernheimer, 17 Misc. 592.....	1110
Greeley &c. R. Co. v. Yeager, 11 Col. 345.....	901
Green v. Ashland Water Co., 101 Wis. 258.....	1148
Green v. Banta, 97 N. Y. 627.....	1106
Green v. Banta, 48 N. Y. Supr. Ct. 156.....	1702
Green v. Bedell, 48 N. H. 546....(1148)	
Green v. Boston & L. R. Co., 128 Mass. 221.....	1147
Green v. Brainerd, 85 Minn. 318.....	1728, 1751
Green v. Bridgetown, 9 Cent. L. J. (Ga.) 206....(368)	
Green v. Chicago &c. R. Co., 110 Mich. 648....(814 787)	
Green v. Clark, 12 N. Y. 343.....	358, 2026
Green v. Clark, 5 Denio, 497....(312)	
Green v. Cornwall, 73 Conn. 309.....	2019
Green v. Crapo, (Mass.) 62 N. E. Rep. 956.....	47
Green v. Doyle, 21 Ill. App. 205.....	1006
Green v. Eden, 24 Ind. App. 583.....	1988, 2047, 2344, 2354
Green v. Erie R. Co., 11 Hun, 333.....	448
Green v. Erie R. Co., 65 N. J. L. 301.....	761
Green v. Garrington, 16 Oh. St. 548....(82)	
Green v. Green, 69 N. Y. 553.....	2203
Green v. Hollingsworth, 5 Dana, (Ky.) 173.....	117
Green v. Hornesville &c. R. Co., 24 App. Div. 43.....	1214
Green v. Metropolitan Street R. Co., 171 N. Y. 201.....	1187
Green v. Metropolitan Street R. Co., 42 App. Div. 160.....	650
Green v. Metropolitan Street R. Co., 65 App. Div. 54.....	2325
Green v. Middlesex Valley R. Co., 31 App. Div. 412.....	679
Green v. Middlesex R. Co., 10 Misc. 475.....	2036
Green v. Nebagamain, (Wis.) 89 N. W. Rep. 520.....	1837
Green v. Pacific Lumber Co., 130 Cal. 435.....	408, 1101, 1178, 1205
Green v. Penn. R. Co., 36 Fed. Rep. 66.....	431
Green v. Port Jervis, 55 App. Div. 58.....	2015
Green v. Port Jervis, 31 Misc. 59.....	2010
Green v. Roark, 59 Pac. Rep. 655.....	1137
Green v. Sansom, 41 Fla. 94.....	1108, 1401
Green v. Smith, 169 Mass. 485.....	1464
Green v. Southern California R. Co., (Cal.) 67 Pac. Rep. 4.....	883
Green v. Western &c. Teleg. Co., 72 Fed. Rep. 250.....	1741
Green v. Wilkie, 98 Iowa, 74.....	172
Green v. Young Men's &c. Ass'n, 65 Ill. App. 459.....	1075
Green Bay &c. Co. v. Kankanna Water Power Co., 112 Wis. 323.....	2086
Green Bay &c. Co. v. Patten Paper Co., 172 U. S. 58.....	2085
Greenberg v. Third Ave. R. Co., 35 App. Div. 619.....	2293
Greene County Poor Directors, 145 Pa. St. 508.....	995
Greene v. Minneapolis &c. R. Co., 31 Minn. 248.....	1572, 1578



# TABLE OF CASES.

CXXI

PAGE

Greenfield Bank v. Stowell, 123 Mass. 196....(173)	
Greengard v. St. Paul City R. Co., 72 Minn. 181.....	2336
Greenhaus v. Alter, 30 App. Div. 585.....	1363
Green Island Bd. of Health v. Magill, 17 App. Div. 249.....	2027
Greenleaf v. Dubuque R. Co., 33 Iowa, 52.....	768, 1542, 1543
Greenleaf v. Ill. Central R. Co., 29 Iowa, 14.....	682, 1409, 1572, 1578
Greenlee v. R. Co., 5 Tenn. 418....(957)	
Greenlee v. Southern R. Co., 122 N. C. 977.....	1429, 1508, 1776
Greenville v. Britton, 19 Tex. Civ. App. 79.....	1815
Greenville v. Henry, 78 Ill. 150.....	1166
Greenville Oil & C. C. v. Harkey, 20 Tex. Civ. App. 225.....	909, 1506, 1741
Greenville &c. Co. v. Davenport, (Tex. Civ. App.) 37 S. W. Rep. 624.....	1147
Greenwald v. United &c. Ass'n, 18 Misc. 91.....	1315
Greenwood v. Callahan, 119 Mass. 298.....	663
Greer v. Nashville &c. R. Co., 104 Tenn. 242.....	1004, 1049
Greef v. Brown, 7 Kan. App. 394.....	1751
Gregg v. Beane, 69 Vt. 22.....	181
Gregg v. Gregg, 55 Pa. St. 227.....	1002, 1007
Gregg v. Illinois &c. R. Co., 147 Ill. 550.....	121, 330
Gregg v. Page Belting Co., 69 N. H. 247.....	1301
Gregg v. Wyman, 4 Cush. 322.....	2383
Gregor v. Cady, 82 Me. 131.....	1328
Gregory v. Chicago &c. R. Co., 100 Iowa, 345.....	546, 592
Gregory v. N. Y., L. E. & W. R. Co., 55 Hun, 303.....	1227
Gregory v. N. Y., L. E. & W. R. Co., 55 N. Y. 308.....	836
Grein v. Muskingum County Commissioners, 23 Oh. C. C. 43.....	1985
Grennis v. Louisville Electric Light Co., (Ky.) 49 S. W. Rep. 184.....	1398
Greneaux v. Wheeler, 6 Tex. 515....(183)	
Grenell v. Michigan C. R. Co., 124 Mich. 141....(788)	739
Grennell v. Cook, 3 Hill, 485....(154)	
Grieten v. Chicago &c. R. Co., 22 Fed. Rep. 609.....	2140
Griewold v. N. Y. C. & H. R. R. Co., 115 N. Y. 61.....	1225
Gribble v. City of B., 68 Ill. 47.....	2125
Griebel v. Brooklyn Heights R. Co., 68 App. Div. 204.....	1189
Grier v. Sampson, 27 Pa. St. 183.....	2346
Grieve v. Illinois C. R. Co., 104 Iowa, 659.....	224, 240, 241, 1091
Grieve v. New York &c. R. Co., 25 App. Div. 518.....	107, 1090
Grieve v. North Jersey Street R. Co., 65 N. J. L. 409.....	516, 934
Griffen v. Lewiston, (Id.) 55 Pac. Rep. 545.....	844, 1145
Griffen v. Manice, 166 N. Y. 188.....	1069, 1105
Griffen v. Maince, 47 App. Div. 70.....	1098
Griffin v. Auburn, 58 N. H. 121.....	1928
Griffin v. Boston & Alb. R. Co., 148 Mass. 143.....	1433
Griffin v. Colver, 16 N. Y. 489....(824)	
Griffin v. Chicago &c. R. Co., 68 Iowa, 638.....	769
Griffin v. Martin, 7 Barb. 297....(1010)	
Griffin v. Mayor &c. of New York, 9 N. Y. 456.....	1939, 1943, 1952
Griffin v. N. Y. Central R. Co., 40 N. Y. 34....(656)	
Griffin v. N. Y. Central R. Co., 112 N. Y. 126....(673)	673
Griffin v. United Light Co., 164 Mass. 492.....	1062
Griffin v. Utica & Black River R. Co., 41 Hun, 448.....	343
Griiffth v. Denver Consol. T. Co., 14 Colo. App. 504.....	2314
Griiffth v. Friendly, 30 Misc. 393.....	10
Griiffth v. Metropolitan Street R. Co., 32 Misc. 289.....	2304, 2334
Griiffth v. Missouri Pac. R. Co., 98 Mo. 160.....	428
Griiffth v. Pennsylvania R. Co., 13 Lane. L. Rev. 193....(791)	
Griiffth v. Zipperwick, 28 Oh. St. 388....(124)	
Griiffths v. Gidlow, 3 H. & N. 648.....	1547
Griiffths v. Godson, Hen. & Man. 648.....	1601
Griiffths v. Kellogg, 39 Wis. 290.....	172
Griiffths v. Metropolitan Street R. Co., 171 N. Y. 106.....	1189
Griiffths v. N. J. & N. Y. R. Co., 5 Misc. 320.....	1560
Griiffths v. New Jersey & New York Railroad Co., 8 Misc. 3.....	1636

	PAGE
Griggs v. Frankenstein, 14 Minn. 81.....	2363
Griggs v. Day, 21 App. Div. 442.....	117
Grill v. G. & C. Co., L. R., 1 C. P. 600.... (102)	
Grimaldi v. Lane, 177 Mass. 565.....	1565, 1752
Grimes v. Penn. R. Co., 36 Fed. Rep. 72.....	372
Grimes v. Young, 51 App. Div. 239.....	27
Grimm v. Washburn, 100 Wis. 229.....	1837
Grimmelmman v. Union P. R. Co., 101 Iowa, 74.....	1701
Grimsley v. Hankins, 40 Fed. Rep. 400.....	1627
Grinnel v. Cook, 3 Hill, (N. Y.) 485.... (155)	137
Griinnell v. W. U. T. Co., 113 Mass. 299.....	2389, 2398, 2399, 2413, 2415
Grinsley v. Hankins, 46 Fed. Rep. 400.....	959
Grinstead v. Sanders, (Ky.) 56 S. W. Rep. 665.....	2083
Grippen v. N. Y. C. R. R. Co., 40 N. Y. 34.....	745, 749, 753, 788, 1524
Griswold v. Chicago & C. R. Co., 64 Wis. 652.....	345
Griswold v. Haven, 25 N. Y. 526.... (23)	
Griswold v. Hutchison, 47 Neb. 727.....	2189
Griswold v. Ludington, 116 Mich. 401.....	220, 1864, 2014
Griswold v. New York & C. R. Co., 53 Conn. 371.... (266)	
Griths v. Earl of Dudley, L. R. 9 Q. B. 357.....	1772
Groake v. Laemmle, 56 App. Div. 61.....	372, 1091, 2133
Grocer v. Robinson, 72 Wis. 199.....	2238
Groesbeck v. Chicago & C. R. Co., 93 Wis. 505.... (752)	
Groesbeck v. Pinson, 21 Tex. Civ. App. 44.....	653
Grogan v. Adams Ex. Co., 114 Pa. St. 523.....	252
Grogan v. Broadway Foundry Co., 87 Mo. 321.....	878, 1333
Grogan v. Schmiele, 53 Conn. 186.....	2113
Gropp v. Carnegie Steel Co., 4 Pa. Super. Ct. 621.....	1542
Gross v. Carnegie Steel Co., 28 Pittsb. L. J. (N. S.) 318.....	2131
Gross v. Electric Traction Co., 180 Pa. St. 99.....	953
Gross v. Penn., Poughkeepsie & Boston R. Co., 65 Hun, 191.....	2027, 2204
Gross v. Portsmouth, 68 N. H. 266.....	1983
Gross v. South Chicago City R. Co., 73 Ill. App. 217.....	2245
Gross v. Moore, 14 App. Div. 353.....	55
Grosse v. Chicago & C. R. Co., 91 Wis. 482.....	1053
Grossman v. Cosgrove, 75 Ill. App. 385.....	911
Grossman v. Dodd, 63 Hun, 324.... (279)	294
Grossman v. Fargo, 6 Hun, 310.....	328
Grossman v. Supreme Lodge, 25 State R. 843.....	1186
Grosvenor v. New York Central R. R. Co., 39 N. Y. 34.... (208)	
Grote v. Chester & C. R. Co., 2 Exch. 251.... (411)	
Grothier v. New York & C. Bridge, 19 App. Div. 586.....	2014
Grötsch v. Steinway R. Co., 19 App. Div. 130.....	469
Groundwater v. Washington, 92 Wis. 56.....	2014
Grove v. Burlington & C. R. Co., 75 Iowa, 163.... (1041)	
Groves v. Louisville & C. R. Co., (Ky.) 58 S. W. Rep. 508.....	2339
Groves v. Rochester, 39 Hun, 5.....	1933
Grow v. Pottsville, 197 Pa. St. 337.....	684
Grows v. Maine & C. R. Co., 67 Me. 104.... (753)	
Grows v. Maine & C. R. Co., 69 Me. 412.....	769
Grundly v. Dyre, (Ky.) 48 S. W. Rep. 155.....	67
Grunst v. Chicago & C. R. Co., 109 Mich. 342.....	2163
Gubbilosi v. Rothschilds, 37 Misc. 99.....	929
Guedelhofer v. Ersting, 23 Ind. App. 188.....	1416, 1683
Guenther v. Fohey, 26 Ind. App. 93.....	974
Guest v. Church Hill, 90 Md. 689.....	1961
Guggenheim v. Lake Shore & C. R. Co., 66 Mich. 150.....	775, 810
Guggenheim Smelting Co. v. Scofield, (N. J. L.) 46 Atl. Rep. 711.....	1622, 1629
Guhl v. Whitecomb, 109 Wis. 69.....	752, 1238
Guichard v. New, 9 App. Div. 485.....	1071
Guillaume v. General Transportation Co., 100 N. Y. 491.....	279, 311
Guillaume v. The Hamburg & Am. P. Co., 42 N. Y. 212.....	232
Guilloz v. Ft. Wayne & C. R. Co., 108 Mich. 41.....	1101

## TABLE OF CASES.

cxxxiii

	PAGE
Guinard v. Knapp &c. Co., 95 Wis. 482.....	1419
Gulterman v. The Liverpool, New York & Philadelphia Steamship Co., 83 N. Y. 358.....	1226, 1232
Guldseth v. Carlin, 19 App. Div. 588.....	1105
Gulf &c. R. Co. v. Abendroth, (Tex. Civ. App.) 55 S. W. Rep. 1122.....	769, 792
Gulf &c. R. Co. v. Abbott, (Tex.) 24 S. W. 299.....	840
Gulf &c. R. Co. v. Barnett, (Tex. Civ. App.) 34 S. W. Rep. 449.....	927
Gulf &c. R. Co. v. Baugh, (Tex. Civ. App.) 42 S. W. Rep. 245.....	215
Gulf &c. R. Co. v. Beall, 91 Tex. 310.....	943
Gulf &c. R. Co. v. Beall, (Tex. Civ. App.) 43 S. W. Rep. 605.....	1408
Gulf &c. R. Co. v. Bell, 93 Tex. 632.....	493
Gulf &c. R. Co. v. Bell, 24 Tex. Civ. App. 579.....	543, 841, 861, 1155, 1156
Gulf &c. R. Co. v. Blankenbeckler, 13 Tex. Civ. App. 249.....	1005, 1038, 2031
Gulf &c. R. Co. v. Bollin, (Ind. Terr.) 51 S. W. Rep. 1085.....	2165
Gulf &c. R. Co. v. Brown, 16 Tex. Civ. App. 93.....	543
Gulf &c. R. Co. v. Bryant, (Tex. Civ. App.) 66 S. W. Rep. 804.....	2166, 2170
Gulf &c. R. Co. v. Calvert, 11 Tex. Civ. App. 297.....	743, 786, 1442, 1695, 1799
Gulf &c. R. Co. v. Campbell, 76 Tex. 174.....	2139
Gulf &c. R. Co. v. Clark, (Ind. Terr.) 51 S. W. Rep. 962.....	2090
Gulf &c. R. Co. v. Cleveland, (Tex. Civ. App.) 33 S. W. Rep. 687.....	865, 936
Gulf &c. R. Co. v. Cole, (Tex. Civ. App.) 35 S. W. Rep. 525.....	1053
Gulf &c. R. Co. v. Compton, 75 Tex. 667.... (878)	
Gulf &c. R. Co. v. Compton, (Tex. Civ. App.) 38 S. W. Rep. 220.....	208, 233, 825
Gulf &c. R. Co. v. Conder, 23 Tex. Civ. App. 488.....	528, 833
Gulf &c. R. Co. v. Copeland, 17 Tex. Civ. App. 55.....	565, 938
Gulf &c. R. Co. v. Crossman, 11 Tex. Civ. App. 622.....	255
Gulf &c. R. Co. v. Darby, (Tex. Civ. App.) 67 S. W. Rep. 129.....	233, 1145, 1584, 1773
Gulf &c. R. Co. v. Dawkins, 77 Tex. 228.....	21, 2139
Gulf &c. R. Co. v. Delaney, 22 Tex. Civ. App. 427.....	926, 1438
Gulf &c. R. Co. v. Duvall, 12 Tex. Civ. App. 349.....	1740
Gulf &c. R. Co. v. Ellison, 70 Tex. 491.....	306
Gulf &c. R. Co. v. Engle, 84 Ill. 397.....	1016
Gulf &c. R. Co. v. Evansich, 61 Tex. 3.....	1126
Gulf &c. R. Co. v. Fowler, 12 Tex. Civ. App. 683.....	319
Gulf &c. R. Co. v. Frank Co., (Tex. Civ. App.) 48 S. W. Rep. 210.....	320, 350
Gulf &c. R. Co. v. Frost, (Tex. Civ. App.) 34 S. W. Rep. 167.....	227, 1195
Gulf &c. R. Co. v. Gardecke, (Tex. Civ. App.) 39 S. W. Rep. 312.... (936)	
Gulf &c. R. Co. v. Gatewood, 79 Tex. 89.....	219
Gulf &c. R. Co. v. Haden, (Tex. Civ. App.) 68 S. W. Rep. 530.....	1449, 1478
Gulf &c. R. Co. v. Hamilton, 17 Tex. Civ. App. 76.....	755, 791, 1127
Gulf &c. R. Co. v. Hayter, (Tex. Civ. App.) 55 S. W. Rep. 128.....	867
Gulf &c. R. Co. v. Henry, 84 Tex. 678.....	569
Gulf &c. R. Co. v. Hernandez, (Tex. Civ. App.) 45 S. W. Rep. 197.....	1559
Gulf &c. R. Co. v. Hill, (Tex. Civ. App.) 58 S. W. Rep. 255.....	2142, 2143
Gulf &c. R. Co. v. Hockaday, 14 Tex. Civ. App. 613.....	1127
Gulf &c. R. Co. v. Holland, (Tex. Civ. App.) 66 S. W. Rep. 68.....	798
Gulf &c. R. Co. v. Holtzheuser, (Tex. Civ. App.) 45 S. W. Rep. 188.....	852, 905
Gulf &c. R. Co. v. Hubert, (Tex. Civ. App.) 54 S. W. Rep. 1074.....	1714
Gulf &c. R. Co. v. Jagoe, (Tex. Civ. Rep.) 32 S. W. Rep.) 717.....	927, 1264
Gulf &c. R. Co. v. Johnson, 92 Tex. 591.... (1257)	
Gulf &c. R. Co. v. Johnson, (Tex. Civ. App.) 51 S. W. Rep. 531.....	1253
Gulf &c. R. Co. v. Johnson, (Tex. Civ. App.) 67 S. W. Rep. 182.....	1117, 1147
Gulf &c. R. Co. v. Johnson, 54 Fed. Rep. 474.... (1020)	
Gulf &c. R. Co. v. Jones, (Ind. Terr.) 37 S. W. Rep. 208.....	246, 1099
Gulf &c. R. Co. v. Jordan, (Tex. Civ. App.) 33 S. W. Rep. 690.....	578
Gulf &c. R. Co. v. Knott, 14 Tex. Civ. App. 158.....	1425, 1747
Gulf &c. R. Co. v. Leatherwood, (Tex. Civ. App.) 69 S. W. Rep. 119.....	320, 341, 1223
Gulf &c. R. Co. v. Lee, (Tex. Civ. App.) 65 S. W. Rep. 54.....	210
Gulf &c. R. Co. v. Letsch, (Tex. Civ. App.) 55 S. W. Rep. 584.....	797, 798
Gulf &c. R. Co. v. Levi, 76 Tex. 337.....	219
Gulf &c. R. Co. v. Levy, 50 Tex. 563.....	2432, 2454
Gulf &c. R. Co. v. Loonie, 82 Tex. 323.....	2449
Gulf &c. R. Co. v. McCorquodale, 71 Tex. 41.....	236

	PAGE
Gulf &c. R. Co. v. McFadden, 25 S. W. (Tex.) 451.....	905
Gulf &c. R. Co. v. McWhirter, 77 Tex. 356.... (706)	
Gulf &c. R. Co. v. Mangham, (Tex. Civ. App.) 69 S. W. Rep. 80.....	669
Gulf &c. R. Co. v. Matthews, (Tex. Civ. App.) 66 S. W. Rep. 588.....	1217
Gulf &c. R. Co. v. Mayo, 14 Tex. Civ. App. 253.....	1741
Gulf &c. R. Co. v. Merchand, 24 Tex. Civ. App. 47.... (752)	
Gulf &c. R. Co. v. Miller, 149 Ind. 490.... (742)	
Gulf &c. R. Co. v. Miller, 21 Tex. Civ. App. 609.....	2182
Gulf &c. R. Co. v. Milner, (Tex. Civ. App.) 66 S. W. Rep. 574.... (793)	
Gulf &c. R. Co. v. Mitchell, 18 Tex. Civ. App. 380.....	1039
Gulf &c. R. Co. v. Moody, (Tex. Civ. App.) 39 S. W. Rep. 987.....	927
Gulf &c. R. Co. v. Moore, (Tex. Civ. App.) 68 S. W. Rep. 559.....	1374, 1677
Gulf &c. R. Co. v. Moorman, (Tex. Civ. App.) 46 S. W. Rep. 662.....	565
Gulf &c. R. Co. v. Morgan, (Tex. Civ. App.) 64 S. W. Rep. 688.....	454
Gulf &c. R. Co. v. Newman, (Tex. Civ. App.) 64 S. W. Rep. 790.....	1503, 1753
Gulf &c. R. Co. v. Oakes, 94 Tex. 155.....	2098
Gulf &c. R. Co. v. Pendery, 14 Tex. Civ. App. 60.....	771, 796, 2038
Gulf &c. R. Co. v. Powell, (Tex. Civ. App.) 60 S. W. Rep. 979.....	1301
Gulf &c. R. Co. v. Reagan, (Tex. Civ. App.) 34 S. W. Rep. 796.....	852, 889
Gulf &c. R. Co. v. Rediker, 75 Tex. 310.....	955
Gulf &c. R. Co. v. Ross, 11 Tex. Civ. App. 201.....	1144
Gulf &c. R. Co. v. Royall, 18 Tex. Civ. App. 86.....	926, 1095
Gulf &c. R. Co. v. Ryan, 69 Tex. 665.....	1733
Gulf &c. R. Co. v. Sandifer, (Tex. Civ. App.) 69 S. W. Rep. 461.....	911, 1302
Gulf &c. R. Co. v. Short, (Tex. Civ. App.) 51 S. W. Rep. 261.....	338
Gulf &c. R. Co. v. Singer, (Tex. Civ. App.) 40 S. W. Rep. 1004.....	740
Gulf &c. R. Co. v. Sparger, (Tex. Civ. App.) 39 S. W. Rep. 1001.....	554
Gulf &c. R. Co. v. Stanley, 89 Tex. 42.... (824)	240
Gulf &c. R. Co. v. Staton, (Tex. Civ. App.) 49 S. W. Rep. 277.....	228, 824
Gulf &c. R. Co. v. Steele, (Tex. Civ. App.) 69 S. W. Rep. 171.....	1220
Gulf &c. R. Co. v. Todd, (Tex. Civ. App.) 19 S. W. Rep. 761.....	2417, 2436
Gulf &c. R. Co. v. Trott, 86 Tex. 412.....	867
Gulf &c. R. Co. v. Wagley, 15 Tex. Civ. App. 308.....	384, 454
Gulf &c. R. Co. v. Wallen, 65 Tex. 568.... (683)	
Gulf &c. R. Co. v. Warlick, (Ind. Terr. App.) 35 S. W. Rep. 235.... 396, 427, 502, 666	
Gulf &c. R. Co. v. Warner, 89 Tex. 475.....	1799
Gulf &c. R. Co. v. Warner, 22 Tex. Civ. App. 167.... (841)	921, 1677
Gulf &c. R. Co. v. Warner, (Tex. Civ. App.) 36 S. W. Rep. 118.....	1411, 1672
Gulf &c. R. Co. v. Weens, (Tex. Civ. App.) 38 S. W. Rep. 1028.... (1093)	
Gulf &c. R. Co. v. West, (Tex. Civ. App.) 36 S. W. Rep. 101.....	742
Gulf &c. R. Co. v. White, (Tex. Civ. App.) 32 S. W. Rep. 322.... (240)	
Gulf &c. R. Co. v. Whittig, (Tex. Civ. App.) 35 S. W. Rep. 857.....	1444, 1494
Gulf &c. R. Co. v. Williams, 72 Texas, 159.....	1688
Gulf &c. R. Co. v. Williams, 21 Tex. Civ. App. 466.....	384, 430
Gulf &c. R. Co. v. Williams, (Tex. Civ. App.) 39 S. W. Rep. 967.....	1553, 1630
Gulf &c. R. Co. v. Wilkins, (Tex. Civ. App.) 32 S. W. Rep. 351.....	2156
Gulf &c. R. Co. v. Wilner, (Tex. Civ. App.) 66 S. W. Rep. 574.....	1157
Gulf &c. R. Co. v. Wilson, 69 Tenn. 739.....	2399
Gulf &c. R. Co. v. Wilson, 69 Tex. 739.....	2417
Gulf &c. R. Co. v. Wilson, 79 Tex. 371.....	373
Gulf &c. R. Co. v. Wilson, (Tex. Civ. App.) 59 S. W. Rep. 589.....	769
Gulf &c. R. Co. v. Wittie, 68 Tex. 295.....	1254
Gulf &c. R. Co. v. Younger, 90 Tex. 387.....	885
Gulf &c. R. Co. v. Younger, (Tex. Civ. App.) 40 S. W. Rep. 423.... (767)	
Gullikson v. McDonald, 62 Minn. 278.....	1986
Gulline v. Lowell, 144 Mass. 491.....	1851
Gulliver v. Blauvelt, 14 App. Div. 523.....	2243
Gulzoni v. Tyler, 64 Cal. 334.....	205
Gumb v. Twenty-third St. R. Co., 114 N. Y. 411.....	827, 843, 2042
Gumbel v. Illinois C. R. Co., 48 La. Ann. 1180.....	1093
Gumby v. Metropolitan Street R. Co., 65 App. Div. 38.....	2294
Gumz v. Chicago &c. R. Co., 52 Wis. 672.....	690
Gun v. Willingham, 111 Ga. 427.....	1560

	PAGE
Gunderson v. Northwestern Elevator Co., 47 Minn. 161....(13)	
Gundlach v. Schott, 192 Ill. 509.....	910, 1215
Gunn v. Felton, (Ky.) 57 S. W. Rep. 15.....	2151
Gunn v. New York &c. R. Co., 171 Mass. 417.....	1779
Gunn v. Ohio River R. Co., 42 W. Va. 676....(708).....	2142, 2143, 2148
Gunn v. Union R. Co., 22 R. I. 321.....	2279
Gunn v. Willingham, 111 Ga. 427.....	1669
Gunn v. Wisconsin &c. R. Co., 70 Wis. 203....(752)	
Gunther v. Dranbauer, 86 Md. 1.....	2246
Gunther v. Lee, 45 Md. 60.....	2203, 2208
Gunther v. Yorkville, 3 Pa. Super. Ct. 403....(648)	
Gurley v. Missouri Pac. R. Co., (Mo.) 26 S. W. Rep. 953.....	2052
Gurney v. Rockport, 93 Me. 360.....	1871, 1942
Gusman v. Caffery &c. R. Co., 49 La. Ann. 1264.....	2046
Gustafson v. Seattle Traction Co., (Wash.) 68 Pac. Rep. 721.....	1521
Gustle v. Union Pac. R. Co., 23 Mo. App. 361....(504)	
Guthman v. Manhattan R. Co., 53 N. Y. Supp. 139.....	501
Guthrie v. Great Northern R. Co., 76 Minn. 277.....	1710
Guthrie v. Harvey Lumber Co., 9 Okl. 464.....	2013
Guthrie v. Nix, 3 Okla. 136.....	2055
Guthrie v. Nix, 5 Okla. 555.....	1909
Guthrie v. Philadelphia, 73 Fed. Rep. 688.....	1997
Guthrie v. Swan, 3 Okla. 116.....	1825, 1920
Guthrie v. Swan, 5 Okla. 779.....	1814, 1822, 1875, 1882
Guthrie v. Thistle, 5 Okla. 517.....	1091, 1821
Gutierrez v. Laredo &c. R. Co., (Tex. Civ. App.) 45 S. W. Rep. 310.....	2334
Gutkind v. Elroy, 97 Wis. 649.....	2016
Gutridge v. R. Co., 94 Mo. 468.....	1403, 1474
Gutrie v. Missouri &c. R. Co., 51 Neb. 746....(667)	
Guy v. N. Y., O. & W. R. R. Co., 30 Hun, 399.....	579
Guy v. Pittsburg &c. R. Co., 6 Oh. N. P. 3.....	350, 904
H. &c. R. Co. v. Sympkins, 54 Tex. 615.....	2146
H. & T. R. Co. v. Carson, 66 Tex. 345.....	809
H. & T. &c. R. Co. v. Clemmons, 55 Tex. 88.....	513
H. & T. &c. R. Co. v. Leslie, 57 Tex. 83....(498)	
H. & T. &c. R. Co. v. McNamara, 59 Tex. 255.....	1432
H. & T. &c. R. Co. v. Myers, 55 Tex. 110.....	1547
H. & T. &c. R. Co. v. Wilson, 60 Tex. 142....(784)	
Haack v. Fearing, 5 Robt. (N. Y.) 528.....	19, 1288
Haas v. Buffalo & P. R. Co., 40 Hun, 145.....	1550
Haas v. Chicago &c. R. Co., 97 Ill. App. 624.....	1682, 1737
Haas v. Grand Rapids &c. R. Co., 47 Mich. 401.....	751, 794, 809
Haas v. Kansas &c. R. Co., 81 Ga. 792.....	219
Haas v. New York &c. R. Co., 11 App. Div. 625.....	1032
Haas v. R. Co., 40 Hun, 145.....	1537
Haase v. Oregon &c. R. Co., 19 Ore. 354.....	2157
Habecker v. Lancaster, 9 Pa. Super. Ct. 553.....	1848, 1849
Haberlan v. Lake Shore &c. R. Co., 73 Ill. App. 261.....	742
Hackemaek v. Wiebrock, 71 Ill. App. 71.....	628
Hackett v. Smelsley, 77 Ill. 109....(954)	
Hackett v. W. U. T. Co., 80 Wis. 187.....	1694
Hackford v. N. Y. Central &c. R. Co., 53 N. Y. 654....(673)	
Hadden v. Smithville Man. Co., 29 Conn. 548.....	674
Haden v. Clark, 10 N. Y. Supp. 291....(843)	
Hadencamp v. Second Ave. R. Co., 1 Sweeney, 490....(500)	
Hadley v. Bafendale, 9 Exch. 353....(829)	
Hadley v. Lake Erie &c. R. Co., 21 Ind. App. 675.....	2169
Hadley v. No. Trans. &c. Co., 115 Mass. 304.....	247
Hadley v. Orchard, 77 Mo. App. 141.....	1104
Hadley v. Taylor, L. R. 1 C. P. 53.....	2255
Hadley v. W. U. T. Co., 115 Ind. 191.....	2438, 2445
Haeker v. Chicago &c. R. Co., 91 Ill. App. 570.....	772, 1165

	PAGE
Haff v. Adams, (Ariz.) 59 Pac. Rep. 111.....	148, 154
Haff v. Minneapolis &c. R. Co., 14 Fed. Rep. 558....(729)	
Haffner v. Chesapeake &c. R. Co., 96 Va. 528.....	1717
Hafner v. St. Paul City R. Co., 73 Minn. 252.....	2323
Hagan v. P. & W. R. Co., 3 R. I. 88....(906)	
Hagan v. Casey, 30 Wis. 553....(1005)	
Hagan v. Philadelphia &c. R. Co., 15 Phila. 278....(497)	
Hagan's Petition, 7 Ont. L. J. 311....(709)	
Hagar v. Clark, 78 N. Y. 45.....	204
Hagenlocher v. C. I. & B. R. Co., 99 N. Y. 136.....	1174
Hagerstown v. Witmer, 86 Md. 293.....	990
Hagerstrom v. West Chicago Street R. Co., 67 Ill. App. 63.....	418, 687
Haggerty v. Powers, 66 Cal. 368.....	2024
Haggerty v. Badwin, (Mich.) 91 N. W. Rep. 150.....	179
Haggerty v. Flint &c. R. Co., 59 Mich. 366.....	562
Haggerty v. Hughes, 4 Baxter, 422.....	2052
Haggerty v. Lewiston, 95 Me. 374.....	1865
Hahn v. Garrett, 69 Cal. 146.....	1000
Hahn v. Kordula, 5 Kan. App. 142.....	982
Hahn v. Roach, 7 Northampton Co. Rep. (Pa.) 21.....	1329
Hahn v. So. Pac. &c. Co., 51 Cal. 605....(30)	
Hahnke v. Frederick, 140 N. Y. 224.....	979
Haile v. Clayton &c. Co., 61 N. J. L. 197.....	399
Haile v. Texas &c. R. Co., 60 Fed. Rep. 557.....	867
Hailzip v. Rosenberg, 63 Ark. 430.....	1325
Haigh v. Elmira, 42 App. Div. 391.....	1892
Haigh v. N. Y. Central R. Co., 7 Lansing, 11.....	749
Haines v. Barclay, 181 Pa. St. 521.....	1956
Haines v. Chicago &c. R. Co., 29 Minn. 160....(617)	
Haines v. Hay, 67 Ill. App. 445.....	59
Haines v. Keahon, 46 App. Div. 164.....	2360
Haines v. Lake Shore &c. R. Co., (Mich.) 89 N. W. Rep. 349.....	864
Haines v. Raleigh Gas Co., 114 N. C. 203.....	1064
Hair v. Little, 28 Ala. 248....(829)	
Hale v. N. J. S. Nav. Co., 15 Conn. 539.....	244
Hale v. Bonner, 82 Tex. 33....(855)	
Hale v. Grand Trunk R., 60 Vt. 605.....	431
Hale v. Johnson, 80 Ill. 185....(647)	
Hale v. Mildock Co., 23 Wis. 276....(1082)	
Hale v. Ogden City Street R. Co., 13 Utah, 243.....	2308
Hale v. Smith, 78 N. Y. 480.....	1089
Hale v. Stery, 7 Colo. App. 165.....	627
Haley v. Chicago &c. R. Co., 21 Iowa, 15....(364)	
Haley v. N. Y. C. R. Co., 7 Hun, 84.....	1551, 1694
Haley v. Jump River L. Co., 81 Wis. 412.....	1694
Haley v. Kansas City &c. R. Co., 113 Ala. 640.....	2142, 2150
Haley v. Kein, 151 Pa. St. 117.....	1645
Haley v. St. Louis &c. R. Co., 69 Mo. 614.....	1258
Hall v. M. & C. Co., 9 Am. & Eng. R. R. Cas. 348.....	586
Hall v. R. R. L. R., 10 Q. B. 437....(358)	
Hall v. Austin, 73 Minn. 134.....	1868, 1992
Hall v. Austin, 20 Tex. Civ. App. 59.....	1963
Hall v. Bark Emily Banning, 33 Cal. 522....(908)	
Hall v. Brown, 54 N. H. 495....(740)	
Hall v. Cadillac, 114 Mich. 99.....	896
Hall v. Cedar Rapids R. Co., (Iowa) 87 N. W. Rep. 739.....	1159
Hall v. Cheney, 36 N. H. 26.....	251, 416
Hall v. Chicago &c. R. Co., 46 Minn. 439.....	1736
Hall v. Cleveland &c. R. Co., 15 Ind. App. 496.....	2156
Hall v. Cooperstown &c. R. Co., 49 Hun, 374.....	1441
Hall v. Corcoran, 107 Mass. 251.....	2384
Hall v. DeCuir, 5 Otto, 485....(367)	
Hall v. Emerson-Stevens Man. Co., 94 Me. 445.....	1408, 1632

## TABLE OF CASES.

cxxvii

	PAGE
Hall v. First Nat. Bank, 5 Kan. App. 493.....	179
Hall v. Huber, 61 Mo. App. 384.....	983, 2370
Hall v. Kleeman, 4 Oh. N. P. 201.....	2101
Hall v. Manson, 99 Iowa, 698.....	849, 1200, 1863, 1949, 2037
Hall v. Memphis &c. R. Co., 9 Fed. Rep. 585.....	566
Hall v. Murdock, 114 Mich. 233.....	1077
Hall v. Murdock, 119 Mich. 389.....	1163
Hall v. Ogden City Street R. Co., 13 Utah, 243....	661, 2271, 2279, 2284, 2288, 2298
Hall v. Pike, 100 Mass. 495....(147)	
Hall v. Poole, 94 Md. 171.....	23
Hall v. Pratt, 103 Ga. 255.....	178
Hall v. R. Co., 25 S. C. 564....(552)	
Hall v. R. Co., 13 Wall. 367.....	1307
Hall v. Renfro, 3 Metc. (Ky.) 51.....	224
Hall v. Smith, 2 Bing. 156.....	79, 655
Hall v. So. Car. R. Co., 28 S. C. 261.....	904
Hall v. Steamboat Co., 13 Conn. 319....(1148)	
Hall v. Texas &c. R. Co., (Tex. Civ. App.) 35 S. W. Rep. 321.....	2262
Hall v. Union &c. R. Co., 16 Fed. Rep. 744.....	1434
Hall v. Wakefield &c. R. Co., 178 Mass. 98.....	1445, 1551
Hall v. Warner, 60 Barb. 198.....	111, 104
Hall v. West End Street R. Co., 168 Mass. 461.....	2315
Hall v. Wilson, 16 Barb. 548....(183)	184
Hall's Estate, 8 Pa. Dist. 8.....	61
Halladay v. Marsh, 20 Am. Dec. 678....(1009)	
Hallahan v. New York &c. R. Co., 102 N. Y. 199....(1213)	
Hallett v. New York &c. R. Co., 42 App. Div. 123.....	1603
Hallihan v. N. Y., L. E. & W. R. Cot, 102 N. Y. 195.....	541, 1100
Hallihan v. Hannibal &c. R. Co., 71 Mo. 113.....	1591
Halliday v. Marsh, 3 Wend. 147....(1008)	
Hallock v. Schreyer, 33 Hun, 111.....	2244
Hallom v. Southern R. Co., 127 N. C. 255.....	1647
Halloran v. R. Co., 2 E. D. Smith, 257....(1004)	
Halloway v. Lockport, 54 Hun, 153.....	695
Hallyburton v. Burke County Fair Ass'n, 119 N. C. 526.....	673, 1294
Halpen v. Townsend, 2 City Ct. Rep. 417.....	1317
Halpin v. Third Ave. R. Co., 40 N. Y. Supr. Ct. 8 J. & S. 175....(489)	
Halsey v. Adams, 64 N. J. L. 724.....	1306
Halstead v. Warsaw, 43 App. Div. 39.....	687, 1914, 2244
Halton v. Southern R. Co., 127 N. C. 255.....	677
Ham v. Del. & H. Canal Co., 142 Pa. St. 617.....	574
Ham v. Georgia &c. R. Co., 97 Ga. 411.....	394
Ham v. Lewiston, 94 Me. 265.....	1942, 1953
Ham v. Mayor &c., 70 N. Y. 459.....	1980
Hamberg v. St. Paul &c. Ins. Co., 68 Minn. 335.....	1219
Hamburg &c. Packet Co. v. Gattman, 127 Ill. 598....(617)	
Hambright v. Western &c. R. Co., 112 Ga. 36.....	1165, 2142
Hamby v. Union Paper Mills Co., 110 Ga. 1.....	1669, 1756
Hamerynck v. Banfield, 36 Ore. 436.....	904, 1838, 1839
Hamil v. New York &c. Ex. Co., 177 Mass. 474.....	207
Hamilton v. T. A. R. Co., 53 N. Y. 25....(520)	
Hamilton v. Ashbrook, 62 Oh. St. 511.....	1814
Hamilton v. Bordentown &c. Light Co., (N. J. L.) 52 Atl. Rep. 290.....	1064
Hamilton v. Buffalo, 55 App. Div. 423.....	1887, 2015
Hamilton v. Chicago &c. R. Co., 103 Iowa, 325.....	316
Hamilton v. Consolidated T. Co., 201 Pa. St. 351.....	2322
Hamilton v. Feary, (Ind.) 35 N. E. Rep. 48.....	1328
Hamilton v. Fond du Lac, 40 Wis. 47.....	88
Hamilton v. Great Falls Street R. Co., 17 Mont. 334. 542, 849, 863, 932, 1101,	2050
Hamilton v. McIndoo, 81 Minn. 324.....	2053
Hamilton v. McPherson, 28 N. Y. 72.....	128, 303, 665
Hamilton v. Marks, 63 Mo. 167....(182)	
Hamilton v. Minneapolis Desk Man. Co., 78 Minn. 3.....	2128

	PAGE
Hamilton v. R. Co., 6 Misc. 382.....	2231
Hamilton v. Texas & C. R. Co., 64 Tex. 251.....	354
Hamilton v. Third Ave. R. Co., 53 N. Y. 25.....	673, 854, 899
Hamilton v. Third Ave. R. Co., 6 Misc. 382.....	2313
Hamilton v. Vought, 34 N. J. L. 187.... (183)	
Hamilton v. Wabash R. Co., 80 Mo. App. 597.....	214, 240
Hamlin v. Biddiford, 95 Me. 308.....	1904, 1908
Hamlin v. Simpson, 105 Iowa, 125.....	178
Hamlin v. Southern R. Co., 76 Miss. 410.... (818)	
Hamman v. Central Coal & C. Co., 156 Mo. 232.....	874
Hammarberg v. St. Paul & C. Lumber Co., 19 Wash. 537.....	1622
Hammel v. Denver, 30 Chic. Leg. News, 262.....	1917
Hammer v. Chicago & C. R. Co., 61 Iowa, 56.....	1706
Hammergreen v. St. Paul, 67 Minn. 6.....	1147
Hammock v. White, 11 Com. B. (N. S.) 588.....	2363
Hammond v. N. E. R. Co., 6 Rich. (S. C.) 130.... (372)	
Hammond v. Chicago & C. R. Co., 43 Iowa, 168.... (1037)	
Hammond v. Melton, 42 Ill. App. 187.....	981
Hammond & C. Electric R. Co. v. Spyzchalski, 17 Ind. App. 7.....	544
Hamor v. Bar Harbor Water Co., 92 Me. 364.....	2085
Hampton v. Norfolk & C. R. Co., 120 N. C. 534.... (1238)	
Hampton v. Pullman & C. Co., 42 Mo. App. 134.....	600, 609
Hams v. Minneapolis & C. R. Co., 36 Misc. 181.....	274
Han v. Newburgh, Dutchess & Conn. R. Co., 69 Hun, 137.... (1056)	
Hance v. Cayuga & C. R. Co., 26 N. Y. 428.... (1034)	1012, 1043
Hance v. Wabash R. Co., 62 Mo. App. 60.... (824)	
Hanche v. Hooper, 7 Car. & P. 81.....	2191
Hancock v. Lake Erie & C. R. Co., 21 Ind. App. 10.... (810)	
Hancock v. Norfolk & C. R. Co., 124 N. C. 222.....	1801
Hancock v. Rand, 94 N. Y. 1.....	135, 145
Hand v. Brookline, 126 Mass. 324.....	1997
Handley v. Daly Min. Co., 15 Utah, 176.....	1673
Handley v. Missouri Pac. R. Co., 61 Kan. 237.....	2147
Handley v. Jamesville & C. R. Co., 117 N. C. 565.....	903
Handy v. Meridian, 114 Mich. 454.....	1134, 1822
Handy v. Metropolitan Street R. Co., 70 App. Div. 26.....	2306
Haner v. Northern R. Co., (Id.) 62 Pac. Rep. 1028.... (657)	1091
Hankins v. N. Y., L. E. & W. R. R. Co., 142 N. Y. 416.....	1656
Hankins v. N. Y., L. E. & W. R. Co., 55 Hun, 51.....	1657
Hankins v. Coulthurst, 5 B. & S. 343.....	1304
Hankins v. Railroad Co., 142 N. Y. 416.....	1657
Hankins v. Watkins, 77 Hun, 360.....	1288
Hanks v. Drake, 49 Barb. 186.... (70)	
Hanley v. Banks, 6 Okla. 79.....	1328
Hanley v. California & C. Const. Co., 127 Cal. 232.....	1451, 1722
Hanlon v. Illinois C. R. Co., 109 Iowa, 136.....	572, 546, 564
Hanlon v. Ingram, 3 Iowa, 80.....	1246
Hanlon v. Keokuk, 7 Iowa, 488.....	657
Hanlon v. Partridge, 69 N. H. 88.....	87
Hanlon v. Philadelphia & C. R. Co., 182 Pa. St. 115.....	2343
Hanlon v. Wheeler, (Tex. Civ. App.) 45 S. W. Rep. 821.....	52
Hanna v. Cresh, 16 Montg. Co., L. R. 182.....	653
Hanna v. Holton, 78 Pa. St. 334.....	128
Hanna v. Jeffersonville R. Co., 32 Ind. 113.....	1369
Hanna v. Nassau Electric R. Co., 18 App. Div. 137.....	554, 580
Hannah v. Conn. R. Co., 154 Mass. 529.....	1688
Hannegan v. Union Warehouse Co., 3 App. Div. 618.....	1463
Hannem v. Pence, 40 Minn. 127.....	2079
Hannibal v. Campbell, 86 Fed. Rep. 297.....	1819, 1847
Hannibal & C. R. Co. v. Fox, 31 Kan. 586.....	1614, 1632
Hannibal & C. R. Co. v. Kanaley, 39 Kan. 1.....	1529, 1736
Hannibal & C. R. Co. v. Martin, 11 Ill. App. 386.....	2028
Hannibal R. Co. v. Swift, 12 Wall. 262.... (209)	608, 615, 616, 617



## TABLE OF CASES.

cxxxix

	PAGE
Hannigan v. Lehigh & C. R. Co., 157 N. Y. 244.....	1120, 1587
Hannigan v. Smith, 28 App. Div. 176.....	1570
Hannigan v. Union Warehouse Co., 3 App. Div. 618.....	1400
Hannon v. Agnew, 96 N. Y. 439.....	1909
Hannon v. North Jersey Street R. Co., (N. J. L.) 47 Atl. Rep. 803.....	2330
Hannon v. St. Louis Co., 62 Mo. 313.....	2006
Hanover Nat. Bank v. Brown, (Tenn.) 53 S. W. Rep. 206.....	118
Hanover & C. Ins. Co. v. Bohn, 48 Neb. 743.....	1312
Hanover & C. R. Co. v. Coyle, 55 Pa. St. 396.....	2052
Hanrahan v. Brooklyn El. R. Co., 17 App. Div. 588.....	1119, 1428, 1709
Hanrahan v. Cochran, 12 App. Div. 91.....	1125, 2352, 2358
Hanrahan v. M. R. Co., 53 Hun, 420.....	432
Hans v. Bethlehem, 134 Pa. St. 12.....	1905
Hanscom v. Home Ins. Co., 90 Me. 333.....	1313
Hansee v. Brooklyn Elev. R. Co., 66 Hun, 384.....	1131, 2043
Hansen v. Flint & C. R. Co., 73 Wis. 346.....	339, 340, 349
Hansen v. North Jersey & C. R. Co., 64 N. J. L. 686.....	399
Hansen v. State & C. Build. Co., 100 Iowa, 672.... (1075)	
Hansen v. Third Ave. R. Co., 27 Misc. 524.....	483
Hansley v. Jamesville & C. R. Co., 117 N. C. 565.....	831
Hanson v. Beckwith, 20 R. I. 165.....	1079
Hanson v. Hammel, 107 Iowa, 171.....	1683
Hanson v. Mansfield & C. R. Co., 38 La. Ann. 111.... (776)	
Hanson v. Pennsylvania R. Co., 62 N. J. L. 391.... (792)	
Hanson v. Railway & C. Co., 37 La. Ann. 111.....	12
Hanson v. Urbana & C. Street R. Co., 75 Ill. App. 474.....	526
Hanton v. South Boston & C. R. Co., 129 Mass. 310.....	1170
Hapgood Plow Co. v. Wabash R. Co., 61 Mo. App. 372.....	102
Harbison v. Hiff, 10 Oh. S. & C. P. Dec. 58.... (668)	
Harbison v. Metropolitan R. Co., 9 App. D. C. 60.....	409, 514, 1091
Hard v. V. & C. R. Co., 32 Vt. 473.....	1619
Hard v. December, 28 App. Div. 365.....	1199
Hardeastle v. South Yorkshire R. Co., 4 H. & N. 67.....	2254, 2255
Hardee v. Drew, 25 Wend. 85.... (271)	
Harden v. Chicago & C. R. Co., 102 Wis. 213.....	405
Hardenbergh v. St. Paul & C. R. Co., 39 Minn. 3.....	554
Hardencamp v. Second Ave. R. Co., 1 Sweeney, 190.... (511)	
Harder v. Minneapolis, 40 Minn. 446.....	2018
Harder & C. Minn. Co. v. Schmidt, 104 Fed. Rep. 282.....	1416, 1560
Hardiman v. Wholley, 172 Mass. 411.....	1012
Hardin v. N. Y. & C. R. Co., 36 Hun, 72.... (854)	
Hardin v. North Carolina R. Co., 129 N. C. 354.....	1412
Hardin v. Sin Claire, 115 Cal. 460.....	2096
Hardin County v. Coffman, 18 Oh. C. C. 254.....	1819, 1830, 1833, 1838, 1999
Harding v. Canfield, 73 Minn. 244.....	60
Harding v. Chicago & C. R. Co., 100 Iowa, 677.....	1038
Harding v. Railway Transfer Co. & C., (Minn.) 83 N. W. Rep. 395.....	1591
Harding v. Townsend, 43 Vt. 536.... (939)	
Harding v. Transfer & C. Co., 80 Minn. 504.....	1440
Hardman v. Montana & C. R. Co., 83 Fed. Rep. 88.....	336
Hardy v. Boston & C. R. Co., 68 N. H. 523.....	1553
Hardy v. Brooklyn, 90 N. Y. 435.....	1402, 1992
Hardy v. Keeler, 56 Ill. 152.....	2181
Hardy v. Shedden Co., 78 Fed. Rep. 610.....	1400, 1462
Hare v. Henley, 10 C. B. (N. S.) 65.....	36
Harff v. Green, 168 Mo. 308.....	1561
Hargrave v. W. U. T. Co., (Tex. Civ. App.) 60 S. W. Rep. 687.....	
	2391, 2421, 2431, 2433
Hargreaves v. Deacon, 25 Mich. 1.....	2106
Hari v. Ohio, (Kan. App.) 62 Pac. Rep. 1010.....	1942
Harkin v. Crumbie, 14 Misc. 439.....	1343, 2260
Harkin v. Crumbie, 20 Misc. 568.....	1355
Harkins v. Philadelphia & C. R. Co., 15 Phila. 286.....	953

	PAGE
Harkins v. Pittsburg &c. T. Co., 173 Pa. St. 149.....	2283
Harkness v. W. U. T. Co., 73 Iowa, 190.....	2423, 2430
Harlan v. St. Louis &c. R. Co., 65 Mo. 22.... (785)	
Harley v. Buffalo Car Co., 142 N. Y. 31.....	1128, 1213, 1403, 1409, 1415, 1417, 1445, 1534
Harlinger v. N. Y. C. & H. R. R. Co., 92 N. Y. 66.....	1157
Harlow v. Humison, 6 Cowlus, 189-191.... (659)	
Harlow v. Mills, 58 Hun, 391.....	57
Harman v. St. Louis, 137 Mo. 494.....	1815
Harmon v. Callahan, (Tex. Civ. App.) 35 S. W. Rep. 705.....	891
Harmony v. Old Colony R. Co., 165 Mass. 100.... (849)	
Harney v. Missouri P. R. Co., 80 Mo. App. 667.....	1707
Harnois v. Cutting, 174 Mass. 398.....	1424
Harobine v. Abbott, 177 Mass. 59.....	2112
Harp v. Baraboo, 101 Wis. 368.....	1462
Harpel v. Fall, 63 Minn. 520.....	1356
Harper v. Albany Mutual Ins. Co., 17 N. Y. 194.... (347)	
Harper v. Barnard, 99 Iowa, 159.... (792)	
Harper v. Delaware &c. R. Co., 22 App. Div. 273.....	1118
Harper v. Indianapolis &c. R. Co., 44 Mo. 489.....	1520
Harper v. Indianapolis &c. R. Co., 47 Mo. 567.....	1481, 1513, 1520
Harper v. Missouri &c. R. Co., 70 Mo. App. 604.....	820
Harper v. Nash County, 123 N. C. 118.....	1370
Harper v. Philadelphia T. Co., 175 Pa. St. 129.....	2326
Harper v. Standard Oil Co., 78 Mo. App. 338.....	2097
Harrell v. Norfolk & C. R. Co., 122 N. C. 822.... (1369)	
Harrelson v. Kansas City &c. R. Co., 151 Mo. 482.....	2085, 2089, 2090
Harrigan v. Brooklyn, 67 Hun, 85.....	1882
Harriman v. Kansas City Star Co., 81 Mo. App. 124.....	1566
Harriman v. Pittsburg &c. R. Co., 45 Oh. St. 11.....	2133
Harriman v. Stowe, 57 Mo. 93.....	1148, 1154, 1167, 1766
Harrington v. Buffalo, 121 N. Y. 147.....	1894
Harrington v. Butte &c. Min. Co., 19 Mont. 411.....	192
Harrington v. Eureka Hill Min. Co., 17 Utah, 300.... (1104)	
Harrington v. Keteltas, 92 N. Y. 40.....	44, 49
Harrington v. McShane, 2 Watts, (Pa.) 443.....	335
Harrington v. Snyder, 3 Barb. (N. Y.) 380.... (105)	109
Harriot v. Plimpton, 166 Mass. 585.....	894, 2190
Harris v. Ansonia, 73 Conn. 359.....	1237
Harris v. Atlanta, 62 Ga. 290.... (30)	
Harris v. Boardman, 68 App. Div. 436.....	1322
Harris v. Brummel, 74 Mo. App. 433.....	991
Harris v. Cameron, 81 Wis. 239.....	2025
Harris v. Chesapeake &c. R. Co., (Va.) 23 S. E. Rep. 219.....	1445, 1745
Harris v. Coates, (Id.) 69 Pac. Rep. 475.... (56)	
Harris v. Cohen, 50 Mich. 324.....	1360
Harris v. Eaton, 20 R. I. 81.....	992
Harris v. Fond du Lac, 104 Wis. 44.....	2011, 2023
Harris v. Great Barrington, 169 Mass. 271.....	1937
Harris v. Gunn, 37 Misc. 796.....	83
Harris v. Hewitt, 64 Minn. 54.....	1576
Harris v. Northern Indiana R. Co., 20 N. Y. 232.....	303
Harris v. Orr, 46 W. Va. 261.....	52
Harris v. Perry, 89 N. Y. 308.....	1067
Harris v. Quincy, 171 Mass. 472.....	1238
Harris v. Sherbeck, 151 Ill. 287.....	1503
Harris v. Stevens, 31 Vt. 79.....	590
Harris v. Union R. Co., 69 App. Div. 385.... (495)	
Harris v. Union &c. R. Co., 4 McCrary, (U. S.) 454.....	1445
Harris v. Uebelhoer, 75 N. Y. 169.....	702, 2371
Harris v. Winton, 64 Mich. 447.....	700
Harris v. W. U. T. Co., 121 Ala. 519.....	2410, 2414
Harrison v. Brown, 5 Wis. 27.... (1010)	

## TABLE OF CASES.

cxxxii

	PAGE
Harrison v. Central R. Co., 31 N. J. L. 293.....	1615, 1622
Harrison v. Jelly, 175 Mass. 292.....	1343
Harrison v. Kansas City &c. R. Co., 50 Mo. App. 332.... (13)	
Harrison v. Sutter Street R. Co., 134 Cal. 459.....	1103, 1169, 1194
Harrison v. Thomas, 112 Fed. Rep. 22.....	75
Harrison v. Wier, 75 N. Y. 909.....	222, 824
Harroun v. Brush &c. L. Co., 12 App. Div. 126.....	1059, 1077, 1141, 1406
Hartan v. Eastern R. Co., 114 Mass. 44.... (351).....	342
Hart v. D., L. & W. R. Co., 76 Hun, 296.....	1763
Hart v. H. R. Bridge Co., 28 N. Y. 622.... (656)	
Hart v. H. R. Bridge Co., 80 N. Y. 622.... (658)	
Hart v. H. R. Bridge Co., 84 N. Y. 56.....	1208
Hart v. R. & S. R. R., 8 N. Y. 37.... (347)	
Hart v. Allegheny County Light Co., 201 Pa. St. 234.....	1725
Hart v. Cedar Rapids &c. R. Co., 109 Iowa, 631.....	2307
Hart v. Charlotte R. Co., 33 S. C. 427.....	861, 904
Hart v. Chicago &c. R. Co., 56 Iowa, 166.....	808, 809
Hart v. Devereux, 41 Oh. St. 565.....	779
Hart v. Direct U. S. Cable Co., 86 N. Y. 633.....	2392, 2398
Hart v. Frame, 3 Jur. 547.....	2174
Hart v. Grennell, 122 N. Y. 371.....	2117
Hart v. Hudson River R. Co., 80 N. Y. 622.....	1427
Hart v. Mayor, 9 Wend. 571.....	2239
Hart v. Naumburg, 123 N. Y. 641.....	1068, 1554, 1598
Hart v. New Haven, (Mich.) 89 N. W. Rep. 677.....	839, 860, 1872
Hart v. Penn. R. Co., 112 U. S. 331.....	255
Hart v. Rensselaer &c. R. Co., 8 N. Y. 37.... (338).....	340, 354, 355
Hart v. W. U. T. Co., 66 Cal. 579.....	2441
Hart v. Washington Park Club, 157 Ill. 9.....	1107, 2044
Hart v. Western &c. R. Co., 13 Metc. 99.... (1255)	
Hart v. Windsor, 12 M. & W. 68.....	1324
Hartell v. Holland, 19 W'kly Dig. 312.... (843)	
Hartfield v. Roper, 21 Wend. 614.... (705).....	707
Hartford v. Brady, 114 Mass. 466.....	994, 1012
Hartford v. Graves, 8 Kan. App. 677.....	1865
Hartford v. Northern P. R. Co., 91 Wis. 374.....	1646
Hartford v. Talcott, 48 Conn. 525.....	2261
Hartford Deposit Co. v. Calkins, 186 Ill. 104.....	936
Hartford Deposit Co. v. Calkins, 85 Ill. App. 627.....	823
Hartford Deposit Co. v. Sollitt, 172 Ill. 222.....	1075, 1076, 1105
Hartford Fire Ins. Co. v. Moore, 13 Tex. Civ. App. 644.....	1311
Hartford Fire Ins. Co. v. Wabash R. Co., 74 Mo. App. 106.....	1308
Hartigan v. Michigan &c. R. Co., 113 Mich. 122.....	420
Hartigan v. R. Co., 86 Cal. 142.... (957)	
Hartley v. Chicago &c. R. Co., 197 Ill. 440.....	1610
Hartley v. Halliwell, 2 Stark. 212.... (978)	
Hartley v. St. Louis &c. R. Co., (Iowa) 89 N. W. Rep. 88.....	338, 345
Hartman v. Harris, 182 Pa. St. 172.... (755)	
Hartman v. Muelbach, 64 Mo. App. 565.....	21, 2112, 2129
Hartman v. Muscatine, 70 Iowa, 511.....	657
Hartung v. Pepper, 11 Pick. 41.... (300)	
Hartweg v. Bay State S. & L. Co., 43 Hun, 425.....	1395
Hartwig v. Chicago &c. R. Co., 49 Wis. 358.....	446
Harty v. Central R. Co. of N. J., 42 N. Y. 468.....	780
Harty v. Railroad Co., 42 N. Y. 468.... (795)	
Harvard v. Marshall, 21 Barb. 409.....	2098
Harvard v. Stiles, 54 Neb. 26.....	909, 1134
Harvard College v. Amory, 9 Pick. 446.....	68, 72
Harvener v. Western Union Teleg. Co., 117 N. C. 540.....	2458
Harvey v. Clarinda, 111 Iowa, 528.....	1848, 1849
Harvey v. Dunlap, Hill & Denio, 193.....	2024
Harvey v. N. Y. C. & H. R. B. Co., 88 N. Y. 481.....	1515
Harvey v. Nassau Electric R. Co., 35 App. Div. 307.....	2277

	PAGE
Harvey v. R. Co., 88 N. Y. 481.....	1610
Harvey v. Rose, 26 Ark. 3.....	663, 809
Harwood v. Bennington &c. R. Co., 67 Vt. 664.... (1040)	
Hasbrouck v. Western Union Teleg. Co., 107 Iowa, 160.....	2460
Hasie v. Alabama &c. R. Co., 78 Miss. 413.....	2168
Haskell v. New Bedford, 108 Mass. 208.....	1902, 1966, 1984
Haskell v. Northern Adirondack Railway Company, 74 Hun, 380.....	888
Haskell v. Penn Yan, 5 Lansing, 43.....	1298, 1892
Haaketh v. New York &c. R. Co., 37 App. Div. 78.....	1400
Haskin v. N. Y. C. R. Co., 65 Barb. 135.....	1519
Haskins v. New York Central & Hudson River Railroad Co., 79 Hun, 159....	1484
Haslan v. M. & E. R. Co., 4 Vroom. 147.... (794)	
Haspes v. Chicago &c. R. Co., 29 Fed. Rep. 763.....	1102
Hassen v. Nassau Electric R. Co., 34 App. Div. 71.....	507
Hastings v. Central Crosstown R. Co., 7 App. Div. 312.....	506
Hastings v. Halleck, 13 Cal. 204.....	2179
Hastings v. Montana U. R. Co., 18 Mont. 493.....	1667
Hastings v. Pepper, 11 Pick. 41.... (1082)	
Hastings v. Stetson, 91 Me. 229.....	910
Hastings Lumber Co. v. Garland, 115 Fed. Rep. 15.....	857, 1163
Hasdorf v. Hudson River &c. Co., 110 Fed. Rep. 669.....	1106
Hasum v. Stone &c. Co., 13 Tex. Civ. App. 414.....	95
Haszlacher v. Third Ave. R. Co., 60 N. Y. S. 1001.....	850
Hatfield v. Malin, 6 Kan. App. 855.....	1371
Hatfield v. St. Paul &c. R. Co., 33 Minn. 130.....	2037
Hatham v. Richmond, 48 Vt. 557.....	2187
Hathaway v. Des Moines, 97 Iowa, 333.....	1643
Hathaway v. Detroit &c. R. Co., 124 Mich. 610.....	1053
Hathaway v. Michigan &c. R. Co., 51 Mich. 253.....	1411, 1474, 1495, 1565
Hathaway v. Railroad Co., 51 Mich. 253.....	1685
Hathorn v. Ely, 28 N. Y. 78.....	324, 624
Hathorn v. Richmond, 48 Vt. 555.....	2192, 2196
Haton v. Ipswich, 12 Cush. 488.....	657, 700
Hatt v. Nay, 144 Mass. 186.....	1543
Hattaway v. Atlanta Steel &c. Co., 155 Ind. 507.....	1556
Hatten v. R. Co., 39 Oh. St. 375.... (569)	
Hatton v. Hilton &c. Co., 42 App. Div. 398.....	1628
Haubelt v. Rea &c. Co., 77 Mo. App. 672.....	2423, 2427
Hauch v. Hernandez, 41 La. Ann. 992.....	2102
Haug v. Great Northern R. Co., 8 N. D. 23.....	582
Haug v. Riley, 101 Ga. 372.....	189
Haugh v. Chicago &c. R. Co., 73 Iowa, 66.....	1473, 1678
Hauk v. New York &c. R. Co., 34 App. Div. 434.....	425
Hauk v. Van Ingen, 196 Ill. 20.....	1083
Haun v. Rio Grande R. Co., 22 Utah, 346.....	1119, 1165
Haupt v. New York &c. R. Co., 20 Misc. 291.... (808)	754, 784
Hausberger v. Sedalia R. &c. Co., 82 Mo. App. 566.... (398)	
Hauselman v. St. Louis &c. R. Co., 88 Mo. App. 123.....	2317
Hauss v. Lake Erie &c. R. Co., 105 Fed. Rep. 733.....	1435, 1511
Hauter v. Tolbard, 47 W. Va. 258.....	628
Havens v. Erie R. Co., 41 N. Y. 296.... (782)	791
Havens v. Hardesty, 18 Oh. C. C. 891.....	2191
Haver v. Central R. Co., 62 N. J. L. 282.....	527
Haver v. Central R. Co., 64 N. J. L. 312.....	584
Haviland v. Parker, 11 Mich. 103.... (828)	
Hawcroft v. Great Northern R. Co., 16 Jurist. 196.... (575)	
Hawes v. Knowles, 114 Mass. 518.... (902)	
Hawk v. McLeod Lumber Co., 166 Mo. 121.....	1659
Hawk v. Standard Oil Co., 38 App. Div. 621.....	1542
Hawke v. Brown, 28 App. Div. 37.....	642
Hawkins v. Front Street Cable R. Co., 3 Wash. 592.....	849
Hawkins v. Johnson, 105 Ind. 29.....	888, 1599, 2125
Hawkins v. Hoffman, 6 Hill, 586.... (607)	613

## TABLE OF CASES.

cxxxiii

	PAGE
Hawkins v. New York, 54 App. Div. 258.....	1892
Hawks v. Chester, 70 Vt. 271.....	1157, 1837
Hawley v. N. C. R. W. Co., 24 Sup. C. N. Y. 115.....	1559
Hawley v. Chicago &c. R. Co., 71 Iowa, 717.....	1731
Hawley v. Gloversville, 4 App. Div. 343.....	1861, 1895
Hawley v. Johnstown, 40 App. Div. 568.....	2014
Hawley v. Northern Central R. Co., 82 N. Y. 370.....	1677
Hawley v. Smith, 25 Wend. (N. Y.) 642.....	140, 154
Hawley v. Williams, 90 Ind. 160.....	2043
Haworth v. Kansas City R. Co., 94 Mo. App. 215.....	839, 1144, 1444, 1803
Hawthurst v. Mayor &c., 43 Hun, 588.....	1945
Hay v. Cohoes Co., 2 N. Y. 159.....	633, 1105, 1108, 2059, 2062, 2069, 2073
Hayball v. Detroit &c. R. Co., 114 Mich. 135.....	1580
Haycroft v. L. S. & M. S. R. Co., 64 N. Y. 636.....	757
Hayden v. Attleborough, 7 Gray, 338.....	1842, 1844, 1956
Hayden v. Smithville Man. Co., 29 Conn. 548.....	609, 1406, 1479, 1551, 1601, 1749
Hayes v. Boyer, 9 Watt, (Pa.) 556.....	113
Hayes v. Bush & D. M. Co., 102 N. Y. 648.....	1806
Hayes v. Colchester Mills, 69 Vt. 1.....	1505, 1506, 1754
Hayes v. Frederick Stearns & Co., (Mich.) 89 N. W. Rep. 947.....	1673, 1678
Hayes v. Forty-second Street &c. R. Co., 97 N. Y. 259.....	468, 505, 1115
Hayes v. Millar, 77 Pa. St. 238..... (203)	
Hayes v. Northern P. R. Co., 74 Fed. Rep. 279.....	2170
Hayes v. Phila. &c. R. Co., 150 Mass. 457.....	2127
Hayes v. Smith, 62 Oh. St. 161.....	995
Hayes v. Smith, 15 Oh. C. C. 300.....	997
Hayes v. Third Ave. R. Co., 18 Misc. 582.....	1235
Hayes v. Western R. Co., 3 Cush. 270.....	1601, 1750
Haymarket Theatre Co. v. Rosenberg, 77 Ill. App. 183.....	1075
Haynes v. Hillsdale, 113 Mich. 44.....	1134
Haynes v. McKee, 19 Misc. 511.....	53
Haynes v. Smith, 62 Oh. St. 161.....	983
Haynie v. Chicago &c. R. Co., 9 Ill. App. 105.....	2045
Hays v. Bush &c. Co., 41 Hun, 407.....	1532
Hays v. Ewing, 70 Cal. 127.....	2179, 2182
Hays v. Miller, 70 N. Y. 112.....	673, 1242, 1364
Hays v. Perkins, 22 Tex. Civ. App. 199.....	2031
Hays v. R. Co., 70 Tex. 602.....	663
Hays v. Tacoma R. &c. Co., 106 Fed. Rep. 48.....	2299
Hays v. Turner, 23 Iowa, 214..... (155)	148, 154
Hazard v. Illinois Cent. R. Co., 67 Miss. 32.....	8
Hazard Powder Co. v. Volger, 58 Fed. Rep. 152.....	841, 847
Hazeltine v. Weld, 73 N. Y. 156.....	112
Hazen v. West Superior Lumber Co., 91 Wis. 208.....	1700
Hazlett v. Powell, 30 Pa. St. 293.....	1316
Hazman v. L. & I. Co., 50 N. Y. 53.....	603
Hazlett v. Powell, 30 Pa. St. 293.....	1324
Heacock v. State of New York, 105 N. Y. 246.....	2219
Head v. Georgia Pac. R. Co., 79 Ga. 358.....	554
Headifen v. Cooper, 6 Misc. 263.....	1631
Heaton v. Rust, 39 Ill. 192..... (1014)	
Healey v. Blake Man. Co., 180 Mass. 270.....	1602
Healey v. Brooklyn &c. R. Co., 18 App. Div. 623.....	2311
Healey v. Ehret, 42 App. Div. 27.....	713, 2357, 2370
Healey v. Lathrop, 171 Mass. 263.....	1396
Healey v. New York &c. R. Co., 20 R. I. 136.....	1656
Healy v. Burke, 36 Misc. 792.....	1784
Healy v. Mayor, 3 Hun, 708.....	703
Heaney v. Long Island R. Co., 112 N. Y. 122..... (759)	758, 760, 813
Hearn v. Quillen, 94 Md. 39.....	1489
Hearn v. St. Charles Street R. Co., 34 La. Ann. 160.....	2296
Heath v. Broadway &c. R. Co., 25 J. & S. (57 Supr. Ct.) 496.....	1189
Heath v. Glens Falls &c. R. Co., 90 Hun, 560.....	485

	PAGE
Heaton v. Kansas City &c. R. Co., 65 Mo. App. 479.....	482
Heazle v. Indianapolis &c. R. Co., 76 Ill. 501.... (413)	
Hebard v. Mabie, 98 Ill. App. 543.....	2354
Hebard v. Riegel, 67 Ill. App. 584.....	614
Hebert v. Louisiana &c. R. Co., 104 La. 483.....	2143
Hecker v. Oregon R. Co., (Or.) 66 Pac. Rep. 270.... (755)	
Heckle v. Southern R. Co., 123 Cal. 441.....	1155
Heckscher v. McCrea, 24 Wend. 309.... (665)	
Heckson v. Evanson, 7 N. D. 173.....	1875, 1883, 2257
Hector v. Boston E. L. Co., 161 Mass. 558.... (1058)	1062
Hector v. Boston &c. Light Co., 174 Mass. 212.....	1062
Hector Min. Co. v. Robertson, 22 Colo. 491.....	661, 2108
Heddl v. City R. Co., 112 Mich. 547.....	1156
Heddles v. Chicago &c. R. Co., 77 Wis. 228.....	856
Hedge v. Williams, 131 Cal. 455.....	646
Hedges v. H. R. R. Co., 49 N. Y. 223.....	620
Heeg v. Licht, 80 N. Y. 579.....	2059, 2073, 2074
Hefferlin v. Krieger, 19 Mont. 123.....	180
Heffern v. R. Co., 45 Minn. 471.....	1744
Heffran v. Brooklyn Heights Railroad Co., 8 Misc. 41.....	2229, 2327
Heffron v. Detroit &c. R. Co., 92 Mich. 406.....	572
Heffing v. Van Zandt, 60 Ill. App. 662.....	1325
Hegan v. Eighth Ave. R. Co., 15 N. Y. 382.....	2270, 2340
Hegerich v. Keddle, 99 N. Y. 258.... (960)	
Hegeman v. Western Railroad Corporation Co., 13 N. Y. 9.....	405, 543
Heh v. Consolidated Gas. Co., 201 Pa. St. 443.....	1383, 2084
Heiar v. M'Caughan, 32 Miss. 17.... (575)	
Heib v. Big Flats, 66 App. Div. 88.....	1833, 1840
Heilner v. Union County, 7 Ore. 83.....	2046
Heimann v. W. U. T. Co., 57 Wis. 562.....	2410, 2414
Heine v. Chicago &c. R. Co., 58 Wis. 531.....	1614, 1620, 1671
Heinemann v. Heard, 62 N. Y. 448.....	69, 109, 1089
Heinstein v. Watts, 84 Me. 139.....	283
Heintz v. Brooklyn &c. R. Co., 91 Hun, 640.....	924
Heintz v. Cardwell, 16 Oh. C. C. App. 630.... (898)	
Heintz v. Cooper, (Cal.) 47 Pac. Rep. 360.....	1207
Heironimus v. Duncan, 11 Tex. Civ. App. 610.....	1009
Heiser v. New York, 104 N. Y. 68.....	1960
Heisey v. Rapho, 181 Pa. St. 561.....	1838, 1840
Heiss v. Chicago &c. R. Co., 103 Iowa, 590.....	452, 2163
Heiss v. Lancaster, (Pa.) 52 Atl. Rep. 201.....	1821
Heister v. Fawn, 189 Pa. St. 253.....	1848
Heizer v. Kingsland &c. Co., 43 A. L. J. 53.....	1380
Helber v. Spokane Street R. Co., 22 Wash. 319.....	2318
Helbig v. Slaughter, 95 Ill. App. 623.....	1344, 1542
Helbling v. Allegheny &c. R. Co., 201 Pa. St. 171.....	829
Heldmaier v. Cobbs, 195 Ill. 172.....	1399
Heldmaier v. Cobbs, 96 Ill. App. 315.....	1623
Heldmaier v. Rehor, 90 Ill. App. 96.....	911
Heldmaier v. Taman, 88 Ill. App. 209.....	714, 922, 2354
Helfenstein v. Medart, 136 Mo. 595.....	1566, 1731, 1740
Heller v. Abbott, 79 Wis. 409.... (1039)	
Heller v. Chicago &c. R. Co., 109 Mich. 53.....	225
Heller v. Spokane Street R. Co., 22 Wash. 319.....	2272
Helm v. Louisville &c. R. Co., (Ky.) 33 S. W. Rep. 396.....	1728
Helmke v. Thilmany, 107 Wis. 216.....	1700
Hemingway v. Illinois C. R. Co., 114 F. R. 843.... (657).....	678, 685, 762, 1095
Hemmi v. Chicago &c. R. Co., 102 Iowa, 25.....	1252, 1257
Hemmington v. Chicago &c. R. Co., 72 Wis. 42.... (491)	
Hemmingway v. New Orleans City &c. R. Co., 50 La. Ann. 1087.....	2315
Hempenstall v. N. Y. C. & H. R. R. Co., 82 Hun, 285.....	450
Hempstead v. R. Co., 28 Barb. 485.... (351)	350
Henderschott v. W. U. T. Co., 106 Iowa, 529.....	2419

## TABLE OF CASES.

CXXXV

PAGE

Henderson v. Bessent, 68 N. C. 223.... (108)	
Henderson v. Chicago &c. R. Co., 73 Ill. App. 57.....	1143
Henderson v. Clayton, (Ky.) 57 S. W. Rep. 1.....	1999
Henderson v. Galveston &c. R. Co., (Tex. Civ. App.) 38 S. W. Rep. 1156.....	367
Henderson v. Greenfield &c. R. Co., 172 Mass. 542.....	2289
Henderson v. Kentucky R. Co., 86 Ky. 289.... (948)	
Henderson v. Louisville &c. R. Co., (Ky.) 68 S. W. Rep. 645.....	928
Henderson v. Nassau Electric R. Co., 46 App. Div. 280.....	514, 539
Henderson v. Pargny, 15 Ky. L. R. 745.....	1912
Henderson v. White, (Ky.) 49 S. W. Rep. 764.....	1825
Henderson Trust Co. v. Stuart, (Ky.) 55 S. W. Rep. 1082.....	59, 676
Henderson &c. Road Co. v. Crosby, (Ky.) 44 S. W. Rep. 639.....	1954
Hendrick v. Boston &c. R. Co., 170 Mass. 44.....	284
Hendrick v. Chicago &c. R. Co., 136 Mo. 548.....	366
Hendricks v. Railroad Co., 52 Ga. 461, 467.....	1772
Hendricks v. Sixth Ave. R. Co., 44 N. Y. Supr. Ct. 8.....	532
Hendricks v. W. U. T. Co., 126 N. C. 304.....	2420, 2421
Hendrickson v. Philadelphia &c. R. Co., (N. J. L.) 52 Atl. Rep. 232.....	1038
Hendrix v. Southern R. Co., 130 Ala. 205.....	1082
Hengstler v. Flint &c. R. Co., 125 Mich. 530.....	287
Henkel v. Murr, 31 Hun, 26.....	1317, 1325, 1351
Henkel v. Pape, L. R., 6 Ex. 7.....	2424
Henkel v. Stahl, 9 Oh. C. D. 397.....	1147
Henly v. Delaware &c. R. Co., 28 Misc. 499.....	525
Henly v. The Mayor, 5 Bing. 91.... (77)	
Henn. v. Long Island R. C., 51 App. Div. 292.....	791, 794, 923
Hennessey v. New Bedford, 153 Mass. 260.....	1989
Hennessey v. Bavarian Brew. Co., 145 Mo. 104.....	952
Hennessey v. Bingham, 125 Cal. 627.....	1682
Hennessey v. Brooklyn City R. Co., 6 App. Div. 206.....	713
Hennessey v. Chicago &c. R. Co., 99 Wis. 109.....	1689, 1709
Hennessey v. Northern C. R. Co., 17 App. Div. 162.... (751)	
Hennessey v. Brooklyn City R. Co., 73 Hun, 569.....	728, 734, 2342
Henning v. Rothchild, 68 N. Y. Supp. 840.....	2347
Henning v. Western Union Tel. Co., 41 Fed. Rep. 864.....	907
Henry v. Brackenridge Lumber Co., 48 La. Ann. 950.....	1538, 2045
Henry v. Brady, 9 Daly, 142.....	1455
Henry v. Dennia, 93 Ind. 452.....	2269
Henry v. Missouri &c. R. Co., (Tex. Civ. App.) 65 S. W. Rep. 644.....	1035
Henry v. N. Y. Cent. R. Co., 57 Hun, 76.....	1187
Henry v. Pittsb. &c. R. Co., 139 Pa. St. 289.....	22, 32
Henry v. St. Louis &c. R. Co., 76 Mo. 288.....	442
Henry v. Sargent, 12 N. H. 333.....	87
Henry v. So. Pac. R. Co., 50 Cal. 176.... (1257)	
Henry v. Staten I. R. Co., 81 N. Y. 373.....	1515
Henry v. Williamsport, 197 Pa. St. 465.....	1863
Henry Wrape Co. v. Huddleston, 66 Ark. 237.....	1741
Hensay v. Howland, 10 Misc. 756.....	1766
Henshaw v. Pond's &c. Co., 66 Hun, 632.....	1612
Henz v. R. Co., 71 Mo. 636.... (753)	
Herbert v. Southern R. Co., 121 Cal. 227.....	751, 769, 792, 1111, 2147
Herbert v. St. Paul &c. R. Co., 85 Minn. 341.....	437, 923
Herbich v. North Jersey &c. R. Co., 65 N. J. L. 381.....	475
Herbst v. Hafner, 7 Pa. Super. Ct. 363.....	1321
Herbst v. The Asiatic Prince, 97 Fed. Rep. 343.....	321
Herdler v. Buck's Stove & R. Co., 136 Mo. 3.....	1456, 1490, 1674
Hert &c. Chemical Co. v. Lackawanna Line, 70 Mo. App. 274.....	334
Hergert v. Union R. Co., 25 App. Div. 218.....	2281, 2305
Herder v. Phoenix Loan Ass'n, 82 Mo. App. 427.....	41
Hermann v. Carrollton R. Co., 11 La. Ann. 5.... (943)	
Hera v. New York &c. R. Co., 89 Md. 762.... (791)	
Hernandez v. Metropole Street R. Co., 36 Misc. 793.....	2318
Hernsheim v. Newport News &c. Co., (Ky.) 35 S. W. Rep. 1115.....	213

	PAGE
Herold v. Pfister, 92 Wis. 417.....	1754
Heron v. St. Paul &c. R. Co., 68 Minn. 542.....	1255
Herrell v. Chicago &c. R. Co., (Wis.) 90 N. W. Rep. 1071..... (1040).....	1050
Herrick v. Quigley, 101 Fed. Rep. 187.....	1466
Herrick v. Wixom, 121 Mich. 384.....	1134, 1156, 2108
Herrigan v. Southern Pac. R. Co., 81 Cal. 248..... (351)	
Herriman Irr. Co. v. Butterfield Min. Co., 19 Utah, 453.....	2084
Herring v. Wabash R. Co., 80 Mo. App. 562.....	787
Herrington v. Lake Shore & Michigan Southern R. Co., 83 Hun, 365.....	1601
Herrington v. Lansingburgh, 110 N. Y. 145.....	635
Herrington v. Phoenix, 41 Hun, 270.....	1944
Herrington v. Winn, 60 Hun, 235.....	1188
Herrman v. Great Northern R. Co., (Wash.) 68 Pac. Rep. 82.....	536
Hershey v. Mill Creek, 8 Cent. (Pa.) 252.....	704, 731
Hertzler's Estate, 192 Pa. St. 531.....	54
Hess v. Adamant Man. Co., 66 Minn. 79.....	1744
Hess v. Berwind-White Coal &c. Co., 178 Pa. St. 239.....	2130
Hess v. Lowrey, 122 Ind. 233.....	2036, 2195
Hess v. Rosenthal, 160 Ill. 621.....	1424, 1484, 1629, 2047
Hess v. Williamsport &c. R. Co., 181 Pa. St. 492..... (751)	
Hesse v. National Casket Co., 66 N. J. L. 652.....	1504
Hession v. Wilmington, 1 Marv. (Del.) 122.....	1813, 1815, 1907, 1963, 1964
Hester v. Dold Packing Co., 84 Mo. App. 451.....	1469, 1479
Hestonville P. R. Co. v. Connell, 88 Pa. St. 520.....	2159
Hestonville &c. R. Co. v. Keely, 102 Pa. St. 115.....	689
Hetfield v. Debaud, 54 N. J. Eq. 371.....	60
Hett v. Boston &c. R. Co., 69 N. H. 139.....	234, 318
Hett v. Pun Pong, 18 Can. S. C. 290.....	2179
Hettchen v. Chipman, 87 Md. 729.....	1506
Heugh v. London &c. I. R. 5 Ex. 51.....	2419
Heusner v. Houston, West Street & Pavonia Ferry R. Co., 7 Misc. 48.....	1203
Hever v. Salisbury, 7 Ill. App. 93.....	1181
Hewes v. McNamara, 106 Mass. 281..... (1012)	
Hewett v. N. Y. C. R. R. Co., 3 Lansing, 83.....	753
Hewey v. Nourse, 54 Me. 256.....	1246
Hewitt v. Attick's Sons, 15 Lanc. L. Rev. 240.....	628
Hewitt v. Eisenbart, 36 Neb. 794.....	2191
Hewitt v. Flint R. Co., 67 Mich. 61.....	1686
Hewitt v. Prince, 21 Wend. 79.....	1186
Hewitt v. Steele, 136 Mo. 327.....	118
Hexamer v. Southall, 49 N. J. L. 682.....	116
Hey v. Philadelphia, 81 Pa. St. 41.....	1844
Heyl v. Inman S. Line, 14 Hun, 564.....	236
Heywood v. Boston &c. R. Co., 169 Mass. 466.....	403
Heywood v. Pickering, 9 L. R. [Q. B.] 428..... (36)	
Hiatt v. Des Moines &c. R. Co., 96 Iowa, 169.....	427
Hiawatha Iron Co. v. John Strange Paper Co., 106 Wis. 111.....	196
Hibbard v. Chicago &c. R. Co., 96 Wis. 443.....	1801
Hibbard v. N. Y. & E. R. Co., 15 N. Y. 455.....	23, 518, 548, 585, 586
Hibbard v. Thompson, 109 Mass. 288.....	2197
Hibbard v. W. U. T. Co., 33 Wis. 558.....	2397, 2408, 2453
Hibernia Nat. Bank v. Lacombe, 84 N. Y. 382..... (33)	
Hickerson v. Neely, (Ky.) 54 S. W. Rep. 842.....	2193
Hickey v. R. Co., 14 Allen, 429..... (513)	508, 537, 766, 815
Hickey v. New York &c. R. Co., 8 App. Div. 123.....	783
Hickey v. Taaffe, 105 N. Y. 26.....	1403, 1409, 1500, 1554, 1584
Hickinbottom v. D., L. & R. Co., 15 N. Y. St. R. 15..... (893)	
Hickman v. Nassau Electric R. Co., 41 App. Div. 629.....	2311
Hickman v. Nassau Electric R. Co., 36 App. Div. 376.....	2335
Hickox v. R. Co., 31 Conn. 281..... (613)	
Hicks v. Chaffee, 13 Hun, 294.....	1837
Hicks v. Dorn, 42 N. Y. 47..... (665)	
Hicks v. Georgia &c. R. Co., 108 Ga. 304.....	502



## TABLE OF CASES.

cxxxvii

	PAGE
Hicks v. Nassau Electric R. Co., 47 App. Div. 479.....	707, 2303
Hicks v. New York, 164 Mass. 424..... (792) .....	804
Hicks v. Southern R. Co., 63 S. C. 559.....	1598, 1607
Higbie v. Guardian Life Ins. Co., 53 N. Y. 602.....	1224
Higby v. Gilmer, 3 Mont. 90.....	1137
Higgin v. Providence &c. R. Co., 3 R. I. 88, 91.....	904
Higgins v. Brooklyn &c. R. Co., 54 App. Div. 69.....	642, 1870, 1881
Higgins v. Fanning &c. Co., 195 Pa. St. 599.....	1108, 1419
Higgins v. Dewey, 107 Mass. 494.....	1246, 1268
Higgins v. Han. & St. Joseph R. Co., 36 Mo. 418..... (23)	
Higgins v. N. Y. &c. R. Co., 2 Bosw. (N. Y.) 132..... (580)	
Higgins v. North Andover, 168 Mass. 251.....	2020
Higgins v. R. Co., 36 Mo. 418..... (376)	
Higgins v. Southern R. Co., 98 Ga. 751.....	526
Higgins v. Watervliet Turnpike R. Co., 46 N. Y. 23.....	518
Higgins v. Western Union Teleg. Co., 156 N. Y. 75.....	15
Higgins v. Western Union &c. Tel. Co., 8 Misc. 433.....	643, 1399
Higgins v. Williams, 114 Cal. 176.....	1401, 1677, 1747
Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352.....	666, 2363, 2373
Higgins Carpet Co. v. O'Keeffe, 79 Fed. Rep. 900.....	1729, 1753, 1783
High v. International &c. R. Co., (Tex. Civ. App.) 55 S. W. Rep. 526.....	493
Higham v. Gault, 15 Hun, 383..... (1797)	
Highland v. Houston &c. R. Co., (Tex. Civ. App.) 65 S. W. Rep. 649.....	
(1106)	
Highland Ave. &c. R. Co. v. Feunnell, 111 Ala. 356..... (751)	
Highland Ave. &c. R. Co. v. Miller, 120 Ala. 535.....	1136, 1590
Highland Ave. &c. R. Co. v. Sampson, 112 Ala. 425.....	2282, 2314
Highland Ave. &c. R. Co. v. South, 112 Ala. 642.....	1335, 2046
Highland Ave. &c. R. Co. v. Swope, 115 Ala. 287.....	393, 661, 737, 2045
Highlands v. Raine, 23 Colo. 295.....	1897
Hightower v. Bamberg Cotton Mills, 48 S. C. 190.....	1498
Higman v. Camody, 112 Ala. 267..... (109)	112
Hildebrand v. Carroll, 106 Wis. 324.....	108
Hildman v. Phillips, 106 Wis. 611.....	1934, 2013, 2015
Hill v. N. A. R. Co., 109 N. Y. 239.....	534, 535
Hill v. P. R. Co., 55 Me. 438..... (1138)	
Hill v. S. B. &c. R. Co., 73 N. Y. 351..... (311)	
Hill v. Applegate, 40 Kan. 31.....	1012
Hill v. Barney, 18 N. H. 607.....	2178
Hill v. Boston, 122 Mass. 344.....	1960, 1970, 1971, 2007
Hill v. Boston &c. R. Co., 144 Mass. 284..... (247)	
Hill v. Caverly, 7 N. H. 215.....	1770
Hill v. Concord &c. R. Co., 67 N. H. 449..... (1040)	
Hill v. Featherstonhaugh, 7 Bing. R. 769.....	2173
Hill v. Fly, (Tenn.) 52 S. W. Rep. 731.....	52
Hill v. Gust, 55 Ind. 45.....	1503, 1599, 1751
Hill v. Lake Shore &c. R. Co., 22 Oh. C. C. 291.....	1529, 1732, 1799
Hill v. Manchester & Salford Water Works Co., 5 B. & Adol. 866.....	2394
Hill v. Metropolitan Street R. Co., 30 Misc. 440.....	2331
Hill v. Meyer Bros. Drug. Co., 140 Mo. 433.....	1699
Hill v. Missouri P. R. Co., 66 Mo. App. 184.....	1014, 1033, 1049, 1372
Hill v. Missouri Pac. R. Co., 49 Mo. App. 520..... (1020)	
Hill v. Moebus, 56 App. Div. 354.....	2347
Hill v. Montgomery, 84 Ill. App. 300.....	2177
Hill v. Mynatt, (Tenn.) 59 S. W. Rep. 163.....	2179
Hill v. Ninth Ave. R. Co., 109 N. Y. 239.....	543
Hill v. Pennsylvania R. Co., 178 Pa. St. 223.....	2205
Hill v. Portland Railroad Co., 55 Me. 438..... (1131)	
Hill v. Railroad Co., 55 Me. 438..... (740)	809
Hill v. Rome &c. R. Co., 101 Ga. 66.....	1169, 2288
Hill v. St. Louis &c. R. Co., 67 Ark. 402.....	315
Hill v. Schneider, 13 App. Div. 299.....	2072
Hill v. Sedalia, 64 Mo. App. 494.....	848, 918, 1861, 2013

	PAGE
Hill v. Southern P. Co., 23 Utah, 94.....	1407, 1675, 1754
Hill v. Starin, 65 App. Div. 361.....	912
Hill v. Supervisors, 53 Hun, 194.....	1912
Hill v. Winston, 73 Minn. 80.....	1594, 1634, 1701
Hill v. W. U. T. Co., 85 Ga. 425.....	2409, 2425
Hill Man. Co. v. Boston & C. R. Co., 104 N. Y. 122.... (342)	
Hillard v. Gould, 34 N. H. 230.... (546)	
Hilliker v. Citizens' Street R. Co., 152 Mo. 86.....	1373
Hillje v. Hettich, (Tex. Civ. App.) 67 S. W. Rep. 90.....	1572, 1573
Hillman v. Newington, 23 Alb. L. J. (Cal.) 294.... (730)	
Hills v. Snell, 104 Mass. 173.... (1080)	
Hillsboro v. Jackson, 18 Tex. Civ. App. 325.....	1876, 2054
Hillsboro Oil Co. v. White, (Tex. Civ. App.) 54 S. W. Rep. 432.....	1112, 1600, 1705, 2048
Hilsenbeck v. Guhring, 131 N. Y. 674.....	1317, 1318, 1350
Hilton v. Adams, 71 Me. 19.....	141
Hilts v. Chicago & C. R. Co., 55 Mich. 437.....	1520, 1530
Hilts v. Foote, 125 Mich. 241.....	2316
Himrod Coal Co. v. Clark, 197 Ill. 514.....	1528
Himrod Coal Co. v. Clark, 99 Ill. App. 332.....	1406
Himrod Coal Co. v. Schroath, 91 Ill. App. 234.....	1783
Hinckley v. Cape May R. Co., 120 Mass. 257.... (792)	
Hinckley v. Emerson, 4 Cow. 351.... (993)	
Hinckly v. Gildersleeve, 19 Grant Ch. (Upper Can.) 212.... (1334)	
Hinckley v. N. Y. Cent. & C. R. Co., 56 N. Y. 429.... (298)	279, 358
Hindman v. First Nat. Bank, 112 Fed. Rep. 931.....	15
Hindry v. Holt, 24 Colo. 464.....	950
Hinds v. Barton, 25 N. Y. 544.....	1107, 1130, 1250, 1272
Hinds v. Breckenridge Co., 16 Oh. C. C. 12.....	1078
Hiner v. Fond du Lac, 71 Wis. 74.....	1857
Hines v. Charlotte, 72 Mich. 278.....	1853
Hines v. City of Lockport, 50 N. Y. 236.....	1809, 1823
Hines v. Lockport, 5 Lansing, 16.....	1944
Hinken v. Iowa & C. R. Co., 97 Iowa, 603.... (761)	
Hinkle v. Southern R. Co., 126 N. C. 932.....	214, 288
Hinkley v. Chicago & C. R. Co., 38 Wis. 194.....	907
Hinkley v. Rosendale, 95 Wis. 271.....	1925
Hinman v. Howe, 1 Silvernail, 241.... (1224)	
Hinnihan v. Lake Ontario & C. Co., 8 App. Div. 509.....	923
Hinshaw v. Raleigh & C. R. Co., 118 N. C. 1047.....	443
Hinton v. Eastern R. Co., 72 Minn. 339.....	230, 305, 1113
Hintsinger v. Trexler, 181 Pa. St. 497.....	1513
Hinz v. Chicago & C. R. Co., 93 Wis. 16.....	1554
Hinz v. Starin, 46 Hun, 526.....	695
Hipkins v. Gas Co., 6 Hurl. & Nor. 250.....	1382, 1384
Hipp v. Southern R. Co., 50 S. C. 129.....	335
Hippin v. Wilmington & C. R. Co., 75 N. C. 626.... (1022)	
Hipsley v. Kansas City R. Co., 88 Mo. 348.....	1114
Hirsch v. Hudson River Line, 26 Misc. 823.....	1090, 1092
Hirschman v. Dry Dock & C. R. Co., 46 App. Div. 621.....	690
Hirschman v. Emme, 81 Minn. 99.....	1294
Hirth v. Indianapolis, 18 Ind. App. 673.....	1961, 1962
Hiscox v. Fels, 86 Ill. App. 216.....	2181
Hissong v. Richmond & C. R. Co., 91 Ala. 514.....	1731, 1773
Hitchcock v. Bank of Suspension Bridge, 57 App. Div. 458.....	38
Hitchcock v. Railway Transfer Co., 81 Minn. 352.....	1716
Hitte v. Republican Valley R. Co., 19 Neb. 620.....	651
Hixon v. St. Louis & C. R. Co., 80 Mo. 335.... (753)	
Hoadley v. International Paper Co., 72 Vt. 79.....	885, 1604, 1741, 2131, 2376
Hoadley v. No. Trans. Co., 115 Mass. 304.....	278, 283
Hoag v. Lake Shore & C. R. Co., 85 Pa. St. 293.....	1268
Hoag v. N. Y. C. & H. R. R. Co., 111 N. Y. 199.....	725, 748
Hoagg v. Lake Shore & C. R. Co., 85 Pa. St. 293.....	1268

## TABLE OF CASES.

CXXXIX

	PAGE
Ioar v. Maine &c. R. Co., 70 Maine, 65.....	19
Ioar v. Merritt, 62 Mich. 386.....	1407
Ioard v. Blackstone Man. Co., 177 Mass. 69.....	1779
Ioas v. Chester Street R. Co., 202 Pa. St. 145.....	2333
Iobbit v. The London &c. R. Co., 4 Exch. 253.....	634
Iobbs v. London &c. R. Co., L. R. 10 Q. B. 111.....	578
Iobbs v. Texas &c. R. Co., 49 Ark. 357.....	379
Ioboken Ferry Co. v. Feist, 58 N. J. L. 198.....	457
Ioboken &c. R. Co. v. Lally, 48 N. J. L. 604.....	2361
Iobson v. New York Condensed Milk Co., 25 App. Div. 111.....	728
Iock v. New York &c. R. Co., 77 N. Y. Supp. 200.....	2281
Iocking Coal &c. Co. v. Voght, 7 Oh. C. D. 494.....	1398
Iocutt v. Wilmington & W. R. Co., 124 N. C. 214.....	1369
Iodge v. N. Y. &c. R. R. Co., 27 Hun, 394.....	1036, 1037
Iodges v. Causey, 77 Miss. 353.....	991
Iodges v. Kimball, 104 Fed. Rep. 745.....	1108, 1587, 1727
Iodges v. N. E. Screw Co., 1 R. I. 312.....	68, 74
Iodges v. Southern R. Co., 120 N. C. 555.....	443
Iodges v. Southern R. Co., 122 N. C. 992.....	487
Iodges v. Standard Wheel Co., 152 Ind. 680.....	1804
Iodges v. Transit Co., 107 N. C. 576.....	443
Iodges v. Waterloo, 109 Iowa, 444.....	1887, 1895
Iodges v. Weber, 65 App. Div. 180.....	945
Iodkins v. Eastern R. Co., 119 Mass. 419.....	1611
Ioeger v. R. Co., 63 Wis. 100..... (622)	
Ioehle v. Allegheny Heating Co., 5 Pa. Super. Ct. 21.....	1383
Ioehman v. New York Dry Goods Co., (Id.) 67 Pac. Rep. 798.....	2047
Ioehmann v. Moss Engraving Co., 4 Misc. 160.....	1074
Ioelzel v. Crescent City R. Co., 49 La. Ann. 802.....	2315
Ioepf v. Muscatine, 57 Iowa, 457.....	2085
Ioeppe v. Southern Hotel Co., 142 Mo. 378.....	1448
Ioos v. Edison &c. Co., 23 App. Div. 433.....	1724
Ioos v. Ocean S. S. Co., 56 App. Div. 259.....	1467, 1488
Ioey v. C. R. Co., 67 Wis. 1.....	755
Ioffauer v. D. & N. W. Co., 52 Iowa, 342.....	586, 1731
Ioffman v. American Foundry Co., 18 Wash. 287.....	1722
Ioffman v. Armstrong, 90 Md. 123.....	51
Ioffman v. Connor, 13 Hun, 541..... (83)	
Ioffman v. Coughlin, 26 Misc. 24..... (107)	
Ioffman v. Cumberland Valley R. Co., 85 Md. 391.....	276, 346
Ioffman v. Fitchburg R. Co., 67 Hun, 581.....	760, 1164
Ioffman v. King, 160 N. Y. 618.....	1283
Ioffman v. Muscatine, 113 Iowa, 332.....	1962, 1965
Ioffman v. Missouri P. R. Co., 45 Minn. 53.....	902
Ioffman v. N. Y. C. & H. R. R. Co., 75 N. Y. 605.....	424
Ioffman v. N. Y. C. & H. R. R. R. Co., 87 N. Y. 25.....	19, 28
Ioffman v. Northern P. R. Co., 45 Minn. 53.....	833
Ioffman v. Street R. Co., 51 Mo. App. 273.....	828
Ioffman v. Syracuse &c. R. Co., 50 App. Div. 83.....	2281, 2360
Ioffman v. Third Ave. R. Co., 45 App. Div. 586.....	1101
Ioffman v. Union Ferry Co., 47 N. Y. 176.....	658, 1171
Ioffman v. Union P. R. Co., 8 Kan. App. 379..... (345)	
Ioffman v. Western Union Teleg. Co., 12 Lanc. L. Rev. (Pa.) 333.....	2452
Iofter v. Prettyman, 6 Pa. Super. Ct. 20.....	2131
Iofter v. Southern R. Co., (Ky.) 53 S. W. Rep. 665.....	815
Iofigle v. N. Y. C. & H. R. R. Co., 55 N. Y. 608.....	632, 1516, 1627
Ioigan v. Arbuckle, 77 N. Y. Supp. 22.....	2122
Ioigan v. Central Park R. Co., 124 N. Y. 647.....	686
Ioigan v. Chicago, 168 Ill. 551.....	1827, 1863, 1872
Ioigan v. Chicago &c. R. Co., 59 Wis. 130.....	2114
Ioigan v. Citizens' R. Co., 150 Mo. 36.....	718, 2296
Ioigan v. Dillon, 76 N. Y. 170.....	1195
Ioigan v. Eighth Ave. &c. R. Co., 15 N. Y. 383..... (673)	

	PAGE
Hogan v. Field, 44 Hun, 72.....	1422
Hogan v. Missouri &c. R. Co., 88 Tex. 679.....	1094, 1652
Hogan v. Smith, 125 N. Y. 774.....	1402, 1413, 1422, 1532
Hogan v. Watervliet, 42 App. Div. 325.....	1866
Hoggard v. Monroe, 51 La. Ann. 683.....	2007
Hogle v. N. Y. & H. R. Co., 28 Hun, 363.....	1244
Hogue v. Sligo Furnace Co., 62 Mo. App. 491.....	1672
Honegsberger v. Second Ave. R. Co., 1 Keyes, 570.... (705).....	706
Honey Grove v. Lamaster, (Tex. Civ. App.) 50 S. W. Rep. 1053.....	1048
Honifus v. Chambersburg Engineering Co., 196 Pa. St. 47.....	1446
Holbrook v. Aldrich, 168 Mass. 15.....	2127
Holbrook v. Utica & Schenectady R. Co., 12 N. Y. 236.....	537, 541, 1095, 1100
Holcomb v. Danby, 51 N. Y. 428.....	2376, 2377
Holcomb v. Harris, 42 App. Div. 363.....	1194
Holden v. Fitchburg R. Co., 129 Mass. 271.....	1403, 1405, 1433, 1435, 1614, 1620
Holden v. Liverpool Gas Co., 3 C. B. 1.... (692).....	
Holden v. R. Co., 129 Mass. 268.....	1415
Holden v. Rutland R. Co., 72 Vt. 156.....	900
Holden v. Shattuck, 34 Vt. 336.....	1011
Holder v. Chicago &c. R. Co., 11 Lea. (Tenn.) 176.... (1023).....	
Holdridge v. Mendenhall, 108 Wis. 1.....	2295
Holdsboro v. Central R. Co., 60 N. J. L. 49.....	1238
Holliday v. Kennard, 12 Wall. 254.....	237
Hollanbeck v. Marion, (Iowa) 89 N. W. Rep. 210.....	1206
Holland v. Brown, 35 Fed. Rep. 43.....	876
Holland v. Chicago &c. R. Co., 18 Fed. Rep. 243.....	769
Holland v. West End &c. R. Co., 16 Mo. App. 172.... (1039).....	
Holland House Co. v. Baird, 169 N. Y. 136.....	2066
Holland House Co. v. Baird, 49 App. Div. 180.....	2072
Hollahan v. Metropolitan Street R. Co., 73 App. Div. 164.....	303, 1091
Hollenbeck v. Johnson, 79 Hun, 499.... (1004).....	
Hollenbeck v. Missouri P. R. Co., 141 Mo. 97.....	913, 1433, 1707
Hollenbeck v. Rowley, 8 Allen, 473.... (1238).....	
Holleran v. Boston, 176 Mass. 75.....	1999
Holliday v. Gardner, 27 Ind. App. 231.....	2365
Hollingsworth v. Long Island R. Co., 91 Hun, 641.....	1586, 1672
Hollinshead v. Stuart, 8 N. D. 35.....	1085
Hollister v. Burritt, 14 Hun, 291.....	49
Hollister v. Nowlen, 19 Wend. 234.... (608).....	200, 209, 271, 295
Hollman v. Plattville, 101 Wis. 94.....	2006
Holoday v. Marsh, 20 Am. Dec. 678.....	1012
Holloran v. Union Iron &c. Co., 133 Mo. 470.....	1456
Halloway v. Wabash R. Co., 62 Mo. App. 53.....	226
Holly v. Bennett, 46 Minn. 386.....	2267
Holly v. Boston Gas-Light Co., 8 Gray, 123.... (705).....	1382, 1384
Holman v. Boston &c. Co., 20 Colo. 7.....	1245
Holman v. Kempe, 70 Minn. 422.....	1675
Holman v. Union S. R. Co., 114 Mich. 208.....	1156, 1230, 1235
Holmes v. N. E. Ry. Co., L. R., 4 Exch. 254.....	2128
Holmes v. Allegheny Traction Co., 153 Pa. St. 152.....	475
Holmes v. Ashtabula Rapid Transit Co., 10 Oh. C. D. 638.....	399, 475, 667
Holmes v. Bridgman, 37 Vt. 28.....	52
Holmes v. Calhoun County, 97 Iowa, 360.....	1965
Holmes v. Clarke, 6 Hurl. & N. 249.....	1578
Holmes v. Cromwell &c. Lumber Co., 51 Ia. Ann. 352.....	1396
Holmes v. Feist, 35 Misc. 863.... (1321).....	
Holmes v. Peck, 1 R. I. 242.....	2175
Holmes v. Pennsylvania R. Co., 13 Oh. C. C. 397.....	2166
Holmes v. Southern P. Co., 120 Cal. 357.....	1587, 1731
Holmes v. Tennessee &c. R. Co., 49 La. Ann. 1465.....	12, 649
Holmes v. Trumper, 22 Mich. 427.... (173).....	
Holmes v. Worthington, 2 Foster & F. 533.....	1572, 1578
Holohan v. Wash. &c. R. Co., 8 Macky, (D. C.) 316.....	483

## TABLE OF CASES.

cxli

	PAGE
Holroyd v. Sheridan, 53 App. Div. 14.....	1341
Holsapple v. R., W. & O. R. Co., 86 N. Y. 275.....	240, 2026
Holston v. Coal and Iron Co., 95 Tenn. 525.....	953
Holt v. Chicago &c. R. Co., 94 Wis. 596.....	1684
Holt v. Great Northern R. Co., 69 Minn. 524.....	1667, 1776
Holt v. Hannibal &c. R. Co., 87 Mo. App. 203.....	370, 582, 831, 1123
Holt v. Southwest Missouri &c. R. Co., 84 Mo. App. 443.....	398
Holt Ice &c. Co. v. Arthur Jordan Co., 25 Ind. App. 314.....	106
Holton v. Daly, 106 Ill. 131.... (878).....	885, 949, 2045
Holton v. Waller, 95 Iowa, 545.....	2126
Holtzinger v. Pennsylvania R. Co., 6 Pa. Dist. 430.....	2109
Holtzman v. Hoy, 118 Ill. 534.....	2195
Holwerson v. St. Louis &c. R. Co., 157 Mo. 216.... (662)	
Holy Cross &c. Co. v. O'Sullivan, (Colo.) 60 Pac. Rep. 570.....	1162
Holyoke v. Hadley Water Power Co., 174 Mass. 424.....	1300, 1827, 2236, 2261
Holzman v. Metropolitan Street R. Co., 31 Misc. 644.....	2273
Holzman v. United States, 14 App. D. C. 454.....	2260
Homan v. Franklin County, 90 Iowa, 185.....	838, 2019, 2044
Homan v. Stanley, 66 Pa. St. 464.....	2254
Home Insurance Co. v. P. R. Co., 11 Hun, 182.... 939, 1131, 1256, 1257, 1285, 1307	
Home &c. Ins. Co. v. Atchison &c. R. Co., 4 Kan. App. 60.... (1253)	
Homer v. Everett, 91 N. Y. 641.....	1198, 1450, 1478
Homestake Mine Co. v. Fullerton, 69 Fed. Rep. 923.....	1581
Hood v. N. Y. &c. R. Co., 22 Conn. 1, 502.... (342).....	338
Hooe v. Groverman, 1 Cranch, 214.... (204)	
Hook v. Worcester &c. R. Co., 58 N. H. 257.... (1048)	
Hooker v. C. & N. W. R. Co., 27 Wis. 81.... (350)	
Hookey v. Oakdale, 5 Pa. Super. Ct. 404.....	1953, 2009, 2248
Hooks v. Alabama &c. R. Co., 73 Miss. 145.....	442
Hooksett v. Concord R. Co., 38 N. H. 242.....	1255
Hooper v. Atlanta &c. R. Co., 107 Tenn. 712.....	1371
Hooper v. Chicago &c. R. Co., 37 Minn. 52.... (1054)	
Hooper v. Johnstown &c. Horse R. Co., 59 Hun, 121.....	2106
Hooper v. Staten Island Midland R. Co., 32 Misc. 721.....	2277
Hooper v. United T. Co., 17 Pa. Super. Ct. 638.....	2297
Hooper v. Wells, 27 Cal. 11.....	244
Hoopes v. West Jersey &c. R. Co., 65 N. J. L. 89.... (764)	
Hoosier Stone Co. v. McCain, 133 Ind. 231.....	1642
Hoover v. Chesapeake &c. R. Co., 46 W. Va. 268.....	1375
Hoover v. Mapleton, 110 Iowa, 571.....	1874, 1876, 1877
Hoover v. Texas &c. R. Co., 61 Tex. 503.....	2156
Hope v. Delaware &c. Canal Co., 111 Mich. 209.....	249
Hope v. Fall Brook Coal Co., 3 App. Div. 70.....	1537
Hope v. Lawrence, 50 Barb. 258.....	70
Hope v. T. & L. R. Co., 40 Hun, 438.....	893, 1191
Hope v. West Chicago &c. R. Co., 82 Ill. App. 311.....	1202
Hopkins v. A. & St. L. R. Co., 36 N. H. 9.... (906).....	846
Hopkins v. Boyd, 18 Ind. App. 63.....	1133, 2170
Hopkins v. Kansas &c. R. Co., 18 Kan. 462.... (1034)	
Hopkins v. Rush River, 70 Wis. 10.....	701
Hopkins v. Southern R. Co., 110 Ga. 85.....	769
Hopkins v. Westcott, 6 Blatch. C. Ct. 64.....	283, 615
Hoplan v. Boston Gaslight Co., 177 Mass. 15.....	1163
Hoppe v. Chicago &c. R. Co., 61 Wis. 357.....	706, 720
Hoppin v. Worcester, 149 Mass. 222.....	1597
Hopping v. Quin, 12 Wend. 517.....	2173
Horey v. Haverstraw, 124 N. Y. 273.....	1829
Horn v. Atlantic &c. R. Co., 35 N. H. 167.....	1039, 1042
Horn v. Baltimore, 30 Md. 218.....	2001
Horn v. New Jersey Steamboat Co., 23 App. Div. 302.....	392, 1101, 1234
Hornbein v. Blanchard, (Col. App.) 35 Pac. Rep. 187.....	994
Horner v. Missouri &c. R. Co., 70 Mo. App. 285.....	825
Horner v. Philadelphia, 194 Pa. St. 542.....	1865

	Page
Horney v. Missouri P. R. Co., 80 Mo. App. 667.....	1568
Horowitz v. Hamburg-American P. Co., 18 Misc. 24.....	393, 1191
Horrigan v. New York & C. R. Co., 7 App. Div. 377.....	1564
Horton v. Bayne, 52 Mo. 531.... (182)	
Horton v. Newell, 17 R. I. 571.....	204
Horton v. Norwalk Tramway Co., 66 Conn. 272.....	237
Horton v. Vulcan Iron Works, 13 App. Div. 508.....	1401, 1731
Horwitz v. Hamburg-American Packet Co., 27 Misc. 814.....	678
Hoskins v. Stewart, 57 Hun, 380.....	1901
Hosmer v. Old Colony R. Co., 156 Mass. 506.... (266)	
Hoster v. Philadelphia, 12 Pa. Super. Ct. 224.....	190
Hotchkiss v. Nat. Bank, 21 Wall. 354.... (182)	
Hoth v. Peters, 55 Wis. 405.....	1578
Hot Springs R. Co. v. Deloney, 65 Ark. 177.....	563, 823
Hot Springs Street R. Co. v. Johnson, 64 Ark. 64.....	2271
Hot Springs & C. R. Co. v. Newman, 36 Ark. 607.....	1021
Hough v. Railway Co., 100 U. S. 213.....	1559, 1573
Houfe v. Fulton, 29 Wis. 296.....	1820, 1844
Hough v. R. Co., 100 U. S. 213.....	1490, 1572, 1578, 1632, 1633
Houghkirk v. Prest. & C. D. & H. Canal Co., 92 N. Y. 219.... (806)	876, 1529
Houlihan v. Connecticut River R. Co., 164 Mass. 555.....	1588, 1718
Hounsell v. Smith, 7 C. B. N. S. 743.....	2104
House v. Blum, (Tex. Civ. App.) 56 S. W. Rep. 82.....	215
House v. Fulton, 29 Wis. 296.... (730)	
House v. Metcalf, 27 Conn. 631.....	1131, 2251
Housel v. Smythe, 7 C. B., (N. S.) 731.....	2254, 2258
Houser v. Tulley, 62 Pa. St. 92.... (142)	15
Houston v. Brush, 66 Vt. 331.....	1470
Houston v. Brush, 29 Atl. (Vt.) 380.....	1460
Houston v. Couser, 57 Tex. 293.....	93
Houston v. Owen, (Tex. Civ. App.) 67 S. W. Rep. 788.....	1573, 1871
Houston v. Thornton, 122 N. C. 365.....	71
Houston C. St. R. Co. v. Rider, 62 Tex. 267.....	238
Houston City Street R. Co. v. Medlenka, 17 Tex. Civ. App. 621, 921, 1949, 1207, 2331	
Houston & C. R. Co. v. Abrahams, (Tex. Civ. App.) S. W. Rep. 1034.... (740)	
Houston & C. R. Co. v. Arey, 18 Tex. Civ. App. 457.....	55
Houston & C. R. Co. v. Baker, 57 Tex. 419.....	90
Houston & C. R. Co. v. Bath & Co., 17 Tex. Civ. App. 697.....	111
Houston & C. R. Co. v. Berling, 14 Tex. Civ. App. 544.....	203
Houston & C. R. Co. v. Boehm, 9 Am. & Eng. R. Cas. (Tex.) 366.....	203
Houston & C. R. Co. v. Burke, 9 Am. & Eng. R. Cas. 369.... (836)	
Houston & C. R. Co. v. Byrd, (Tex. Civ. App.) 61 S. W. Rep. 147.....	739, 771
Houston & C. R. Co. v. Cohn, 22 Tex. Civ. App. 11.....	578, 490
Houston & C. R. Co. v. Cook, 60 Tex. 403.... (965)	
Houston & C. R. Co. v. Crone, (Tex. Civ. App.) 37 S. W. Rep. 1074.... 572, 593, 83	
Houston & C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.....	44
Houston & C. R. Co. v. Dunn, 17 Tex. Civ. App. 687.....	820, 183
Houston & C. R. Co. v. Gaither, (Tex. Civ. App.) 43 S. W. Rep. 266.....	148
Houston & C. R. Co. v. Gee, (Tex. Civ. App.) 66 S. W. Rep. 78.....	84
Houston & C. R. Co. v. George, (Tex. Civ. App.) 60 S. W. Rep. 313.... (400)	
Houston & C. R. Co. v. Goodyear, (Tex. Civ. App.) 66 S. W. Rep. 862.....	57
Houston & C. R. Co. v. Gorbett, 49 Tex. 573.... (659)	
Houston & C. R. Co. v. Greer, 22 Tex. Civ. App. 5.....	40
Houston & C. R. Co. v. Grigsby, 13 Tex. Civ. App. 639.....	30, 42
Houston & C. R. Co. v. Grubbs, (Tex. Civ. App.) 67 S. W. Rep. 519.....	43
Houston & C. R. Co. v. Hampton, 64 Tex. 427.... (541)	
Houston & C. R. Co. v. Boehm, 9 Am. & Eng. R. Cas. 369.... (836)	
Houston & C. R. Co. v. Hartnett, (Tex. Civ. App.) 48 S. W. Rep. 773.....	852, 140
Houston & C. R. Co. v. Harvin, (Tex. Civ. App.) 54 S. W. Rep. 629.....	
..... 796, 2143, 2144, 2151, 215	
Houston & C. R. Co. v. Higgins, 22 Tex. Civ. App. 430.....	1499, 1680, 173
Houston & C. R. Co. v. Hollingsworth, (Tex. Civ. App.) 68 S. W. Rep. 724.....	
..... 1014, 1019, 104	

# TABLE OF CASES.

cxliii

	PAGE
Houston &c. R. Co. v. Hopson, (Tex. Civ. App.) 67 S. W. Rep. 458.....	1218
Houston &c. R. Co. v. Houx, 15 Tex. Civ. App. 502.....	301
Houston &c. R. Co. v. Huffhines, (Tex. Civ. App.) 39 S. W. Rep. 625.... (1033)	
Houston &c. R. Co. v. Johnson, (Tex. Civ. App.) 66 S. W. Rep. 72.....	875
Houston &c. R. Co. v. Jones, 16 Tex. Civ. App. 179.... (941).....	1127
Houston &c. R. Co. v. Kelly, 13 Tex. Civ. App. 1, 25.....	1095, 1465, 1672, 1756
Houston &c. R. Co. v. Kimbell, (Tex. Civ. App.) 43 S. W. Rep. 1049.....	2169
Houston &c. R. Co. v. Knipstein, (Tex. Civ. App.) 55 S. W. Rep. 754.... (752)	
Houston &c. R. Co. v. Laskowski, (Tex. Civ. App.) 47 S. W. Rep. 59.... 737, 752, 815	
Houston &c. R. Co. v. Lee, 69 Tex. 556.....	411
Houston &c. R. Co. v. Liscomb, (Tex.) 64 S. W. Rep. 923.....	536, 895, 939
Houston &c. R. Co. v. Loeffler, (Tex. Civ. App.) 51 S. W. Rep. 536.....	1157
Houston &c. R. Co. v. McCullough, 22 Tex. Civ. App. 208.... (373).....	840
Houston &c. R. Co. v. McKenzie, (Tex. Civ. App.) 41 S. W. Rep. 831.....	867
Houston &c. R. Co. v. Malone, (Tex. Civ. App.) 37 S. W. Rep. 640.... (785)	
Houston &c. R. Co. v. Martin, 21 Tex. Civ. App. 207.....	1587
Houston &c. R. Co. v. Meyers, 55 Tex. 110.....	1571
Houston &c. R. Co. v. Milam, (Tex. Civ. App.) 58 S. W. Rep. 735.....	1713, 2204
Houston &c. R. Co. v. Miller, 51 Tex. 270.....	1752
Houston &c. R. Co. v. Ney, (Tex. Civ. App.) 58 S. W. Rep. 43.....	354, 825
Houston &c. R. Co. v. Nichols, Tex. Civ. App.) 39 S. W. Rep. 954.... (1013)...	1014
Houston &c. R. Co. v. Norris, (Tex. Civ. App.) 41 S. W. Rep. 708.... (382)...	
	412, 487, 1135, 1144, 1196
Houston &c. R. Co. v. O'Neal, 91 Tex. 671.....	786
Houston &c. R. Co. v. Patterson, 20 Tex. Civ. App. 255.....	786, 1609
Houston &c. R. Co. v. Pereira, (Tex. Civ. App.) 45 S. W. Rep. 767.... (784)...	972
Houston &c. R. Co. v. Perkins, 21 Tex. Civ. App. 508.....	531, 855
Houston &c. R. Co. v. Phillio, (Tex. Civ. App.) 67 S. W. Rep. 915.....	533
Houston &c. R. Co. v. Pollard, (Tex. Civ. App.) 66 S. W. Rep. 851.....	820
Houston &c. R. Co. v. Powell, 41 S. W. Rep. 695.....	1444, 2155
Houston &c. R. Co. v. Quill, (Tex. Civ. App.) 55 S. W. Rep. 1126.....	1679, 1689
Houston &c. R. Co. v. Reason, 61 Tex. 613.... (705)	
Houston &c. R. Co. v. Red Cross Stock Farm, 22 Tex. Civ. App. 114.....	786, 1021
Houston &c. R. Co. v. Richards, 59 Tex. 373.... (752)	
Houston &c. R. Co. v. Rippettor, (Tex. Civ. App.) 64 S. W. Rep. 1016.....	2168
Houston &c. R. Co. v. Ritter, 16 Tex. Civ. App. 482.....	528, 573
Houston &c. R. Co. v. Rodican, 15 Tex. Civ. App. 556.....	1124, 1747
Houston &c. R. Co. v. Rogers, 15 Tex. Civ. App. 680.....	784, 1374, 1375
Houston &c. R. Co. v. Rogers, 16 Tex. Civ. App. 19.....	831, 1054
Houston &c. R. Co. v. Seale, (Tex. Civ. App.) 67 S. W. Rep. 437.....	297, 831
Houston &c. R. Co. v. Sglinski, 19 Tex. Civ. App. 107.....	2166
Houston &c. R. Co. v. Simpson, 60 Tex. 103.....	2133
Houston &c. R. Co. v. Smith, 52 Tex. 178.....	2142
Houston &c. R. Co. v. Smith, (Tex. Civ. App.) 32 S. W. Rep. 710.....	578
Houston &c. R. Co. v. Smith, (Tex. Civ. App.) 38 S. W. Rep. 51.....	1589, 1708
Houston &c. R. Co. v. Smith, (Tex. Civ. App.) 39 S. W. Rep. 582.....	1744
Houston &c. R. Co. v. Smith, (Tex. Civ. App.) 51 S. W. Rep. 506.....	1539, 1717
Houston &c. R. Co. v. Stell, (Tex. Civ. App.) 67 S. W. Rep. 537.....	579
Houston &c. R. Co. v. Stewart, 92 Tex. 540.....	1530
Houston &c. R. Co. v. Stewart, 14 Tex. Civ. App. 703.....	477
Houston &c. R. Co. v. Strychaski, (Tex. Civ. App.) 35 S. W. Rep. 851.....	1510
Houston &c. R. Co. v. Stuart, (Tex.) 48 S. W. Rep. 799.....	1658, 1800
Houston &c. R. Co. v. Summers, (Tex. Civ. App.) 49 S. W. Rep. 1106.....	412
Houston &c. R. Co. v. Talley, 15 Tex. Civ. App. 115.....	1621
Houston &c. R. Co. v. Terry, 42 Tex. 451.... (1025)	
Houston &c. R. Co. v. Trammell, (Tex. Civ. App.) 68 S. W. Rep. 716.....	320
Houston &c. R. Co. v. Wallace, 21 Tex. Civ. App. 394.....	2144
Houston &c. R. Co. v. Waller, 56 Tex. 331.... (768)	
Houston &c. R. Co. v. Weaver, (Tex. Civ. App.) 41 S. W. Rep. 846.... 820, 938, 1157	
Houston &c. R. Co. v. White, 23 Tex. Civ. App. 280.....	879, 1095, 1673
Houston &c. R. Co. v. Wilson, (Tex. Civ. App.) 50 S. W. Rep. 156.....	1160
Houston &c. R. Co. v. Davidson, 15 Tex. Civ. App. 334.....	244

	PAGE
Hovenden v. Pennsylvania R. Co., 180 Pa. St. 244.... (761)	
Hover v. Burkhoff, 44 N. Y. 113.....	76, 77, 78, 82
Hover v. Kansas City & C. R. Co., 69 Mo. App. 557.... (793)	
Hover v. Penn. R. Co., 25 Oh. St. 667.... (962)	
Hovey v. Michigan Teleph. Co., 124 Mich. 607.....	667, 2247
How v. Medoris, 183 Ill. 288.....	1146
Howard v. D. & H. C. Co., 40 Fed. Rep. 195.....	1614
Howard v. Babcock, 21 Ill. 259.... (114).....	117
Howard v. Brooklyn, 30 App. Div. 217.....	1814, 1998
Howard v. Chesapeake & C. R. Co., 11 App. D. C. 300.....	345, 356, 1195, 1369
Howard v. Cobb, 10 Monthly L. Rep. 377.... (573)	
Howard v. Hood, 155 Mass. 391.....	1637
Howard v. Louisville & C. R. Co., 67 Miss. 247.....	1021
Howard v. St. Paul & C. R. Co., 32 Minn. 214.... (798)	
Howard v. Union Traction Co., 195 Pa. St. 391.....	2030
Howard v. Worcester, 153 Mass. 426.....	1983
Howard County v. Chicago & C. R. Co., 130 Mo. 652.....	1372
Howard Oil Co. v. Davis, 76 Tex. 630.... (852)	
Howd v. Miss. R. Co., 50 Miss. 178.....	1405
Howe v. Cincinnati & C. R. Co., 18 Oh. C. C. 333.....	318
Howe v. Franklin, 20 Tex. 798.....	150
Howe v. Medaris, 82 Ill. App. 515.....	1683
Howe v. Minneapolis & C. R. Co., 62 Minn. 71.....	920
Howe v. Plainfield, 41 N. H. 135.... (1179)	
Howe v. West Seattle Land & C. Co., 21 Wash. 594.....	2103
Howell v. Christy, 3 Lansing. 238.....	82
Howell v. Commissioners, 121 N. C. 362.....	952
Howell v. Grand Trunk R. Co., 92 Hun, 423.....	610
Howell v. Illinois C. R. Co., 75 Miss. 242.... (420)	
Howell v. Rochester R. Co., 24 App. Div. 502.....	680
Howell v. St. Charles St. R. Co., 22 La. Ann. 603.... (472)	
Howell v. Union Traction Co., (Pa. St.) 51 Atl. Rep. 885.....	461
Howell v. Yancey, 121 N. C. 362.....	1984
Howes v. Rose, 13 Ind. App. 674.....	1107, 1379
Howey v. Fisher, 122 Mich. 43.....	1898
Howey v. Lake Shore & C. R. Co., 13 Misc. 641.....	1546
Howie v. Lewis, 14 Pa. Sup. Ct. 232.... (174)	
Howland v. Vincent, 10 Met. 371.....	2254
Howley v. Kraemer, 36 Misc. 190.....	2360
Howson v. Hancock, 8 T. R. 575.....	2378
Howry v. Eppinger, 34 Mich. 29.... (182)	
Hoy v. Terminal R. Asso., 65 Ill. App. 349.....	2167
Hoye v. Chicago & C. R. Co., 62 Wis. 666.....	685
Hoyer v. Tonawanda, 79 Hun, 39.....	1927
Hoyt v. Cleveland & C. R. Co., 112 Mich. 638.....	577
Hoyt v. Danbury, 69 Conn. 341.....	1825, 1862, 1881, 2259
Hoyt v. Hoyt, 112 N. Y. 515.....	1194
Hoyt v. Hoyt, 9 State R. 731.....	1186
Hoyt v. Hudson, 41 Wis. 105.... (658)	
Hoyt v. Jeffers, 30 Mich. 181.....	1251, 1258, 1269
Hoyt v. Metropolitan Street R. Co., 73 App. Div. 249.....	2281
Hoyt v. N. Y., L. E. & W. R. Co., 118 N. Y. 399.....	1139
Hozman v. The Hoboken Land & C. Co., 50 N. Y. 53.... (673)	
Hrabak v. Dodge, 62 Neb. 591.....	86
Hubbard v. Androscoggin & C. R. Co., 39 Maine, 506.....	2257
Hubbard v. Chicago & C. R. Co., 104 Wis. 160.....	954
Hubbard v. Harnden Ex. Co., 10 R. I. 244.....	233, 234
Hubbard v. Mason City, 60 Iowa, 400.....	704
Hubbard v. New York & C. R. Co., 72 Conn. 24.....	1261
Hubbard v. Preston, 90 Mich. 221.....	990
Hubbell v. City of Yonkers, 104 N. Y. 434.....	1847, 2117
Hubener v. Heide, 73 App. Div. 200.....	1073
Hubener v. New Orleans & C. R. Co., 23 La. Ann. 492.... (482)	



## TABLE OF CASES.

cxlv

	PAGE
Huber v. Jackson &c. Co., 1 Marv. (Del.) 374.....	1145, 1205, 1492, 1572
Huber v. La Crosse City R. Co., 92 Wis. 636.... (1066)	
Huber v. Nassau Electric R. Co., 22 App. Div. 426.....	2310
Huber v. Ryan, 57 App. Div. 34.....	1329
Huberwald v. Orleans R. Co., 50 La. Ann. 477.....	951
Hugh v. New Orleans &c. R. Co., 6 La. Ann. 495.... (943)	
Huckshold v. St. Louis &c. R. Co., 90 Mo. 548.....	758
Huda v. American Glucose Co., 154 N. Y. 474.....	1363, 1458, 1541
Hudon v. Little Falls, 68 Minn. 463.....	1879
Hudson v. Best, 104 Ga. 131.....	189
Hudson v. Bradford, 91 Ill. App. 218.....	106, 116
Hudson v. Chicago &c. R. Co., 59 Iowa, 581.....	1133, 1140
Hudson v. Lynn &c. R. Co., 178 Mass. 64.....	365, 549, 582
Hudston v. Midland R. Co., L. R. 4 Q. B. 366.....	619
Hudson v. Mo. &c. R. Co., 16 Kan. 470.....	31
Hudson v. Northern P. R. Co., 107 Wis. 620.....	670
Hudson v. Ocean S. S. Co. of Savannah, 110 N. Y. 625.....	1533, 1535
Hudson v. People's Street R. Co., 175 Mass. 23.....	1716, 1717
Hudson v. Rome, Watertown & Ogdensburgh R. Co., 73 Hun, 467.....	1476
Hudson v. Roberts, 6 Exch. 699.....	975, 977
Hudson v. Roxbury Inst. for Sav., 176 Mass. 522.....	165
Hudson River Lighterage Co. v. Wheeler &c. Co., 93 Fed. Rep. 374.....	320
Hudson R. T. Co. v. Watervliet T. & R. Co., 61 Hun, 140.... (1058)	
Hudson Valley Knitting Co., 69 Hun, 375.....	1446
Hudson &c. L. Co. v. Wheeler, 93 Fed. Rep. 374.....	1099
Huelzenkamp v. Cit. R. Co., 34 Mo. 45.....	684
Huerzeler v. Central &c. R. Co., 1 Misc. 136.....	2229, 2294
Huerzeler v. Central Crosstown Railroad, 130 N. Y. 490.....	705, 716, 2230, 2292
Hueston v. Mississippi &c. Co., 76 Minn. 251.....	2085
Huff v. Ames, 16 Neb. 139.....	714, 718
Huff v. Austin, 46 Oh. St. 386.....	1097, 1108
Huff v. Chesapeake &c. R. Co., 48 W. Va. 45.....	785, 2139, 2158
Huff v. Ford, 126 Mass. 24.....	1399
Huff v. Kentucky Lumber Co., (Ky.) 45 S. W. Rep. 94.....	2085
Huffer v. Herman, 66 Ill. App. 481.....	1449
Huffman v. Chicago &c. R. Co., 78 Mo. 50.....	1520
Huffman v. Michigan C. R. Co., 109 Mich. 251.....	1553
Huffman v. Toledo &c. R. Co., 9 Oh. S. & C. P. Dec. 748.....	867
Huggard v. Missouri P. R. Co., 134 Mo. 673.... (755)	
Hugh v. R. Co., 6 La. Ann. 495.....	1547
Hughes v. Auburn, 161 N. Y. 96.....	945, 1903
Hughes v. Boston &c. R. Co., 71 N. H. 279.....	2161
Hughes v. Delaware &c. Canal Co., 176 Pa. St. 254.... (764)	
Hughes v. Fond du Lac, 73 Wis. 380.....	1942
Hughes v. Lawrenceburg, (Ky.) 37 S. W. Rep. 257.....	1984
Hughes v. Louisville &c. R. Co., (Ky.) 48 S. W. Rep. 671.....	1159
Hughes v. Malden &c. Light Co., 168 Mass. 395.....	1452, 1508
Hughes v. Mercantile Ins. Co., 55 N. Y. 265.....	1311
Hughes v. Monroe County, 147 N. Y. 49.....	1982
Hughes v. Muscatine, 44 Iowa, 672.....	1213
Hughes v. Neal Loan &c. Co., 97 Ga. 383.....	38
Hughes v. New Jersey Steamboat Company, 11 Misc. 65.....	424
Hughes v. Orange County Milk Association, 56 Hun, 396.....	2233, 2251
Hughes v. Oregon Imp. Co., 20 Wash. 294.....	1453, 1623, 1723
Hughes v. Pennsylvania R. Co., 202 Pa. St. 222.....	263, 339
Hughes v. Pullman Palace Car Co., 74 Fed. Rep. 499.....	602
Hughes v. Richter, 161 Ill. 409.....	1219
Hughes v. Western Union Teleg. Co., 79 Mo. App. 133.....	2444
Hughes v. Western Union Teleg. Co., 114 N. C. 70.....	2452
Hughes v. Winona &c. R. Co., 27 Minn. 137.....	1406, 1543, 1544, 1683
Huehey v. Sullivan, 36 Oh. L. J. 247.....	874
Huehley v. Wabash, 69 Minn. 245.....	1408
Huiet v. Marx, 67 Mo. App. 418.....	1328

	PAGE
Huizega v. Lumber Co., 51 Mich. 272.....	1470
Hulbert v. N. Y. C. R. Co., 40 N. Y. 145.....	424, 522
Hulbert v. Hartman, 79 Ill. App. 289.....	141, 154
Hulbert v. Topeka R. Co., 44 Fed. Rep. 310..... (948)	
Hulbert v. N. Y. C. R. Co., 40 N. Y. 145..... (438)	
Hulehan v. Green Bay &c. R. Co., 58 Wis. 319.....	1439
Hulehan v. R. Co., 68 Wis. 520.....	1470
Huler v. Nassau Electric R. Co., 22 App. Div. 426.....	2271
Hulet v. Missouri &c. R. Co., 80 Mo. App. 87.....	2245
Hulett v. Swift, 33 N. Y. 571.....	136
Hull v. Hall, 78 Me. 114.....	1412
Hull v. Sacramento &c. R. Co., 14 Cal. 387.....	1256, 1258
Hull v. Sherrod, 97 Ill. App. 298.....	1355
Hullett v. Hood, 109 Ala. 345.....	53
Huloen v. Chicago &c. R. Co., 107 Wis. 122.....	1713
Hulse v. Goshen, 71 App. Div. 436.....	1926
Humboldt Bldg. Ass'n Co. v. Ducker, (Ky.) 64 S. W. Rep. 671.....	2175
Hume v. The Mayor, 74 N. Y. 264.....	1854, 2227
Humes v. Missouri Pac. R. Co., 9 Mo. App. 588..... (1043)	
Hummell v. Wester, Bright (Pa.) 133.....	2363
Humphreys v. Armstrong County, 56 Pa. St. 204.....	698
Humphreys v. Fremont &c. R. Co., 8 S. D. 103.....	517
Humphreys v. Perry, 148 U. S. 627.....	619
Humphreys v. Reed, 6 Wharton, (Pa.) 485.....	200
Humphries v. Johnson, 20 id. 190..... (901)	
Humpton v. Unterkirchner, 97 Iowa, 509.....	643
Hun v. Carey, 82 N. Y. 65.....	68
Hund v. Gier, 72 Ill. 393..... (711)	
Hundley v. Harrison, 123 Ala. 292.....	2096
Hungerford v. S. B. & N. Y. R. Co., 46 Hun, 339.....	1036
Hungerford v. Bent, 55 Hun, 3.....	2263, 2264
Hungerman v. Wheeling, 46 W. Va. 761.....	1822, 1849
Hunn v. Mich. &c. R. Co., 78 Mich. 513.....	1657
Hunnewell v. Haskell, 174 Mass. 557.....	2127
Hunt v. R. Co., 14 Mo. App. 160..... (730)	
Hunt v. Bates, 7 R. I. 217.....	2207
Hunt v. Blackburn, 128 U. S. 464.....	1194
Hunt v. Dubuque, 96 Iowa, 314.....	1133
Hunt v. Fitchburg R. Co., 22 App. Div. 212.....	783
Hunt v. Gas Co., 1 Allen, 347.....	1382, 1384
Hunt v. Graham, 15 Pa. Super. Ct. 42.....	722, 2137
Hunt v. Hurd, 98 Fed. Rep. 683.....	1445
Hunt v. Kane, 100 Fed. Rep. 256..... 670, 1435, 1540, 1546.	1690
Hunt v. Kile, 98 Fed. Rep. 49.....	1564, 1720
Hunt v. Lake Shore &c. R. Co., 112 Ind. 69..... (1048)	1045
Hunt v. Mayor &c., 109 N. Y. 134.....	1818, 1921
Hunt v. People, 3 Parker C. R. 569..... (1176)	
Hunt v. Salem, 121 Mass. 294..... (711)	
Hunt v. Smith, 58 N. J. Eq. 25.....	60
Hunt v. Wyman, 100 Mass. 198..... (272)	
Hunter v. C. & S. V. R. Co., 112 N. Y. 371.....	481
Hunter v. C. & S. V. R. Co., 126 N. Y. 18.....	481
Hunter v. N. Y., O. & W. R. Co., 116 N. Y. 615.....	1435
Hunter v. Baltimore Packing &c. Co., 75 Minn. 408.....	133
Hunter v. Burtis, 10 Wend. 358.....	2181
Hunter v. Cincinnati &c. R. Co., 7 Oh. N. P. 202.....	2084
Hunter v. Consolidated Traction Co., 193 Pa. St. 557.....	2296
Hunter v. Cooperstown &c. R. Co., 112 N. Y. 377..... (673)	
Hunter v. Kansas City &c. R. Co., 85 Fed. Rep. 379.....	1803
Hunter v. Montana C. R. Co., 22 Mont. 525..... (791)	755, 784
Hunter v. Potts, 4 Camp. 403..... (230)	
Hunter v. Reed, 12 Pa. Super. Ct. 112.....	101
Hunter v. Third Ave. R. Co., 21 Misc. 1.....	2320

## TABLE OF CASES.

cxlvii

	PAGE
Hunter v. Tolbard, 47 W. Va. 258.... (669)	
Hunter v. Windsor, Vt. 327.... (83)	
Huntingburgh v. First, 15 Ind. App. 552.....	1879
Huntingburgh v. First, 22 Ind. App. 66.....	1873, 1878
Huntington v. Breen, 77 Ind. 29.....	657
Huntington v. Burke, 21 Ind. App. 655.....	1178, 1869
Huntington v. Folk, 154 Ind. 91.....	1877
Huntington v. McClurg, 22 Ind. App. 261.....	1825
Huntington v. Rummill, 3 Day, 390.....	2174
Huntington County v. Bonebrake, 146 Ind. 311.....	920, 1840
Huntington &c. R. Co. v. Decker, 84 Pa. St. 419.....	1643
Huntoon v. Trumbull, 2 McCreary C. C. 314.....	732, 2366, 2368
Huntress v. Boston &c. R. Co., 66 N. H. 185.....	683
Huntsville &c. R. Co. v. Ewing, 11 Ala. 576.....	2045
Hunting Elevator Co. v. Bosworth, 179 U. S. 415.....	335
Hupfer v. National Distilling Co., 114 Wis. 279.....	2132
Hupper v. National Dist. Co., (Wis.) 90 N. W. Rep. 191.....	1237
Hurd v. R. Co., 25 Vt. 122.... (1008)	
Hurdinburgh v. First, 22 Md. App. 66.....	1877
Hurdle v. Washington &c. R. Co., 8 App. D. C. 120.....	2314
Hurl v. New York &c. R. Co., 68 App. Div. 400.....	1602
Hurlburt v. Litchfield, 1 Root. (Conn.) 520.....	1986
Hurley v. Bowdoinham, 88 Me. 293.....	1871, 1942
Hurley v. Lukens Iron &c. Co., 186 Pa. St. 187.....	1704
Hurley v. New York &c. Brew. Co., 13 App. Div. 167.....	392, 679
Hurley v. New York &c. R. Co., 90 Hun, 1.....	809
Hurley v. Texas, 20 Wis. 634.... (88)	
Hurley v. West End &c. R. Co., 180 Mass. 370.....	2316
Hursen v. Chicago, 85 Ill. App. 298.....	1898
Hursh v. Byers, 29 Mo. 469.....	145
Hussey v. Coger, 112 N. Y. 614.....	1535, 1635
Hussey v. Ryan, 64 Md. 426.....	1216
Hustis v. Banister Co., (N. J. L.) 43 Atl. Rep. 651.....	1465, 1633
Huston v. Council Bluffs, 101 Iowa, 33.....	1886
Huston &c. R. Co. v. Carruth, (Tex. Civ. App.) 50 S. W. Rep. 1036.... (739)	
Huston Bros. v. Wabash R. Co., 63 Mo. App. 671.....	226, 306
Hutcherson v. Louisville &c. R. Co., (Ky.) 52 S. W. Rep. 955.....	808
Hutcherson v. St. Louis &c. R. Co., (Ky.) 52 S. W. Rep. 955.....	1137
Hutches v. Case Threshing Machine Co., (Tex.) 35 S. W. Rep. 60.....	194
Hutchings v. Sullivan, 90 Me. 131.....	1825, 1827
Hutchins v. Gas Light Co., 122 Mass. 219.....	1382
Hutchins v. Macomber, 68 N. H. 473.....	474
Hutchins v. Priestly &c. Co., 61 Mich. 252.....	2127
Hutchins v. St. Paul &c. R. Co., 44 Minn. 5.....	857
Hutchinson v. Chicago &c. R. Co., 37 Minn. 524.....	249, 305
Hutchinson v. Collins, Ill. 410.....	697
Hutchinson v. Gas Light Co., 122 Mass. 219.... (1384)	
Hutchinson v. Guion, 5 C. B. N. S. 149.... (231)	
Hutchinson v. Parker Co., 39 App. Div. 133.....	1593
Hutchinson v. St. Louis &c. R. Co., 88 Mo. App. 376.....	2325
Hutchinson v. Van Cleve, 7 Kan. App. 676.... (859)	
Hutchinson v. York &c. Railway Co., 5 Exch. R. 343.....	1601
Huth v. Dohle, 76 Mo. App. 671.....	1632
Hutkoff v. Moje, 20 Misc. 632.....	171
Hutkoff v. Pennsylvania R. Co., 29 Misc. Rep. 770.....	243, 1099
Hutson v. King, 95 Ga. 271.....	699, 2108, 2115
Hutson v. The Mayor &c., 9 N. Y. 163.....	77, 1899, 1935
Hutto v. South Bound R. Co., 61 S. C. 495.... (784)	
Hyatt v. N. Y., L. E. & W. R. Co., 64 Hun, 542.....	1030, 1052
Hyatt v. Adams, 16 Mich. 180.... (943)	
Hyatt v. Taylor, 42 N. Y. 258.... (135)	
Hyatt v. Taylor, 51 Barb. 632.....	151
Hyatt v. Wood, 3 Johns. 239.... (590)	
Hyde v. Jamaica, 27 Vt. 443.....	820, 1960

	PAGE
Hutson v. The Mayor &c., 9 N. Y. 163.....	77, 1899, 1935
Hyde v. Trent Navigation Company, 5 Term. R. 380.... (323)	
Hyde v. Wabash &c. R. Co., 61 Iowa, 441.....	962
Hyde Park &c. Co. v. Porter, 64 Ill. App. 152.....	2097
Hydes Ferry &c. Co. v. Yates, (Tenn.) 67 S. W. Rep. 69.....	731
Hydraulic &c. Brick Co. v. School Dist., 79 Mo. App. 665.....	1980
Hyer v. Janesville, 101 Wis. 371.....	1886
Hygienic &c. Man. Co. v. Raleigh &c. R. Co., 122 N. C. 881.... (1257)	
Hyland v. Burns, 10 App. Div. 386.....	679
Hyland v. Paul, 33 Barb. 241.... (203)	
Hyman v. Central Vermont R. Co., 66 Hun, 202.....	351
Hynes v. Hickey, 109 Mich. 188.....	1113
Hynes v. San Francisco &c. R. Co., 65 Cal. 316.....	767
Hynes v. Winston, (Tex.) 40 S. W. Rep. 1025.....	194
Hysell v. Swift & Co., 78 Mo. App. 39.....	1405, 1416, 1464, 1508
I. B. &c. R. Co. v. Birney, 71 Ill. 391.....	575
I. C. R. Co. v. Abel, 59 Ill. 131.... (493)	
I. C. R. Co. v. Burton, 69 Ill. 174.... (793)	
I. C. R. Co. v. Godfrey, 71 Ill. 500.....	2140
I. C. R. Co. v. Hammer, 72 Ill. 347.....	2140
I. C. R. Co. v. Handy, 63 Miss. 614.....	596
I. C. R. Co. v. Hetherington, 83 Ill. 510.....	2140
I. C. R. Co. v. Slatton, 54 Ind. 133.... (493)	
I. C. R. Co. v. Read, 37 Ill. 484.....	262
I. C. R. Co. v. Ross, 81 Ill. App. 170.....	31
I. & G. N. R. Co. v. Hassel, 62 Tex. 256.....	565, 568
I. & G. N. R. Co. v. Underwood, 64 Tex. 463.....	2038
I & St. L. R. Co. v. Peyton, 76 Ill. 340.... (1013)	
I. & St. L. R. Co. v. Vallie, 60 Tex. 481.....	411
Iba v. Hannibal &c. R. Co., 45 Mo. 469.... (1013)	
Ibach v. Huntington Light & Fuel Co., 23 Ind. App. 281.....	1384
Ide v. Fratcher, 194 Ill. 552.....	1489
Ide v. Fratcher, 96 Ill. App. 549.....	1679
Ide v. Gilbert, 62 Ill. App. 524.....	2028
Idel v. Mitchell, 158 N. Y. 134.....	1118, 1325
Idel v. Mitchell, 5 App. Div. 268.....	1323
Ihl v. Forty-second Street R. R. Co., 47 N. Y. 317.....	705, 707, 715
Illick v. Flint &c. R. Co., 67 Mich. 632.....	1411, 1413, 1585, 1708
Illidge v. Goodwin, 5 C. & P. 190.....	2288
Ilwaco R. & Nev. Co. v. Hedrick, 1 Wash. 446.....	2135
Illingsworth v. Boston E. L. Co., 161 Mass. 583.....	1062
Illinois Car &c. Co. v. Walsh, (Ala.) 31 South Rep. 470.....	1802
Illinois C. R. Co. v. Able, 59 Ill. 131.....	466
Illinois C. R. Co. v. Adams, 42 Ill. 474.....	304
Illinois C. R. Co. v. Ashline, 171 Ill. 313.....	1206
Illinois C. R. Co. v. Anderson, 184 Ill. 294.....	262, 2162
Illinois C. R. Co. v. Anderson, 81 Ill. App. 137.....	515
Illinois C. R. Co. v. Arnold, 47 Ill. 173.... (1048)	
Illinois C. R. Co. v. Axley, 47 Ill. App. 307.....	439, 440
Illinois C. R. Co. v. Baches, 55 Ill. 379.... (798)	
Illinois C. R. Co. v. Bandy, 88 Ill. App. 629.....	711, 717, 880
Illinois C. R. Co. v. Barnett, (Ky.) 66 S. W. Rep. 9.... (1112)	
Illinois C. R. Co. v. Barrett, (Ky.) 66 S. W. Rep. 9.....	1173, 1253
Illinois C. R. Co. v. Barron, 5 Wall. 90.... (871)	
Illinois C. R. Co. v. Batson, 81 Ill. App. 142.... (751)	
Illinois C. R. Co. v. Bauer, 66 Ill. App. 124.....	552, 592
Illinois C. R. Co. v. Beebe, 174 Ill. 13.....	374, 514
Illinois C. R. Co. v. Beebe, 69 Ill. App. 363.... (1603)	
Illinois C. R. Co. v. Bentz, 99 Fed. Rep. 657.....	1611
Illinois C. R. Co. v. Bethel, 11 Ill. App. 17.....	2102
Illinois C. R. Co. v. Bishop, 76 Mass. 758.....	1539, 1610
Illinois C. R. Co. v. Bogard, 78 Miss. 11.....	250
Illinois C. R. Co. v. Borders, 61 Ill. App. 55.... (751)	

## TABLE OF CASES

cxlix

	PAGE
Illinois C. R. Co. v. Campbell, 170 Ill. 163.....	1370, 1589
Illinois C. R. Co. v. Carter, 165 Ill. 570.....	275, 282, 322, 330, 349
Illinois C. R. Co. v. Carter, 62 Ill. App. 618.....	316
Illinois C. R. Co. v. Chambers, 71 Ill. 519.....	491, 493
Illinois C. R. Co. v. Cheek, 152 Ind. 663.....	441, 2051
Illinois C. R. Co. v. Clark, 83 Ill. App. 620.... (814)	
Illinois C. R. Co. v. Clark, (Ky.) 55 S. W. Rep. 699.....	1711, 2037
Illinois C. R. Co. v. Cole, 62 Ill. App. 480.....	919
Illinois C. R. Co. v. Coleman, (Ky.) 59 S. W. Rep. 13.....	1661
Illinois C. R. Co. v. Commonwealth, (Ky.) 45 S. W. Rep. 367.....	743
Illinois C. R. Co. v. Cozby, 174 Ill. 109.....	1099, 1118
Illinois C. R. Co. v. Cozby, 69 Ill. App. 256.....	957, 1432
Illinois C. R. Co. v. Crawford, 169 Ill. 554.....	1030
Illinois C. R. Co. v. Crawford, 68 Ill. App. 355.....	774
Illinois C. R. Co. v. Craig, 102 Tenn. 298.....	289
Illinois C. R. Co. v. Creighton, 63 Ill. App. 165.....	1538, 1580, 1743
Illinois C. R. Co. v. Crockert, 78 Miss. 407.....	2161
Illinois C. R. Co. v. Crudup, 63 Miss. 291.....	906, 949, 963, 965, 1181
Illinois C. R. Co. v. Daniels, 73 Miss. 258.....	1412
Illinois C. R. Co. v. Davenport, 177 Ill. 110.....	369
Illinois C. R. Co. v. Davenport, 75 Ill. App. 579.....	419, 918
Illinois C. R. Co. v. Davidson, 76 Fed. Rep. 517.....	430, 445, 1124
Illinois C. R. Co. v. Davis, 104 Tenn. 442.....	2054
Illinois C. R. Co. v. Dick, 91 Ky. 434.....	2375, 2382
Illinois C. R. Co. v. Farrell, 86 Ill. App. 436.... (751)	
Illinois C. R. Co. v. Finnigan, 21 Ill. 646.....	1335
Illinois C. R. Co. v. Frankenberg, 54 Ill. 88.... (341)	278, 349
Illinois C. R. Co. v. Gheen, (Ky.) 68 S. W. Rep. 1087.....	937
Illinois C. R. Co. v. Gholson, (Ky.) S. W. Rep. 1022.... (1017)	
Illinois C. R. Co. v. Gilbert, 157 Ill. 354.....	1442
Illinois C. R. Co. v. Goddard, 72 Ill. 568.... (737)	
Illinois C. R. Co. v. Godfrey, 71 Ill. 500.... (815)	
Illinois C. R. Co. v. Greaves, 75 Miss. 360.....	1024
Illinois C. R. Co. v. Griffin, 184 Ill. 9.....	817, 1146
Illinois C. R. Co. v. Griffin, 80 Fed. Rep. 278.....	430
Illinois C. R. Co. v. Guess, 74 Miss. 170.....	1716
Illinois C. R. Co. v. Hammer, 85 Ill. 526.... (659)	
Illinois C. R. Co. v. Hanberry, (Ky.) 66 S. W. Rep. 417.....	492, 860
Illinois C. R. Co. v. Harris, 184 Ill. 57.....	223
Illinois C. R. Co. v. Hilliard, 99 Ky. 684.....	1477, 1615, 1631, 1685
Illinois C. R. Co. v. Hobbs, 58 Ill. App. 130.....	426, 1103
Illinois C. R. Co. v. Hocker, (Ky.) 55 S. W. Rep. 438.....	2143, 2149
Illinois C. R. Co. v. Hodge, (Ky.) 55 S. W. Rep. 688.....	1372
Illinois C. R. Co. v. Hunter, 70 Miss. 471.... (961)	
Illinois C. R. Co. v. James, 67 Ill. App. 649.....	769, 2162
Illinois C. R. Co. v. Johnson, 34 Ill. 389.... (338)	
Illinois C. R. Co. v. Johnson, 67 Ill. 312.... (553)	
Illinois C. R. Co. v. Johnson, 95 Ill. App. 54.....	1564, 1673
Illinois C. R. Co. v. Johnson, 77 Miss. 727.....	952
Illinois C. R. Co. v. Jones, 97 Ill. App. 131.....	657, 1608
Illinois C. R. Co. v. Jones, 95 Fed. Rep. 370.....	722, 752, 771
Illinois C. R. Co. v. Kanouse, 39 Ill. 272.....	1335, 1474
Illinois C. R. Co. v. Keller, 77 Ill. App. 474.....	682
Illinois C. R. Co. v. Kerl, 77 Miss. 736.....	225
Illinois C. R. Co. v. Kerr, 68 Miss. 14.....	351, 352
Illinois C. R. Co. v. King, 179 Ill. 91.....	28, 526
Illinois C. R. Co. v. Klein, 95 Ill. App. 220.....	739, 814
Illinois C. R. Co. v. Latimer, 128 Ill. 163.....	832
Illinois C. R. Co. v. Louthan, 80 Ill. App. 579.....	592
Illinois C. R. Co. v. McCallip, 76 Miss. 360.... (796)	
Illinois C. R. Co. v. McClelland, 42 Ill. 355.....	1258, 1262, 1265
Illinois C. R. Co. v. McCowan, 70 Ill. App. 345.....	1604, 2162
Illinois C. R. Co. v. McLeod, 78 Miss. 334.....	731, 791

	PAGE
Illinois C. R. Co. v. McManus, (Ky.) 67 S. W. Rep. 1000.....	2151
Illinois C. R. Co. v. McNicholas, 98 Ill. App. 54.....	1685
Illinois C. R. Co. v. Maffit, 67 Ill. 431.... (659)	
Illinois C. R. Co. v. Mahan, (Ky.) 34 S. W. Rep. 16.....	21, 63
Illinois C. R. Co. v. Marlett, 75 Miss. 956.....	572
Illinois C. R. Co. v. Meyer, 65 Ill. App. 531.....	1607
Illinois C. R. Co. v. Minor, 69 Miss. 710.....	539
Illinois C. R. Co. v. Mizell, 100 Ky. 235.....	758, 911
Illinois C. R. Co. v. Moore, 79 Miss. 766.....	849
Illinois C. R. Co. v. Neer, 31 Ill. App. 126.....	1734
Illinois C. R. Co. v. Nelson, 59 Ill. 110.....	378
Illinois C. R. Co. v. Noble, 142 Ill. 578.....	1021, 1025
Illinois C. R. Co. v. North, 97 Ill. App. 124.....	1572
Illinois C. R. Co. v. Nunn, 51 Ill. 78.....	1262
Illinois C. R. Co. v. Oberhoefer, 76 Ill. App. 672.....	346
Illinois C. R. Co. v. O'Connell, 160 Ill. 636.....	426
Illinois C. R. Co. v. O'Connor, 90 Ill. App. 142.....	910
Illinois C. R. Co. v. O'Keefe, 168 Ill. 115.....	369
Illinois C. R. Co. v. Orr, 59 Ill. App. 260.....	1655
Illinois C. R. Co. v. Patterson, 93 Ill. 290.... (659)	
Illinois C. R. Co. v. Pearson, (Miss.) 31 South. Rep. 435.....	963
Illinois C. R. Co. v. People, 59 Ill. App. 256.....	743
Illinois C. R. Co. v. Peterson, 68 Miss. 454.....	305
Illinois C. R. Co. v. Phillips, 49 Ill. 234.....	1470
Illinois C. R. Co. v. Price, 72 Miss. 862.....	1503, 1776
Illinois C. R. Co. v. Pummill, 58 Ill. App. 83.....	1121, 1682
Illinois C. R. Co. v. Radford, (Ky.) 64 S. W. Rep. 511.....	935
Illinois C. R. Co. v. Reardon, 157 Ill. 372.....	850
Illinois C. R. Co. v. Reed, 37 Ill. 484.... (261)	
Illinois C. R. Co. v. Robinson, 58 Ill. App. 181.....	851, 922
Illinois C. R. Co. v. Sanders, 166 Ill. 270.....	1677, 1688, 1689
Illinois C. R. Co. v. Schenk, 64 Ill. App. 24.....	1300
Illinois C. R. Co. v. Scruggs, 69 Miss. 418.....	250
Illinois C. R. Co. v. Seamans, 79 Miss. 106.....	1441
Illinois C. R. Co. v. Sims, 77 Miss. 325.....	134
Illinois C. R. Co. v. Slater, 129 Ill. 91.....	679
Illinois C. R. Co. v. Slatton, 54 Ill. 133.... (473)	
Illinois C. R. Co. v. Smyser, 38 Ill. 354.... (208)	
Illinois C. R. Co. v. Southern &c. Cabinet Co., 104 Tenn. 568.....	254, 825
Illinois C. R. Co. v. Strause, 75 Miss. 367.....	433
Illinois C. R. Co. v. Swearingen, 47 Ill. 206.... (1037)	
Illinois C. R. Co. v. Swisher, 61 Ill. App. 611.....	1550, 1655, 1704
Illinois C. R. Co. v. Swisher, 74 Ill. App. 164.....	1370, 1554
Illinois C. R. Co. v. Trail, (Miss.) 25 South. Rep. 863.....	493
Illinois C. R. Co. v. Treat, 75 Ill. App. 327.....	426
Illinois C. R. Co. v. Trent, 75 Ill. App. 327.....	917
Illinois C. R. Co. v. Tronstein, 64 Miss. 832.....	102
Illinois C. R. Co. v. Troustine, 64 Miss. 834.....	612
Illinois C. R. Co. v. Truesdell, 68 Ill. App. 324.... (818)	
Illinois C. R. Co. v. Waters, 41 Ill. 73.....	213
Illinois C. R. Co. v. Weiland, 67 Ill. App. 332.....	1571
Illinois C. R. Co. v. Welch, 52 Ill. 183.....	1437, 1531
Illinois C. R. Co. v. Wells, 104 Tenn. 706.....	2182
Illinois C. R. Co. v. West, (Ky.) 60 S. W. Rep. 290.....	2151
Illinois C. R. Co. v. Whittaker, (Ky.) 57 S. W. Rep. 465.....	486
Illinois C. R. Co. v. Whittemore, 43 Ill. 420.....	545, 546, 1731
Illinois C. R. Co. v. Wilbourn, 74 Miss. 284.....	2091
Illinois C. R. Co. v. Wyatt, 104 Tenn. 432.....	1147
Illinois C. R. Co. v. Zerwick, 88 Ill. App. 651.....	1728
Illinois Iron &c. Co. v. Weber, 89 Ill. App. 368.....	923
Illinois Midland R. Co. v. People, 84 Ill. 426.....	1335
Illinois-Mutual Wheel Co. v. Mosher, 85 Ill. App. 240.....	1117
Illinois R. Co. v. Brown, 77 Miss. 338.....	516

## TABLE OF CASES.

cli

	PAGE
Illinois R. Co. v. Cragin, 71 Ill. 177. . . (966)	
Illinois R. Co. v. O'Keefe, 63 Ill. App. 102. . . . .	416
Illinois R. Co. v. Sutton, 42 Ill. 438. . . (1179)	
Illinois Steel Co. v. Bauman, 78 Ill. App. 73. . . . .	1602
Illinois Steel Co. v. Hanson, 97 Ill. App. 469. . . . .	912
Illinois Steel Co. v. McFadden, 98 Ill. App. 296. . . . .	1447
Illinois Steel Co. v. Mann, 197 Ill. 186. . . . .	1219
Illinois Steel Co. v. Mann, 170 Ill. 200. . . . .	1573
Illinois Steel Co. v. Mann, 67 Ill. App. 66. . . . .	1580
Illinois Steel Co. v. Ostrowaki, 194 Ill. 376. . . (838)	
Illinois Steel Co. v. Richter, 82 Ill. App. 45. . . . .	1371
Illinois Steel Co. v. Schymanowski, 162 Ill. 447. . . . .	1416, 1639, 1674, 1700, 1703
Illinois Steel Co. v. Schymanowski, 59 Ill. App. 32. . . . .	1569
Illinois Steel Co. v. Sitar, 98 Ill. App. 300. . . . .	914, 1447
Illinois Steel Co. v. Szutenbach, 64 Ill. App. 642. . . . .	798, 1094, 1370
Illinois &c. R. Co. v. Aland, 192 Ill. 37. . . . .	2168
Illinois &c. R. Co. v. Beebe, 174 Ill. 13. . . . .	262
Illinois &c. R. Co. v. Bentz, 108 Tenn. 670. . . . .	885
Illinois &c. R. Co. v. Buckner, 28 Ill. 299. . . (702)	
Illinois &c. R. Co. v. Carter, 165 Ill. 570. . . . .	321
Illinois &c. R. Co. v. Cragin, 71 Ill. 177. . . (704)	
Illinois &c. R. Co. v. Frelka, 110 Ill. 498. . . . .	1763
Illinois &c. R. Co. v. Frelka, 9 Ill. App. 605. . . . .	2146
Illinois &c. R. Co. v. Houghton, 126 Ill. 233. . . (1043)	
Illinois &c. R. Co. v. Mahan, (Ky.) 34 S. W. Rep. 16. . . (787)	
Illinois &c. R. Co. v. Middleworth, 43 Ill. 64. . . (1040)	
Illinois &c. R. Co. v. O'Connell, 160 Ill. 636. . . . .	394
Illinois &c. R. Co. v. Whelen, 19 Bradw. (Ill.) 116. . . . .	1437
Imhoff v. Chicago &c. R. Co., 22 Wis. 681. . . . .	431, 476
Improvement Co. v. Munson, 14 Wall. 442. . . . .	1115, 1120
Inarman v. Bennett, 6 M. & W. 500. . . . .	1399
Independence v. Ott, 135 Mo. 301. . . . .	2128
Independence v. Slack, 134 Mo. 66. . . . .	651, 2247
Independent Tug Line v. Jacobson, 84 Ill. App. 684. . . . .	1404
Ind. &c. R. Co. v. Bonehart, (Ind.) 13 West. 425. . . . .	1100
Ind. &c. R. Co. v. Guard, 24 Ind. 222. . . (1043)	
Ind. &c. R. Co. v. Irish, 26 Ind. 268. . . (1032)	
Ind. &c. R. Co. v. McBrown, 46 Ind. 229. . . (740)	
Ind. &c. R. Co. v. McKinney, 24 Ind. 283. . . . .	1040
Indiana Bituminous Coal Co. v. Buffey, 28 Ind. App. 108. . . . .	1682, 2048
Indiana Car Co. v. Parker, 100 Ind. 181. . . (688). . . . .	1643
Indiana Iron Co. v. Gray, 19 Ind. App. 565. . . . .	648, 1401, 1485, 1629
Indiana Pipe-Line &c. Co. v. Neusbaum, 21 Ind. App. 361. . . . .	1396, 1451, 1606
Indiana &c. Gas. &c. Co. v. Bailey, 14 Ind. App. 697. . . . .	1383
Indiana &c. Gas. Co. v. Jones, 14 Ind. App. 55. . . . .	1383
Indiana &c. Gas. Co. v. Long, 27 Ind. App. 219. . . . .	1383
Indiana &c. Gas. Co. v. McMath, 26 Ind. App. 154. . . . .	2245
Indiana &c. Gas. Co. v. Marshall, 22 Ind. App. 121. . . . .	1599, 1676, 1751
Indiana &c. Gas. Co. v. New Hampshire &c. Ins. Co., 23 Ind. App. 298. . . . .	1383
Indiana &c. R. Co. v. Adkins, 23 Ind. 340. . . (1045)	
Indiana &c. R. Co. v. Anthony, 43 Ind. 183. . . . .	29
Indiana &c. R. Co. v. Barnhart, 115 Ind. 399. . . . .	1763, 2125
Indiana &c. R. Co. v. Bundy, 152 Ind. 590. . . . .	1122, 1161, 1196, 1432, 1497
Indiana &c. R. Co. v. Ditto, (Ind.) 64 N. E. Rep. 222. . . . .	581
Indiana &c. R. Co. v. Doremeyer, 20 Ind. App. 605. . . . .	234
Indiana &c. R. Co. v. Hammock, 113 Ind. 11. . . (741)	
Indiana &c. R. Co. v. Hawkins, 81 Ill. App. 570. . . . .	1267
Indiana &c. R. Co. v. Koons, 72 Ill. App. 497. . . . .	1125
Indiana &c. R. Co. v. Leamon, 18 Ind. 175. . . (1039)	
Indiana &c. R. Co. v. Masterson, 16 Ind. App. 323. . . . .	403
Indiana &c. R. Co. v. Mundy, 21 Ind. 48. . . . .	263
Indiana &c. R. Co. v. Paramore, 31 Ind. 143. . . (1251). . . . .	1256
Indiana &c. R. Co. v. Patchette, 59 Ill. App. 251. . . . .	2089

	PAGE
Indiana &c. R. Co. v. Rutherford, 29 Ind. 82.....	537
Indiana &c. R. Co. v. Thomas, 84 Ind. 194....(1045)	
Indiana &c. R. Co. v. Wheeler, 115 Ind. 253.....	741
Indiana &c. R. Co. v. Zilly, 20 Ind. App. 569.....	623
Indianapolis v. Cook, 99 Ind. 10....(699)	
Indianapolis v. Emmelman, 108 Ind. 530.....	719, 1133, 1934, 2113
Indianapolis v. Gaston, 58 Ind. 224....(959)	
Indianapolis v. Marold, 25 Ind. App. 428.....	1877, 2009
Indianapolis v. Mitchell, 27 Ind. App. 589.....	1865, 1878
Indianapolis Gas Co. v. Shumack, (Ind.) 54 N. E. Rep. 414.....	1804
Indianapolis Man. Co. v. Millican, 87 Ind. 87.....	2055
Indianapolis Street R. Co. v. Robinson, 157 Ind. 414.....	456, 2046, 2051
Indianapolis &c. R. Co. v. Adamson, 90 Ind. 60.....	2044
Indianapolis &c. R. Co. v. Adkins, 23 Ind. 340....(1047)	
Indianapolis &c. R. Co. v. Allen, 31 Ind. 394.....	263
Indianapolis &c. R. Co. v. Burdige, 94 Ind. 46.....	2044
Indianapolis &c. R. Co. v. Carr, 35 Ind. 510.....	688
Indianapolis &c. R. Co. v. Crandall, 58 Iowa, 365....(1054)	
Indianapolis &c. R. Co. v. Flanigan, 77 Ill. 369.....	1474, 1546
Indianapolis &c. R. Co. v. Hall, 88 Ill. 368....(1036)	
Indianapolis &c. R. Co. v. Hamilton, 44 Ind. 76....(784).....	796
Indianapolis &c. R. Co. v. Horst, 93 U. S. 291.....	375, 766
Indianapolis &c. R. Co. v. Keely, 23 Ind. 133....(943).....	944, 946, 949, 761
Indianapolis &c. R. Co. v. Kennedy, 77 Ind. 507.....	579
Indianapolis &c. R. Co. v. Love, 10 Ind. 554.....	1548
Indianapolis &c. R. Co. v. McClure, 26 Ind. 370.....	1016
Indianapolis &c. R. Co. v. McLinn, 82 Ind. 435.....	735, 784
Indianapolis &c. R. Co. v. Morganstern, 106 Ill. 216.....	1613
Indianapolis &c. R. Co. v. Neubacher, 16 Ind. App. 21.....	800, 804
Indianapolis &c. R. Co. v. Paramore, 31 Ind. 143....(1260)	
Indianapolis &c. R. Co. v. Parker, 29 Ind. 472.....	1039
Indianapolis &c. R. Co. v. Pitzey, 109 Ind. 179.....	581, 708, 709, 741, 2110
Indianapolis &c. R. Co. v. Quick, 109 Iowa, 295....(1054)	
Indianapolis &c. R. Co. v. Rinard, 46 Ind. 293.....	366, 553
Indianapolis &c. R. Co. v. Robinson, 157 Ind. 414.....	846, 2048, 2054
Indianapolis &c. R. Co. v. Shimer, 17 Ind. 295.....	1048
Indianapolis &c. R. Co. v. Stout, 53 Ind. 143....(957)	
Indianapolis &c. R. Co. v. Thomas, 84 Ind. 194....(1045)	
Indianapolis &c. R. Co. v. Townsend, 10 Ind. 38....(1034).....	1039
Indianapolis &c. R. Co. v. Troy, 91 Ill. 474.....	1403
Indianapolis &c. R. Co. v. Truitt, 24 Ind. 162....(1036)	
Indianapolis &c. R. Co. v. Watson, 114 Ind. 20.....	1573, 1574
Indig v. National City Bank, 80 N. Y. 100.....	36
Industrial Lumber Co. v. Johnson, 22 Tex. Civ. App. 596.....	1573
Ingalls v. Adams Express Co., 44 Minn. 128.....	2128
Ingalls v. Bills, 9 Mete. 1....(688).....	543
Ingalls v. Lord, 1 Cow. 240....(36)	
Ingallsbee v. Wood, 33 N. Y. 577....(135).....	141, 147
Ingallsbee v. Wood, 36 Barb. 458....(137)	
Ingersoll v. Stockbridge &c. R. Co., 8 Allen, 438.....	1264
Ingraffia v. Samuels, 71 App. Div. 14.....	871, 1073
Ingram v. Fosburgh, 73 App. Div. 129.....	1561, 1624
Ingram v. Hilton &c. Lumber Co., 108 Ga. 194.....	1603
Ingram v. Lehigh Coal &c. Co., 148 Pa. St. 177....(700)	
Inland Steel Co. v. Eastman, 80 Ill. App. 59.....	1592
Inman v. S. C. R. Co., 109 U. S. 128.....	1307
Inman v. St. Louis &c. R. Co., 14 Tex. Civ. App. 39....(824)	
Inman v. South Car &c. R. Co., 129 U. S. 128.....	256
Innes v. Milwaukee, 96 Wis. 170.....	1419
Innes v. Milwaukee, 103 Wis. 582.....	925, 1218
Inness v. Boston &c. R. Co., 168 Mass. 433.....	370, 1111
In re Beam, 8 Kan. App. 835.....	56
In re Brewster's Estate, 113 Mich. 561.....	60



# TABLE OF CASES.

cliii

	PAGE
<i>In re California Nav. &amp;c. Co.</i> , 110 Cal. 670.....	418, 875, 1470, 1487
<i>In re Cohn</i> , 78 N. Y. 248.....	69
<i>In re Cornell</i> , 110 N. Y. 351.....	69
<i>In re Excelsior Man. Co.</i> , 164 Mo. 316.....	93
<i>In re Gouldsey's Estate</i> , 201 Pa. St. 491.....	48
<i>In re Hertemen</i> , 73 Cal. 545.....	58
<i>In re Lent</i> , 47 App. Div. 349.....	1963
<i>In re Lowenstein's Estate</i> , 2 Misc. R. 323.....	1186
<i>In re McGonnigle's Estate</i> , 31 Pittsb. L. J. (N. S.) 27.....	48
<i>In re McGuinness</i> , 69 App. Div. 606.....	2180
<i>In re Merrill</i> , 54 Vt. 200.....	1763
<i>In re Regan</i> , 58 App. Div. 1.....	2182
<i>In re Wade's Estate</i> , 18 Lanc. L. Rev. 91.....	52
<i>In the matter of accounting of Dean</i> , 86 N. Y. 398.....	69
<i>Ins. Co. v. Allen</i> , 116 Mass. 398.....	2428
<i>Insurance Co. v. Bachler</i> , 44 Neb. 549.....	1312
<i>Insurance Co. v. Mosley</i> , 8 Wall. 400.....	1140, 1179
<i>Insurance Co. v. Brame</i> , 95 U. S. 754.... (943)	
<i>Insurance Co. of North America v. Lake Erie &amp;c. R. Co.</i> , 152 Ind. 333.....	246
<i>Insurance Co. &amp;c. v. International Trust Co.</i> , 71 Fed. Rep. 88.....	1309
<i>Insurance Co. &amp;c. v. Lake Erie &amp;c. R. Co.</i> , 152 Ind. 333.....	305, 1092
<i>International &amp;c. Co. v. Gray</i> , 65 Tex. 32.....	1112
<i>International Light &amp;c. Co. v. Maxwell</i> , (Tex. Civ. App.) 65 S. W. Rep. 78.....	1066
<i>International Nav. Co. v. Ryan</i> , 82 Tex. 565.....	1405, 1621, 1661, 1796
<i>International &amp;c. R. Co. v. Anderson</i> , 15 Tex. Civ. App. 180.....	414
<i>International &amp;c. R. Co. v. Anthony</i> , 24 Tex. Civ. App. 9.....	400, 413
<i>International &amp;c. R. Co. v. Barton</i> , 93 Tex. 63.... (941)	
<i>International &amp;c. R. Co. v. Bayne</i> , (Tex. Civ. App.) 67 S. W. Rep. 443.....	1539
<i>International &amp;c. R. Co. v. Bergman</i> , (Tex. Civ. App.) 64 S. W. Rep. 999....	233
<i>International &amp;c. R. Co. v. Best</i> , (Tex. Civ. App.) 55 S. W. Rep. 315.....	561
<i>International &amp;c. R. Co. v. Bonatz</i> , (Tex. Civ. App.) 48 S. W. Rep. 767....	909, 1673
<i>International &amp;c. R. Co. v. Brooks</i> , (Tex. Civ. App.) 54 S. W. Rep. 1056 (657).....	815, 1095, 1124, 2139, 2163
<i>International &amp;c. R. Co. v. Bryant</i> , (Tex. Civ. App.) 54 S. W. Rep. 364.....	671, 689, 766, 1157
<i>International &amp;c. R. Co. v. Cocke</i> , 64 Tex. 151.... (1005)	
<i>International &amp;c. R. Co. v. Cook</i> , 16 Tex. Civ. App. 386.....	1681
<i>International &amp;c. R. Co. v. Cooper</i> , 88 Tex. 607.....	421
<i>International &amp;c. R. Co. v. Culpepper</i> , 19 Tex. Civ. App. 182.....	1539, 1713, 1729
<i>International &amp;c. R. Co. v. Dalwigh</i> , (Tex. Civ. App.) 48 S. W. Rep. 527.....	736, 786, 1095
<i>International &amp;c. R. Co. v. Dalwigh</i> , (Tex. Civ. App.) 56 S. W. Rep. 136. 918, 1373	
<i>International &amp;c. R. Co. v. Davis</i> , 17 Tex. Civ. App. 340.....	374
<i>International &amp;c. R. Co. v. Downing</i> , 16 Tex. Civ. App. 643.....	444, 466, 2045
<i>International &amp;c. R. Co. v. Dunham</i> , 68 Tex. 231.... (1005)	1019
<i>International &amp;c. R. Co. v. Eason</i> , (Tex. Civ. App.) 35 S. W. Rep. 208....	2138, 2170
<i>International &amp;c. R. Co. v. Elkins</i> , (Tex. Civ. App.) 54 S. W. Rep. 931.....	841, 915, 1470
<i>International &amp;c. R. Co. v. Emery</i> , 14 Tex. Civ. App. 551.....	1687
<i>International &amp;c. R. Co. v. Erwin</i> , (Tex. Civ. App.) 67 S. W. Rep. 466.. (1049)	
<i>International &amp;c. R. Co. v. Garcia</i> , 70 Tex. 207.... (906)	
<i>International &amp;c. R. Co. v. Gilmer</i> , 18 Tex. Civ. App. 680.....	466
<i>International &amp;c. R. Co. v. Hanna</i> , (Tex. Civ. App.) 58 S. W. Rep. 548....	383, 417
<i>International &amp;c. R. Co. v. Hatchell</i> , 22 Tex. Civ. App. 498.....	215, 826
<i>International &amp;c. R. Co. v. Hawes</i> , (Tex. Civ. App.) 54 S. W. Rep. 325..	1418, 1489
<i>International &amp;c. R. Co. v. Hughes</i> , 68 Texas, 290.... (1030)	
<i>International &amp;c. R. Co. v. Ing</i> , (Tex. Civ. App.) 68 S. W. Rep. 722.....	573
<i>International &amp;c. R. Co. v. Johnson</i> , 23 Tex. Civ. App. 160.....	1106, 1112, 1435, 1466, 1677
<i>International &amp;c. R. Co. v. Jones</i> , (Tex. Civ. App.) 60 S. W. Rep. 978.....	935
<i>International &amp;c. R. Co. v. Kindred</i> , 57 Tex. 491.....	878, 1181, 1707
<i>International &amp;c. R. Co. v. Kuehn</i> , 70 Tex. 582.....	957
<i>International &amp;c. R. Co. v. Lee</i> , (Tex. Civ. App.) 34 S. W. Rep. 160....	1171, 2150

	PAGE
International &c. R. Co. v. Locke, (Tex. Civ. App.) 67 S. W. Rep. 1082....	766, 669
International &c. R. Co. v. McDonald, 75 Tex. 41.....	965
International &c. R. Co. v. McIver, (Tex. Civ. App.) 40 S. W. Rep. 438.....	889
International &c. R. Co. v. Martinez, (Tex. Civ. App.) 57 S. W. Rep. 689.....	1217
International &c. R. Co. v. Mitchell, (Tex. Civ. App.) 60 S. W. Rep. 996.....	752, 855, 2151
International &c. R. Co. v. Moore, 16 Tex. Civ. App. 51.....	1656
International &c. R. Co. v. Mulliken, 10 Tex. Civ. App. 663.... (444).....	923
International &c. R. Co. v. Newburn, (Tex. Civ. App.) 58 S. W. Rep. 542....	1696
International &c. R. Co. v. Newman, (Tex. Civ. App.) 40 S. W. Rep. 854.....	1135, 1144, 1254
International &c. R. Co. v. Parish, 18 Tex. Civ. App. 130.....	255
International &c. R. Co. v. Phillips, (Tex. Civ. App.) 69 S. W. Rep. 107.....	412
International &c. R. Co. v. Pool, 24 Tex. Civ. App. 575.....	229
International &c. R. Co. v. Richmond, (Tex. Civ. App.) 67 S. W. Rep. 1029....	(1049)
International &c. R. Co. v. Sampson, (Tex. Civ. App.) 64 S. W. Rep. 692....	578, 561
International &c. R. Co. v. Satterwhite, 19 Tex. Civ. App. 170.....	445
International &c. R. Co. v. Sein, 11 Tex. Civ. App. 386.....	742, 772
International &c. R. Co. v. Simcock, 81 Tex. 503.....	840
International &c. R. Co. v. Smith, 62 Tex. 252.....	2146
International &c. R. Co. v. Starling, 16 Tex. Civ. App. 365.... (762)	
International &c. R. Co. v. Startz, (Tex. Civ. App.) 33 S. W. Rep. 575.....	227, 825
International &c. R. Co. v. Stephenson, 22 Tex. Civ. App. 220.....	1589, 1679
International &c. R. Co. v. Tabor, 12 Tex. Civ. App. 283.....	2146
International &c. R. Co. v. Tisdale, 74 Tex. 8.....	219
International &c. R. Co. v. True, 23 Tex. Civ. App. 523.....	227
International &c. R. Co. v. Vinson, (Tex. Civ. App.) 66 S. W. Rep. 800.....	1553
International &c. R. Co. v. Wilkes, 68 Tex. 617.....	574
International &c. R. Co. v. Williams, 20 Tex. Civ. App. 587... 517, 1547, 1572, 1672	
International &c. R. Co. v. Yarbrough, (Tex. Civ. App.) 39 S. W. Rep. 1096..	740
Ionnone v. New York &c. R. Co., 21 R. I. 452.....	376
Iowa v. Anamosa, 76 Iowa, 538.....	1825
Ireland v. Mobile &c. R. Co., 105 Ky. 400.....	247, 346
Ireland v. Oswego &c. R. Co., 13 N. Y. 526.....	1933
Ireson v. Pearman, 3 B. & C. 799.....	2174
Irish v. Northern Pac. R. Co., 4 Wash. 48.....	431
Irmer v. St. Louis Brew. Co., 69 Mo. App. 17.....	1407, 1672, 1694
Iron Mountain R. Co. v. Dies, 98 Tenn. 655.....	787, 794
Iron R. Co. v. Mowery, 36 Oh. St. 418.....	690, 1101
Iroquois Furnace Co. v. McCrea, 191 Ill. 340.....	1231
Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337.....	912, 1237, 1461
Irvin v. Gulf &c. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 66.... (766)	
Irvin v. Phelps, (Ky.) 45 S. W. Rep. 659.....	133
Irvine v. Angus, 84 Fed. Rep. 127.....	7
Irvine v. Chattanooga, 101 Tenn. 291.....	1985
Irvine v. Wood, 51 N. Y. 224.....	1098, 1346, 2232, 2255
Irving v. Media, 10 Pa. Super. Ct. 132.....	2085
Irving v. Minneapolis &c. R. Co., 71 Minn. 9.....	214
Irving v. Motley, 7 Bing. 543.... (308)	
Irwin v. Reeves Pulley Co., 20 Ind. App. 101.....	3
Irwin v. R. Co., 59 N. Y. 653.... (338)	
Isaackson v. Duluth &c. R. Co., 75 Minn. 27.....	1196, 227
Isaackson v. New York Central & Hudson R. R. Co., 94 N. Y. 278.... (351)	
Isaacs v. Third Ave. R. Co., 47 N. Y. 122.....	23, 519, 52
Isbell v. N. Y. &c. R. Co., 27 Conn. 393.....	1013, 101
Iseman v. South Carolina &c. R. Co., 52 S. C. 566.....	52
Isham v. Dow's Estate, 70 Vt. 588.....	99
Isham v. Post, 141 N. Y. 100.....	70, 10
Island Coal Co. v. Clemmitt, 19 Ind. App. 21.....	124
Island Coal Co. v. Greenwood, 151 Ind. 476.....	178
Island Coal Co. v. Neal, 15 Ind. App. 15.....	113
Island &c. Bank v. Galvin, 20 R. I. 158.....	109
Isler v. Linde Co., 33 Misc. Rep. 465.....	13

## TABLE OF CASES.

clv

PAGE

<i>Isola v. Weber</i> , 147 N. Y. 329.....	947
<i>Israel v. Bowers &amp; Bank</i> , 9 Daly, 507.....	156, 163
<i>Israel v. Gale</i> , 77 Fed. Rep. 532.....	195
<i>Iway v. Hedges</i> , 9 L. R. Q. B. Div. 80.....	2106
<i>Ivens v. Cincinnati &amp; C. R. Co.</i> , 103 Ind. 27.... (660)	
<i>Ives v. Welden</i> , 114 Iowa, 476.....	1380
<i>Ivey v. Macon</i> , 102 Ga. 141.....	1963, 1964
<i>Ivory v. Deerpark</i> , 116 N. Y. 476.....	1842
<i>Isett v. Mountain</i> , 4 East, 371.... (268)	
<i>Izlar v. Manchester &amp; C. R. Co.</i> , 57 S. C. 322.....	384, 429
<i>J. S. &amp; E. R. Co. v. Southworth</i> , 135 Ill. 250.....	1772
<i>Jack v. Hudnall</i> , 25 Oh. St. 255.....	997, 2026
<i>Jack v. McCabe</i> , 56 App. Div. 378.....	2263
<i>Jackman v. Lord</i> , 56 Hun, 192.....	2042
<i>Jackson v. R. &amp; B. E. Co.</i> , 25 Vt. 150.... (1040)	
<i>Jackson v. Alabama &amp; C. R. Co.</i> , 76 Miss. 703.....	582
<i>Jackson v. Chicago &amp; C. R. Co.</i> , 31 Iowa, 176.....	1257
<i>Jackson v. Crilly</i> , 16 Colo. 103.....	514
<i>Jackson v. Galveston &amp; C. R. Co.</i> , 14 Tex. Civ. App. 685.....	1626
<i>Jackson v. Kansas City &amp; C. R. Co.</i> , 157 Mo. 421.....	
..... 672, 776, 1170, 2141, 2142, 2154, 2155, 2158	
<i>Jackson v. Kansas City R. Co.</i> , 66 Mo. App. 506.... (1055)	
<i>Jackson v. Lansing</i> , 121 Mich. 279.....	1864
<i>Jackson v. Louisville &amp; C. R. Co.</i> , (Ky.) 46 S. W. Rep. 5.....	2110
<i>Jackson v. Missouri &amp; C. R. Co.</i> , 23 Tex. Civ. App. 319.....	1179
<i>Jackson v. N. Y. C. R. Co.</i> , 2 Thomp. & Cook, 653.... (1222)	
<i>Jackson v. Norfolk &amp; C. R. Co.</i> , 43 W. Va. 380.....	1606, 1607, 1628, 1665, 1707
<i>Jackson v. Philadelphia Traction Co.</i> , 182 Pa. St. 104.....	516
<i>Jackson v. R. Co.</i> , 13 Lea, (Tenn.) 491.....	821
<i>Jackson v. Rutland R. Co.</i> , 25 Vt. 150.....	1012, 1019, 1044
<i>Jackson v. St. Paul C. R. Co.</i> , 74 Minn. 48.....	510, 918, 1111
<i>Jackson v. St. Louis &amp; C. R. Co.</i> , 52 La. Ann. 1706.....	910, 2151, 2153
<i>Jackson v. St. Louis &amp; C. R. Co.</i> , 87 Mo. 422.....	32
<i>Jackson v. Second Ave. R. Co.</i> , 47 N. Y. 274.....	520
<i>Jackson v. Smithsonian</i> , 15 M. & N. 563.... (977)	975
<i>Jackson v. Standard Oil Co.</i> , 98 Ga. 749.....	691
<i>Jackson Co. v. B. M. Ins. Co.</i> , 139 Mass. 508.... (1307)	
<i>Jackson Electric R. &amp; C. Co. v. Lowry</i> , 79 Miss. 431.....	582
<i>Jackson &amp; Works v. Hurlbut</i> , 158 N. Y. 34.....	199
<i>Jackson &amp; Works v. Hurlburt</i> , 15 Misc. 93.....	304
<i>Jackson &amp; C. R. Co. v. Lowry</i> , 79 Miss. 431.....	830
<i>Jackson &amp; C. R. Co. v. Simmons</i> , (Tex. Civ. App.) 64 S. W. Rep. 705.....	1598
<i>Jacksonville v. Doan</i> , 145 Ill. 23.....	1907
<i>Jacksonville v. Lambert</i> , 62 Ill. 519.....	1966
<i>Jacksonville v. Smith</i> , 78 Fed. Rep. 292.....	1992
<i>Jacob v. Louisville &amp; C. R. Co.</i> , 10 Bush, (Ky.) 263.....	663, 966
<i>Jacobi v. Haynes</i> , 14 Misc. 15.....	140
<i>Jacobs v. Third Ave. R. Co.</i> , 75 N. Y. Supp. 679.....	832
<i>Jacobs v. Third Ave. R. Co.</i> , 69 N. Y. Supp. 981.....	561
<i>Jacobs v. Ohio &amp; C. R. Co.</i> , (Ky.) 45 S. W. Rep. 509.....	2156
<i>Jacobs v. Tutt</i> , 33 Fed. Rep. 412.....	618
<i>Jacobmeyer v. Poggemoeller</i> , 47 Mo. App. 560.... (995)	
<i>Jacobson v. Adams Ex. Co.</i> , 1 Oh. C. D. 212.....	210
<i>Jacobson v. Cornelius</i> , 52 Hun, 377.....	1409, 1410
<i>Jacobson v. Dallas</i> , 93 Fed. Rep. 975.....	2043
<i>Jacobus v. St. Paul &amp; C. R. Co.</i> , 20 Minn. 125.....	264, 512
<i>Jacoby v. Ocherhausen</i> , 59 Hun, 619.....	970, 979
<i>Jacoway v. Hall</i> , 67 Ark. 340.....	55
<i>Jacquay v. Hartzill</i> , 1 Ind. App. 500.....	989
<i>Jacques v. Mfg. Co.</i> , 66 N. H. 482.....	1405, 1469, 1661
<i>Jacques v. National &amp; C. Co.</i> , 15 Abb., (N. C.) 250.....	2244
<i>Jaffe v. Hartean</i> , 56 N. Y. 398.....	1316, 1317, 1324

	PAGE
Jager v. Adams, 123 Mass. 26.....	2263
Jailie v. Cardinal, 35 Wis. 119.....	147
Jakobaki v. Grand Rapids &c. R. Co., 106 Mich. 440.....	2166
James v. Christy, 18 Mo. 162....(943)	
James v. Dalbey, 107 Iowa, 463....(1083)	
James v. Ford, 30 N. Y. St. Rep. 667 (N. Y. C. P.).....	2122
James v. Harrodsburg, 85 Ky. 191.....	1955
James v. Illinois C. R. Co., 195 Ill. 327.....	2139
James v. Kansas City &c. R. Co., 69 Mo. App. 431.....	2090
James v. Orrell, 68 Ark. 284.....	108
James v. Rapides Lumber Co., 50 La. Ann. 717.....	1503
James v. Richmond &c. R. Co., 92 Ala. 231.....	908
Jameson v. C. & A. R. Co., 2 Am. L. Reg. 234.....	345, 346
Jamison v. Ill. &c. R. Co., 63 Miss. 33.....	663, 1143, 2154
Jamison v. New York &c. R. Co., 11 App. Div. 50.....	1221
Jammison v. Chesapeake &c. R. Co., 92 Va. 327.....	503
Janes v. Brunswick, 8 N. M. 105.....	61
Janny v. Great Northern R. Co., 63 Minn. 380.....	381
Jansen v. Atchison, 16 Kan. 358.....	1861
Jansen v. Siddal, 41 Mo. App. 279....(706)	
Jaquinto v. B. & Seventh Ave. R. Co., 2 Misc. 174.....	2294
Jaquith v. Richardson, 8 Met. (Mass.) 213.....	2345
Jarboe v. Carrollton, 73 Mo. App. 347.....	1963, 2014
Jarnett v. Brooklyn St. R. Co., 49 Supr. Ct. 185.....	2313
Jaroszeski v. Osgood &c. Man. Co., 80 Minn. 393.....	1448, 1752
Jarrell v. Charleston &c. R. Co., (S. C.) 36 S. E. Rep. 910....(1103)	
Jarvis v. Drake, 97 Ill. App. 153.....	1717
Jarvis v. Metropolitan Street R. Co., 65 App. Div. 490.....	917, 1234
Jarvis v. Northern &c. Co., 55 App. Div. 272.....	1677, 1680
Jasper County v. Allman, 142 Ind. 572.....	1982, 1988
Jaycox v. Trembly, 42 App. Div. 416.....	1032
Jayne v. Sebewaing Coal Co., 108 Mich. 242.....	1452
Jean v. Boston &c. R. Co., 181 Mass. 197.....	1696
Jebb v. Chicago &c. R. Co., 67 Mich. 160....(1042)	
Jefferson v. Birmingham R. &c., 116 Ala. 294.....	418, 2050
Jefferson v. Jameson &c. Co., 165 Ill. 138.....	646
Jefferson R. Co. v. Cleveland, 8 Bush. 184.....	620
Jefferson R. Co. v. Swift, 26 Ind. 459....(766)	
Jeffersonville v. McHenry, 22 Ind. App. 10.....	714, 1143, 1868
Jeffersonville Co. v. Rogers, 28 Ind. 1.....	586
Jeffersonville R. Co. v. Swayne 26 Ind. 477....(965)	
Jeffersonville &c. R. Co. v. Adams, 43 Ind. 402....(1013)	
Jeffersonville &c. R. Co. v. Bohlen, 40 Ind. 445....(706)	
Jeffersonville &c. R. Co. v. Dunlap, 112 Ind. 93....(1047)	
Jeffersonville &c. R. Co. v. Foster, 63 Ind. 342....(1013)	
Jeffersonville &c. R. Co. v. Goldsmith, 47 Ind. 43....(658)	815
Jeffersonville &c. R. Co. v. Hendricks, 26 Ind. 228....(965)	472, 493
Jeffersonville &c. R. Co. v. Hendricks, 41 Ind. 48....(946)	
Jeffersonville &c. R. Co. v. Nichols, 30 Ind. 321....(1045)	
Jeffersonville &c. R. Co. v. Parmalee, 51 Ind. 42.....	432, 472, 473
Jeffersonville &c. R. Co. v. Riley, 39 Ind. 568.....	384, 896
Jeffersonville &c. R. Co. v. Rogers, 38 Ind. 116....(29)	553, 554
Jeffersonville &c. R. Co. v. Ross, 37 Iowa, 545....(671)	
Jeffersonville &c. R. Co. v. Swift, 26 Ind. 459....(498)	493
Jeffries v. De Hart, 96 Fed. Rep. 494.....	1401
Jeffries v. Seaboard &c. R. Co., 129 N. C. 236.....	852
Jeffry v. Keokuk &c. R. Co., 56 Iowa, 546.....	1219
Jeggin v. Roeder, 79 Mo. App. 428.....	1951, 2256
Jehl v. Ellicott Square Co., 31 App. Div. 336.....	642
Jelinski v. Belt R. Co., 86 Ill. App. 535.....	775, 779, 2139
Jemison v. So. Western R. Co., 75 Ga. 444.....	989
Jenck v. Coleman, 2 Sumner, 221.....	365, 1731
Jencks v. Lehigh Valley R. Co., 33 App. Div. 635.....	1111

## TABLE OF CASES.

clvii

	PAGE
Jenkins v. Bank of Bowdoinham, 58 Me. 275.... (127)	
Jenkins v. Brooklyn &c. R. Co., 29 App. Div. 8.....	545
Jenkins v. Hamkins, 98 Tenn. 545.....	955
Jenkins v. Maginnis Cotton Mills, 51 La. Ann. 1011.....	1743
Jenkins v. Mammoth Min. Co., (Utah) 68 Pac. Rep. 845.....	1673, 1805
Jenkins v. Mottow, 1 Sneed. (Ky.) 248.....	417
Jenkins v. Turner, 1 Ld. Raymond, 109.....	1006
Jenkinson v. Carlin, 10 Misc. 22.....	1627
Jenkinson v. Coggins, 123 Mich. 7.....	995, 1011
Jenks v. Lansing Lumber Co., 97 Iowa, 342.....	2246
Jenne v. Sutton, 43 N. J. L. 257.....	2269
Jenney v. Brooklyn, 120 N. Y. 164.....	1818
Jennings v. D. G. Burton Co., 73 Hun, 545.... (979)	992
Jennings v. Grand Trunk Railway of Canada, 127 N. Y. 438.....	274, 337, 340, 351
Jennings v. Grand Trunk R. Co., 52 Hun, 227.... (347)	
Jennings v. Iron Bay Co., 47 Minn. 111.....	1424
Jennings v. Smith, 99 Fed. Rep. 189.....	257
Jennings v. Smith, 106 Fed. Rep. 139.....	257, 299
Jennings v. Tompkins, 180 Mass. 302.....	2127
Jennings v. Van Schaick, 108 N. Y. 530.....	1317, 1330, 1875, 2233
Jensen v. Hudson Sawmill Co., 98 Wis. 73.....	1460, 1572
Jensen v. Omaha &c. R. Co., 115 Iowa, 404.....	1690, 1798
Jensen v. Wetherill, 79 Ill. App. 33.....	2045
Jenson v. Chicago &c. R. Co., 86 Wis. 589.....	829, 852
Jenson v. Great Northern R. Co., 72 Minn. 175.....	1681
Jerome v. Smith, 48 Vt. 230.... (569)	550
Jerowski v. Marco, 56 S. C. 241.....	2053
Jespersen v. Phillips, 46 Minn. 147.....	1247
Jessup v. Bamford Man. Co., 66 N. J. L. 641.....	2083
Jetter v. N. Y. C. &c. R. Co., 2 Abb. Ct. App. Dec. 458.....	1167, 1171, 2378, 2379
Jewell v. Chicago &c. R. Co., 54 Wis. 610.... (493)	
Jewell v. Colby, 66 N. H. 399.....	903
Jewell v. Grand Trunk R. Co., 55 N. H. 84.....	4
Jewell v. New York &c. R. Co., 27 App. Div. 500.....	451, 1229
Jewett v. Kansas City R. Co., 38 Mo. App. 48.... (1018)	
Jewett v. Kansas City &c. R. Co., 50 Mo. App. 547.... (1014)	
Jewett v. Klein, 27 N. J. Eq. 550.... (762)	
Jewett v. Olsen, 18 Or. 419.....	234
Jewett v. Paterson R. Co., 62 N. J. L. 424.....	2331
Jewett v. Sweet, 178 Ill. 96.....	2083
Jewhurst v. City of Syracuse, 108 N. Y. 303.....	1842
Jochen v. Robinson, 66 Wis. 638.....	2233, 2239
Jochumsen v. Suffolk Savings Bank, 3 Allen, 87.....	164
Joel v. Morison, 6 Carr. & P. 50.... (6)	
Johanson v. Eastman's Co., 44 App. Div. 270.....	1778, 1782
Johanson v. New York, 76 N. Y. Supp. 119.....	2205
Johanson v. Pioneer Fuel Co., 72 Minn. 405.....	32
John Spry Lumber Co. v. Duggan, 182 Ill. 218.....	1596, 2125
Johns v. Cleveland &c. R. Co., 7 Oh. N. P. 592.....	1690
Johnsen v. Oakland &c. R. Co., 127 Cal. 608.....	408
Johnson v. Alabama &c. R. Co., 69 Miss. 191.....	306
Johnson v. Ashland Water Co., 71 Wis. 553.....	1396, 1404
Johnson v. Ashland Water Co., 77 Wis. 51.....	1669
Johnson v. Atchison &c. R. Co., 56 Kan. 263.....	2153
Johnson v. Atlantic &c. R. Co., (N. C.) 41 S. E. Rep. 794.....	477
Johnson v. Baltimore &c. R. Co., 25 W. Va. 570.... (1035)	
Johnson v. Belden, 47 N. Y. 130.....	692
Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455.....	1460, 2054
Johnson v. Boston &c. R. Co., 125 Mass. 75.....	384, 815, 2140, 2141
Johnson v. Brewer, 61 Penn. St. 58.....	1172
Johnson v. Brooklyn Heights R. Co., 34 App. Div. 271.....	1111, 2329
Johnson v. Brown, 61 Penn. St. 58.....	1171
Johnson v. Chapman, 43 W. Va. 639.....	2079

	PAGE
Johnson v. Charleston &c. R. Co., 55 S. C. 152.....	1799
Johnson v. Chesapeake &c. Co., 36 W. Va. 73.....	1616
Johnson v. Chicago &c. R. Co., 58 Iowa, 348.... (24).....	1
Johnson v. Chicago &c. R. Co., 116 Iowa, 639.....	2151
Johnson v. Chicago &c. R. Co., 31 Minn. 57.....	1267
Johnson v. Chicago &c. R. Co., 94 Fed. Rep. 473.....	422
Johnson v. Chicago &c. R. Co., 56 Wis. 274.....	2297
Johnson v. Chicago &c. R. Co., 64 Wis. 425.....	926, 1181
Johnson v. Cleveland &c. R. Co., 11 Oh. C. C. 553.....	1647, 1734
Johnson v. Detroit &c. R. Co., (Mich.) 90 N. W. Rep. 274.....	527
Johnson v. Devoe Snuff Co., 62 N. J. L. 417.....	1542, 1699
Johnson v. Farmer, 89 Tex. 610.....	1374
Johnson v. Friel, 50 N. Y. 679.....	2249
Johnson v. Glidden, 11 S. D. 237.....	2024
Johnson v. Great Northern R. Co., 7 N. D. 284.... (796, 821).....	814
Johnson v. Hubby, 98 Mich. 343.....	1729
Johnson v. Hudson R. Co., 20 N. Y. 615.....	658, 734, 789, 2285
Johnson v. Holyoke, 105 Mass. 80.... (828)	
Johnson v. Illinois C. L. Co., 61 Ill. App. 522.... (771)	
Johnson v. Irasburgh, 47 Vt. 28.....	2377
Johnson v. London &c. Co., 115 Mich. 86.....	1310
Johnson v. Long Island R. Co., 80 Hun, 306.....	871
Johnson v. McConnell, 80 Cal. 545.....	989
Johnson v. McKee, 27 Mich. 47.... (1179)	
Johnson v. Mo. Pac. &c. R. Co., 80 Mo. 620.... (1004).....	1048
Johnson v. Manhattan R. Co., 52 Hun, 111.....	836
Johnson v. Minneapolis &c. R. Co., 43 Minn. 207.... (1015).....	1013, 1018
Johnson v. M. R. Co., 52 Hun, 111.....	1131, 1226
Johnson v. National Bank, 79 Wis. 414.....	1643
Johnson v. Netherlands Ass'n Co., 132 N. Y. 576.....	3, 1757
Johnson v. N. Y. C. & H. R. R. Co., 20 N. Y. 65.....	1089
Johnson v. N. Y. Central R. Co., 33 N. Y. 612.....	308
Johnson v. Oakland &c. R. Co., 127 Cal. 608.....	1205
Johnson v. Oakes, 70 Fed. Rep. 566.....	1705
Johnson v. Oregon Short-Line R. Co., (Id.) 63 Pac. Rep. 112.....	1006, 1032
Johnson v. Parker, 7 Misc. 685.....	2350
Johnson v. Patterson, 14 Conn. 1.... (989)	
Johnson v. Philadelphia &c. R. Co., 63 Md. 106.....	564
Johnson v. Portland Stone Co., 40 Or. 436.....	1525, 1563, 1671
Johnson v. Poughkeepsie, 29 App. Div. 16.....	1866
Johnson v. Ramberg, 49 Minn. 341.....	2127, 2128
Johnson v. Reynolds, 3 Kan. 257.....	135, 148
Johnson v. Richardson, 17 Ill. 302.....	141
Johnson v. R. Co., 29 Minn. 425.... (1040)	
Johnson v. Railway Co., 20 N. Y. 615.....	2229
Johnson v. R. Co., 70 Pa. St. 365.....	487
Johnson v. Railroad Co., 86 Va. 975.....	1773
Johnson v. Rio Grande &c. R. Co., 19 Utah, 77.....	1110, 2150, 2155, 2157
Johnson v. Scottish &c. Ins. Co., 93 Wis. 223.....	1312
Johnson v. Slaymaker, 18 Oh. C. C. 104.....	1217
Johnson v. Southern R. Co., 122 N. C. 955.....	1396, 1647, 1714
Johnson v. Southern R. Co., 53 S. C. 203.....	444
Johnson v. Spear, 76 Mich. 139.....	2122, 2127
Johnson v. Spencer, 51 Neb. 198.....	1200
Johnson v. St. Paul &c. R. Co., 31 Minn. 283.....	2049
Johnson v. St. Paul &c. R. Co., 43 Minn. 53.....	1693
Johnson v. St. Paul City R. Co., 67 Minn. 260.....	731, 923, 2316
Johnson v. State, 37 Ala. 457.....	1207
Johnson v. State, 14 Ga. 55.....	1165
Johnson v. Steam Gauge & Lantern Co., 72 Hun, 535.....	1220, 1363
Johnson v. Stewart, 62 Ark. 104.....	164, 681, 2326
Johnson v. Stone, 11 Tenn. 419.... (613)	
Johnson v. Superior &c. R. Co., 91 Wis. 233.....	732, 2299

# TABLE OF CASES.

clix

	PAGE
Johnson v. Tacoma Mill Co., 22 Wash. 88.....	1700
Johnson v. Third Ave. R. Co.; 69 App. Div. 247.....	2285, 2313
Johnson v. Troy, 24 App. Div. 602.....	2017
Johnson v. Walsh, 83 Minn. 74.....	1098
Johnson v. Way, 27 Oh. St. 374.... (183)	
Johnson v. West Chester &c. R. Co., 70 Pa. St. 357.... (476)	
Johnson v. Western &c. R. Co., 55 Ga. 133.... (699)	
Johnson v. Western Union Teleg. Co., 14 Tex. Civ. App. 536.....	2457
Johnson v. Whidden, 32 Me. 230.....	1166
Johnson v. Wilcox, 135 Pa. St. 217.....	2127
Johnson v. Winona &c. R. Co., 11 Minn. 296.....	683
Johnson Chair Co. v. Agresto, 73 Ill. App. 384.....	1925
Johnson City v. Wolfe, 103 Tenn. 227.....	2007
Johnson County v. Hemphill, 14 Ind. App. 219.....	1830, 1831
Johnson County v. Rainier, 18 Ind. App. 119.....	1988
Johnson &c. Comm. Co. v. Wabash &c. R. Co., 64 Mo. App. 590.... (824)	
Johnson &c. Comm. Co. v. Wabash R. Co., 64 Mo. App. 590.....	825
Johnston v. Northwestern Live Stock Ins. Co., 107 Wis. 337.....	1313
Johnston v. Phoenix Bridge Co., 44 App. Div. 581.....	642
Johnston v. Richmond &c. R. Co., 95 Ga. 685.....	1094
Johnston v. Youghiogheny River Coal Co., 183 Pa. St. 623.....	1419
Johnstons v. W. U. T. Co., 33 Fed. Rep. 362.....	2410
Johnstown v. Rodgers, 20 Misc. 262.....	83
Joliet v. Harwood, 86 Ill. 110-116.....	2073
Joliet v. Johnson, 177 Ill. 178.....	1869
Joliet v. Johnson, 71 Ill. 423.....	919
Joliet v. Verley, 35 Ill. 58.....	1844
Joliet v. Youngs, 61 Ill. App. 589.....	1862
Joliet R. Co. v. Barty, 96 Ill. App. 351.....	2273
Joliet R. Co. v. McPherson, 96 Ill. App. 286.....	912
Joliet & R. Co. v. Caul, 32 N. E. Rep. 388.....	2036
Joliet &c. R. Co. v. Eich, Ill. App. 240.....	2286
Joliet &c. R. Co. v. Jones, 20 Ill. 221.... (1042)	
Jolly v. Hawesville, 11 Ky. L. R. 477.....	1986, 1987
Joly v. New York &c. R. Co., 48 App. Div. 624.....	929
Jonas v. Long Island R. Co., 20 Misc. 176.....	498
Jones' Appeal, 8 W. & S. (Pa.) 143.....	68, 74
Jones v. Albany, 151 N. Y. 223.....	2011, 2016
Jones v. Albany, 62 Hun, 353.....	2016
Jones v. Alabama Min. R. Co., 107 Ala. 400.....	1107, 2049
Jones v. Andover, 19 Allen, 18.....	2376, 2377
Jones v. Barnard, 63 Mo. App. 501.... (755)	
Jones v. Brooklyn Heights Railroad Co., 10 Misc. 543.....	2286
Jones v. Brooklyn &c. R. Co., 23 App. Div. 141.....	850
Jones v. Chantry, 1 Hun, 613.....	2232, 2241
Jones v. Chicago &c. R. Co., 43 Minn. 279.....	512
Jones v. Chicago &c. R. Co., 80 Minn. 488.....	1773
Jones v. Clinton, 100 Iowa, 333.....	1920
Jones v. Collins, 177 Mass. 444.....	1934, 2256
Jones v. De Coursey, 12 App. Div. 164.....	1141
Jones v. Deering, 94 Me. 165.....	863, 1865, 1871
Jones v. Georgia &c. R. Co., 103 Ga. 570.....	496
Jones v. Gordon, 2 App. Cases, 616.... (182)	
Jones v. Granite Mills, 126 Mass. 84.....	1457
Jones v. Greensboro, 124 N. C. 310.....	1866
Jones v. Greensboro &c. Street R. Co., 9 Pa. Super. Ct. 65.....	2279, 2334
Jones v. Harris, 186 Pa. St. 469.....	743, 800
Jones v. Illinois C. R. Co., 75 Miss. 970.....	1113, 1223
Jones v. Lehigh &c. R. Co., 202 Pa. St. 81.....	1166
Jones v. McMillan, (Mich.) 88 N. W. Rep. 206.....	884, 951
Jones v. Mayor &c., 14 Q. B. 890.....	1399
Jones v. Manufacturing &c. Co., 92 Me. 565.....	1585
Jones v. Mining Co., 66 Wis. 268.....	1510

	PAGE
Jones v. Morgan, 90 N. Y. 4.....	131, 827
Jones v. N. Y. C. & H. R. R. Co., 28 Hun, 364.....	1407, 1415, 1427, 1478
Jones v. N. & C. T. Co., 50 Barb. 193.....	620
Jones v. Nashville & C. R. Co., 104 Tenn. 119.....	1030
Jones v. New Haven, 34 Conn. 1.....	1852, 1925
Jones v. New York & C. R. Co., 156 N. Y. 187.....	462
Jones v. New York & C. R. Co., 46 App. Div. 470.....	439
Jones v. New York & C. R. Co., 20 R. I. 210.....	1147, 1474
Jones v. N. & C. Co., 50 Barb. 193.....	307, 624
Jones v. Oregon Short Line R. Co., (Id.) 56 Pac. Rep. 76....	(1006)
Jones v. Pennsylvania Canal Co., 178 Pa. St. 123.....	1838
Jones v. Perry, 2 Eng. 482....	(973)
Jones v. Philadelphia Traction Co., 185 Pa. St. 75.....	2130
Jones v. Pipe Co., 15 Oh. C. C. 26.....	1539
Jones v. Preston, 1 Tex. L. J. 66....	(619)
Jones v. Probasco, 18 Tex. Civ. App. 699....	(736)
Jones v. R. Co., 89 Ala. 379....	(280)
Jones v. R. Co., 42 Wis. 306....	(1040)
Jones v. Railway Co., 10 Misc. 543.....	2229
Jones v. Railway Co., 107 Mass. 261.....	2366
Jones v. Roach, 94 Tex. 649.....	2431
Jones v. Roach, 21 Tex. Civ. App. 301.....	2440, 2446, 2461
Jones v. Rochester Gas & C. Co., 7 App. Div. 465.....	1381
Jones v. St. Louis & C. Packet Co., 43 Mo. App. 398.....	23
Jones v. St. Louis & C. R. Co., 65 Mo. App. 442.....	1053
Jones v. St. Louis & C. R. Co., 89 Mo. App. 653.....	339
Jones v. Seattle, 23 Wash. 753.....	890
Jones v. Shattuck, 175 Mass. 415.....	2348, 2359
Jones v. Shaw, 16 Tex. Civ. App. 290.....	1217, 1473, 1675
Jones v. Sheboygan R. Co., 42 Wis. 206....	(1032)
Jones v. Shore & C. R. Co., 49 Mich. 573.....	1544, 1600
Jones v. Sutherland, 91 Wis. 587.....	1722
Jones v. U. & B. R. R. Co., 36 Hun, 115.....	727, 782
Jones v. Union R. Co., 18 App. Div. 267.....	1059, 1090, 1105
Jones v. Union T. Co., 201 Pa. St. 344.....	2797
Jones v. Utica & B. R. R. Co., 40 Hun, 349.....	844, 1226
Jones v. Voorhees, 10 Oh. 145.....	613, 615
Jones v. Vroom, 8 Colo. App. 143.....	2193
Jones v. W. U. T. Co., 101 Tenn. 442.....	2391
Jones v. W. U. T. Co., 18 Fed. Rep. 717.....	2398, 2408
Jones v. Wabash & C. R. Co., 17 Mo. App. 158.....	579
Jones v. Walnut, 59 Kan. 774.....	1836
Jones v. White, 90 Ind. 215.....	2049
Jones v. Wiesen, 50 Neb. 243.....	192
Jones v. Williamsburg, 97 Va. 722.....	1814
Jones Bros. v. Greenburg & C. R. Co., 9 Pa. Super. Ct. 65.....	2298
Jones Fertilizer Co. v. Cleveland & C. R. Co., 7 Oh. N. P. 245.....	1239
Jonesboro v. Baldwin, 57 Ind. 86....	(699)
Jordan v. Benwood, 42 W. Va. 312.....	1814, 1962, 1965
Jordan v. Bowen, 46 N. Y. Supr. Ct. 355.....	871
Jordan v. Cincinnati R. Co., 11 Ky. L. R. 204.....	945
Jordan v. Seattle, 26 Wash. 61.....	1869
Jordan v. Fall River R. Co., 5 Cush. 69.....	613, 615
Jordan v. Mt. Pleasant, 15 Utah, 449.....	1963, 2084
Jordan v. New York, 44 App. Div. 149.....	1926, 1952
Jordan v. New York & C. R. Co., 165 Mass. 346.....	397, 428, 2375
Jordan v. R. R., 5 Cush. 69....	(619)
Jordan v. Sullivan, (Mass.) 63 N. E. Rep. 909.....	1357
Jorgenson v. Johnson Chair Co., 169 Ill. 429.....	1091, 1397
Jorganson v. Johnson Chair Co., 67 Ill. App. 80.....	1461, 1724
Jorgenson v. Squires, 144 N. Y. 280.....	1929, 2233
Joseph v. Edison Electric Light Co., 104 La. 634.....	2029
Joseph v. George C. Whitney Co., 177 Mass. 176.....	1805



	PAGE
Joseph Schlitz Brew. Co. v. Duncan, 6 Kan. App. 178.....	2354
Joseph Schlitz Brew Co. v. Blacklay, 18 Oh. C. C. 359....(973)	
Joslin v. Gris Co., 50 Mich. 516.....	2049
Joslin v. La Baron, 44 Mich. 160.....	2247
Jossaers v. Walker, 14 App. Div. 303.....	17
Jossey v. Georgia Southern &c. R. Co., 109 Ga. 439.....	2205
Journeaux v. Stafford Co., (Mich.) 81 N. W. Rep. 259.....	1585
Joy v. Hopkins, 5 Den. 84....(1222)	
Joyce v. Martin, 15 R. I. 558.....	1318
Joyce v. Home &c. R. Co., 92 Hun, 107.....	1755
Joyner v. South Car. &c. R. Co., 26 S. Car. 47....(1027)	
J. Russell Manufacturing Co. v. New Haven S. Co., 50 N. Y. 121.....	130, 324
Juchatz v. Michigan Alkali Co., 120 Mich. 654.....	1704
Judd v. Fargo, 107 Mass. 264.....	2367
Judd v. Hartford, 72 Conn. 350.....	1904
Judd v. Wabash &c. R. Co., 23 Mo. App. 56.....	1018
Judge v. Narraganset &c. Lighting Co., 21 R. I. 128.....	1092, 1156
Judson v. Central &c. R. Co., 158 N. Y. 597.....	737, 758
Judson v. Great Northern R. Co., 63 Minn. 248....(751, 791)	
Judson v. Village of Olean, 116 N. Y. 655.....	1664
Judson v. Western R. R. Co., 4 Allen, 520....(208)	
Julian v. Stony Creek &c. Co., 71 Conn. 632.....	1565
Julian v. W. U. T. Co., 98 Ind. 327.....	2429
Junction City v. Blades, 59 Kan. 774.....	1924
Junction City v. Blades, 1 Kan. App. 85.....	1111, 1946
Juskowitz v. Dry Dock &c. R. Co., 25 Misc. 64.....	717
Justice v. Penn. Co., 130 Ind. 321.....	1666
Jutte v. Hughes, 67 N. Y. 267.....	827, 2041, 2061, 2220
K. P. R. Co. v. Cranner, 4 Colo. 524....(659)	
K. P. R. Co. v. Little, 19 Kan. 267.....	1632
K. P. R. Co. v. Nichols, 9 Kan. 235.....	224
K. P. R. Co. v. Peavey, 29 Kan. 122.....	1772
K. P. R. Co. v. Pointer, 14 Kan. 37....(657).....	659, 660, 809
K. P. R. Co. v. Reynolds, 17 Kan. 251.....	247
K. P. R. Co. v. Richardson, 25 Kan. 409....(809)	
K. P. R. Co. v. Salmon, 11 Kan. 83.....	1513
Kaare v. The Troy Steel & Iron Co., 139 N. Y. 389.....	1555
Kaberl v. Rockport, 87 Me. 527.....	2017
Kafka v. Levensohn, 18 Misc. 202....(111)	
Kain v. Larkin, 56 Hun, 79.....	954
Kain v. Smith, 80 N. Y. 458.....	91, 1422, 1694
Kaiser v. First Nat. Bank, 78 Fed. Rep. 281.....	195
Kaiser v. Flaccus, 138 Penn. St. 332.....	1673
Kaiser v. Latimer, 9 App. Div. 36.....	107, 1090
Kaiser v. Latimer, 40 App. Div. 149.....	107, 680
Kaiser v. McLean, 20 App. Div. 326.....	17
Kaiser v. New Orleans &c. R. Co., 107 La. 539.....	2304
Kaiser v. United States Nat. Bank, 99 Ga. 258.....	189
Kaiser v. Washburn, 55 App. Div. 159.....	680
Kalb v. American Nat. Bank, 21 Oh. C. C. 1.....	74
Kalb v. Klages, 27 Ill. App. 531.....	976
Kalbfleisch v. The Long Island R. Co., 102 N. Y. 520.....	1261, 1273
Kalen v. Terre Haute &c. R. Co., 18 Ind. App. 202.....	854, 2045
Kalfur v. Broadway Ferry, 34 App. Div. 267.....	912
Kallman v. U. S. Ex. Co., 3 Kan. 205....(283)	
Kalmerton v. Cowen, 111 Fed. Rep. 297....(752)	
Kalteyer v. Sullivan, 18 Tex. Civ. App. 488.....	1916
Kalk v. Winona &c. R. Co., 76 Minn. 351.....	1248
Kammerer v. Gallagher, 58 Ill. App. 561.....	1357
Kane v. N. H. & H. R. Co., 132 N. Y. 160.....	781, 803
Kane v. Mitchell Transp. Co., 90 Hun, 65.....	924, 1603
Kane v. Northern Central R. Co., 128 N. S. 91.....	1715

	PAGE
Kane v. People's Pass. R. Co., 181 Pa. St. 53.....	229
Kane v. Philadelphia, 7 Pa. Super. Ct. 109.....	1826, 1827
Kane v. Smith, 80 N. Y. 458.....	2023
Kane v. West End Street R. Co., 169 Mass. 64.....	720, 2338
Kane v. Whittaker, 33 App. Div. 416.....	172
Kane v. Yonkers, 169 N. Y. 392.....	1828
Kane v. Yonkers, 43 App. Div. 599.....	1838
Kane v. Yonkers, 60 N. Y. Supp. 216.....	183
Kankakee v. Illinois Eastern Hospital Trustees, 66 Ill. App. 112.....	190
Kankakee v. Steinbach, 89 Ill. App. 513.....	838, 1221, 186
Kankakee v. Whitehouse, 71 Ill. App. 635.....	187
Kansas Central R. Co. v. Marsh Oil Co., 140 Mo. 458.....	123
Kansas City v. File, 60 Kan. 157.....	1061, 194
Kansas City v. Frohwerk, (Kan. App.) 62 Pac. Rep. 432.... (1369)	
Kansas City v. Hart, 60 Kan. 684.....	137
Kansas City v. Lemon, 57 Fed. Rep. 905.....	198
Kansas City v. McDonald, 60 Kan. 481.....	1403, 1819, 195
Kansas City v. Orr, 62 Kan. 61.....	1821, 1823, 1861, 238
Kansas City v. Smith, 8 Kan. App. 82.....	1864, 206
Kansas City &c. R. Co. v. Becker, 63 Ark. 477.....	1092, 179
Kansas City &c. R. Co. v. Becker, 67 Ark. 1.....	1631, 1773, 179
Kansas City &c. R. Co. v. Campbell, 6 Kan. App. 417.....	66
Kansas City &c. R. Co. v. Chamberlain, (Kan.) 60 Pac. Rep. 15.....	126
Kansas City &c. R. Co. v. Daughtry, 88 Tenn. 721.....	90
Kansas City &c. R. Co. v. Eagan, 64 Kan. 421.... (850)	
Kansas City &c. R. Co. v. Fitzsimmons, 22 Kan. 686.....	213
Kansas City &c. R. Co. v. Henson, (Ala.) 31 South. Rep. 590.....	102
Kansas City &c. R. Co. v. Herman, (Kan. App.) 62 Pac. Rep. 543....	788, 213
Kansas City &c. R. Co. v. Holden, 66 Ark. 602.....	548, 54
Kansas City &c. R. Co. v. Holland, 68 Miss. 351.....	23
Kansas City &c. R. Co. v. King, 66 Ark. 439.....	162
Kansas City &c. R. Co. v. Kirksey, 48 Ark. 366.... (1026)	
Kansas City &c. R. Co. v. Lackey, 114 Ala. 152.....	54
Kansas City &c. R. Co. v. McGahey, 63 Ark. 344.....	613, 620, 6
Kansas City &c. R. Co. v. McHenry, 24 Kan. 359.... (1013)	
Kansas City &c. R. Co. v. Owen, 25 Kan. 419.....	124
Kansas City &c. R. Co. v. Patten, 3 Kan. App. 338.....	68
Kansas City &c. R. Co. v. Rogers, 48 Neb. 653.....	8
Kansas City &c. R. Co. v. Sawyer, 7 Kan. App. 146.....	168
Kansas City &c. R. Co. v. Sharp, 64 Ark. 115.....	31
Kansas City &c. R. Co. v. Spellman, 102 Fed. Rep. 251.....	169
Kansas City &c. R. Co. v. State, 65 Ark. 363.....	61
Kansas City &c. R. Co. v. Sweeney, 150 Mo. 385.....	231
Kansas City &c. R. Co. v. Watson, 91 Ala. 483.....	1023, 106
Kansas City Car &c. Co. v. Sechrist, 59 Kan. 778.....	164
Kansas Elevator Co. v. Harris, 6 Kan. App. 89.....	1
Kansas &c. Coal Co. v. Reid, 85 Fed. Rep. 914.....	172
Kansas &c. R. Co. v. Ayers, 63 Ark. 331.....	213, 240, 30
Kansas &c. R. Co. v. Cranmer, 4 Colo. 524.....	6
Kansas &c. R. Co. v. Dye, 70 Fed. Rep. 24.....	153
Kansas &c. R. Co. v. Fitzhugh, 61 Ark. 341.....	214
Kansas &c. R. Co. v. Gabsky, (Ark.) 66 S. W. Rep. 915.....	98
Kansas &c. R. Co. v. Kier, 41 Kan. 661.....	131
Kansas &c. R. Co. v. Landis, 24 Iowa, 293.... (1040)	
Kansas &c. R. Co. v. Patten, 3 Kan. App. 338.....	6
Kansas &c. R. Co. v. Salmon, 11 Kan. 83.... (376)	
Kansas &c. R. Co. v. Twombly, 3 Colo. 125.... (764)	
Kansas &c. R. Co. v. Waters, 70 Fed. Rep. 28.....	164
Kanz v. Page, 168 Mass. 217.....	1509, 13
Kaplan v. Metropolitan Street R. Co., 52 App. Div. 296.....	9
Kaplan v. New York Biscuit Co., 5 App. Div. 60.....	14
Kaples v. Orth. 61 Wis. 531.....	29
Karahuta v. Schuylkill T. Co., 6 Pa. Super. Ct. 319.....	719, 29

	PAGE
Karasch v. Peier, 22 Wash. 419.....	2103
Karle v. Kansas &c. R. Co., 55 Mo. 476.... (785).....	487
Karlson v. Healy, 38 App. Div. 486.....	1323
Karr v. N. R. Com. Co., 48 Hun, 266.....	1548
Karr v. Parks, 40 Cal. 188.... (715)	
Karr v. Parks, 44 Cal. 46.... (983)	
Karr Supply Co. v. Kroenig, 167 Ill. 560.....	1404, 1414
Karrer v. Detroit R. Co., 76 Mich. 400.....	1729
Karsen v. Milwaukee &c. R. Co., 29 Minn. 12.....	1258, 1261
Kaseman v. Sunbury, 197 Pa. St. 162.....	1829, 1851
Kaspar v. Dawson, 71 Conn. 405.....	2097
Kaspari v. Marsh, 74 Wis. 562.....	1454
Kaspers v. Chicago &c. R. Co., 85 Ill. App. 316.....	1122
Kassmann v. St. Louis, 153 Mo. 293.....	1950
Kastl v. Wabash R. Co., 114 Mich. 53.....	1602
Kates v. Pullman's Palace Car Co., 95 Ga. 810.....	599, 1102
Kaumier v. City Electric R. Co., 116 Mich. 306.....	2136
Kaverny v. Troy, 108 N. Y. 571.....	1115, 1818, 1888
Kay v. Penn. R. Co., 65 Pa. St. 269.... (719).....	708, 798
Kaye v. Rob Roy Hosiery Co., 51 Hun, 519.....	1030, 1070
Kays v. Metropolitan Street R. Co., 163 N. Y. 447.....	1090, 1091
Kayser v. Lindell, 73 Minn. 123.....	1356
Keane v. Baltimore &c. R. Co., 61 Md. 154.....	2148
Kean v. Chenault, (Ky.) 41 S. W. Rep. 24.....	1028
Kean v. West Chicago Street R. Co., 75 Ill. App. 38.....	508
Keane v. Waterford, 130 N. Y. 188.....	1894
Keans v. Saunders, 105 Mass. 63.....	2373
Keans v. Sonder, 104 Mass. 63.....	2383
Kearns v. Chicago &c. R. Co., 66 Ia. 599.....	1438
Kearns v. South Middlesex Street R. Co., 181 Mass. 587.....	2339
Keast v. Santa Ysabel &c. Min. Co., 136 Cal. 256.....	872, 1673
Keates v. Cadogan, 10 Com. Bench. 591.... (1324)	
Keating v. N. Y. C. & H. R. Co., 49 N. Y. 673.....	438, 461
Keating v. Brown, 30 Minn. 9.....	2050
Keating v. Pacific &c. Whaling Co., 21 Wash. 415.....	1658
Keatley v. Illinois C. R. Co., 103 Iowa, 232.....	1797
Keator v. Scranton Traction Co., 191 Pa. St. 102.....	371, 1102
Keck v. Sanford, 2 Misc. 484.....	1116
Keck v. Baltimore &c. R. Co., 17 Md. 32.....	1017, 1024
Keefe v. Milwaukee, 21 Minn. 209.....	1345
Keefe v. Narragansett &c. Lighting Co., 21 R. I. 575.....	1066
Keefe v. Pacific &c. Ins. Co., 201 Pa. St. 448.....	1160
Keegan v. Kavanaugh, 62 Mo. 230.... (698)	
Keegan v. Luzerne County, 8 Kulp, 160.....	2110
Keegan v. New York &c. R. Co., 45 App. Div. 629.....	1637
Keegan v. Third Ave. R. Co., 34 App. Div. 297.....	392
Keegan v. Western R. Co., 8 N. Y. 175.....	1425, 1481, 1601
Keehn v. McGillicuddy, 15 Ind. App. 580.....	1962
Keen v. Detroit Electric R. Co., 123 Mich. 247.....	562
Keen v. Havre de Grace, 93 Md. 34.....	1872
Keely Brew Co. v. Parbin, 13 Ind. App. 588.....	2048
Keenan v. Brooklyn City R. Co., 8 Misc. 601.....	2294
Keenan v. Cavanaugh, 44 Vt. 268.... (1005).....	1002, 1007, 1008
Keenan v. Gutta Percha Mfg. Co., 46 Hun, 544.... (943)	
Keenan v. Southworth, 110 Mass. 474.....	85
Keenan v. Union T. Co., 202 Pa. St. 107.....	2317
Keenan v. Van Dusen, 19 Pa. Co. Ct. 282.....	1085
Keenan v. R. Co., 145 N. Y. 190.....	1515
Keenan v. Railway Co., 8 Misc. 601.....	2229, 2230
Keenan v. Waters, 181 Pa. St. 247.....	1448, 1492
Keeney v. G. T. R. Co., 47 N. Y. 525.....	238
Keeney v. Oregon &c. R. Co., 19 Ore. 291.... (1013)	
Keep v. Walsh, 17 App. Div. 104.....	9

	PAGE
Keester v. Chicago &c. R. Co., 106 Wis. 460.... (755)	
Kehler v. Schwenk, 151 Pa. St. 505.....	1505, 1753
Kehoe v. Allen, 92 Mich. 464.....	1637
Kehoe v. Halpin, 65 Mo. App. 343.....	2256
Keife v. Thorn, 24 W. N. Rep. 379.....	1510
Keiffert v. Nassau &c. R. Co., 51 App. Div. 301.....	916
Keightlinger v. Eagan, 65 Ill. 235.....	973, 979, 986
Keilbach v. Chicago &c. R. Co., 11 S. D. 468.....	1019
Keilt v. Staten Island Rapid Transit R. Co., 75 Hun, 579.....	460
Keim v. Union R. Co., 90 Mo. 314.... (785)	653
Keiser v. Gas Co., 143 Pa. St. 276.... (1381)	
Keist v. Chicago &c. R. Co., 110 Iowa, 32.....	1189, 1438
Keitel v. R. Co., 28 Mo. App. 657.... (730)	
Keith v. Granite Mills, 126 Mass. 90.....	1457
Keith v. Marcus, 181 Mass. 377.....	2178
Keith v. New Haven R. Co., 140 Mass. 175.....	1473, 1519
Keithsburg v. Simpson, 70 Ill. App. 467.....	1915, 1962
Keithlinger v. Avary, 65 Ill. 235.... (983)	
Kelleher v. Railroad Co., 80 Wis. 584.....	1694
Keller v. Baltimore &c. R. Co., 10 Pa. Super. Ct. 240.....	253
Keller v. Gaskill, 36 N. E. (Ill.) 303.....	1503
Keller v. Gilman, 93 Wis. 9.....	1207
Keller v. Grath, 45 Mo. App. 332.... (104)	115
Keller v. Haaker, 2 App. Div. 245.....	711, 2354
Keller v. Lewis, 65 Ark. 578.....	2197
Keller v. N. Y. Central &c. R. Co., 24 How. 177.....	673
Keller v. Sioux &c. R. Co., 27 Minn. 178.... (472)	
Kellerman v. Kansas City &c. R. Co., 136 Mo. 177.....	250, 287
Kelley v. C. M. &c. R. Co., 53 Wis. 74.....	1704
Kelley v. Adehmann, 72 App. Div. 590.....	2360, 2369
Kelley v. Anderson, 15 S. D. 107.....	1172, 1248
Kelley v. Boston, 180 Mass. 233.....	1952
Kelley v. Chicago &c. R. Co., 50 Wis. 381.....	2051
Kelley v. Forty-second Street &c. R. Co., 58 Hun, 93.....	1412
Kelley v. Fourth of July Min. Co., 16 Mont. 484.....	1572, 1594, 1643
Kelley v. Hogan, 76 N. Y. Supp. 913.....	1625
Kelley v. Minneapolis, 77 Minn. 76.....	2022
Kelley v. New York, 19 Misc. 257.....	2013
Kelley v. Norcross, 121 Mass. 508.....	1490
Kelley v. Phenix National Bank, 17 App. Div. 496.....	37
Kelley v. Solari, 9 M. & W. 54.... (1079)	
Kelley v. Tilton, 3 Keyes, (42 N. Y.) 263.... (986)	
Kelley v. Wakefield &c. Street R. Co., 175 Mass. 331.....	2316
Kelleyville Coal Co. v. Petraytis, 95 Ill. App. 635.... (962)	
Kelliher v. Connecticut &c. R. Co., 107 Mass. 411.....	1046
Kellinger v. Railway Co., 50 N. Y. 208.....	2226
Kellogg v. N. Y. C. & H. R. R. Co., 79 N. Y. 72.....	758, 759, 938
Kellogg v. Chicago &c. R. Co., 26 Wis. 222.....	896, 1266
Kellogg v. New York, 15 App. Div. 326.....	202
Kellogg v. Northampton, 4 Gray, (Mass.) 165.....	191
Kellogg v. Smith, 179 Mass. 595.....	41
Kellogg v. Steiner, 29 Wis. 626.....	12
Kellogg v. Sweeney, 46 N. Y. 291.....	18
Kellogg v. Thompson, 66 N. Y. 88.....	190
Kellow v. Central Iowa R. Co., 68 Iowa, 470.....	94
Kellow v. Scranton, 195 Pa. St. 134.....	186
Kelly v. R. Co., 75 Mo. 138.....	232
Kelly v. Abbott, 63 Wis. 307.....	1474, 15
Kelly v. Anderson, 19 R. I. 544.....	107
Kelly v. Bennett, 132 Pa. St. 218.....	21
Kelly v. Central R. &c., 5 McCrary C. C. 653.....	8
Kelly v. Cohoes Knitting Co., 8 App. Div. 156.....	
Kelly v. Cook, 21 R. I. 29.....	190

## TABLE OF CASES.

clxv

	PAGE
Kelly v. Consolidated T. Co., 62 N. J. L. 514.....	474
Kelly v. Congrove, 48 Iowa, 979.....	2382
Kelly v. Detroit Bridge Works, 17 Kan. 558.....	1440
Kelly v. Doody, 116 N. Y. 575.....	3, 2227, 2233
Kelly v. Hannibal &c. R. Co., 70 Mo. 604.....	493
Kelly v. Han. &c. R. Co., 75 Mo. 138.....	663, 751, 769
Kelly v. Juttes &c. Co., 104 Fed. Rep. 955.....	1559, 1646
Kelly v. Louisville R. Co., (Ky.) 46 S. W. Rep. 688.....	2315
Kelly v. Manayunk &c. R. Co., 11 Cent. Rep. (Pa.) 415.....	2259
Kelly v. Manhattan R. Co., 112 N. Y. 445.....	389, 435
Kelly v. Mayor &c. of New York, 11 N. Y. 432.....	632, 634, 635, 639
Kelly v. Metropolitan Street R. Co., 25 Misc. 194.....	2339
Kelly v. Met. Ry., 1 Q. B. 944.....	1767
Kelly v. Minneapolis, 77 Minn. 76.....	2023
Kelly v. New Haven Steamboat Co., 74 Conn. 343.....	1638
Kelly v. New York, 16 App. Div. 296.....	2204
Kelly v. Perrault, (Id.) 48 Pac. Rep. 45.....	1235
Kelly v. Pittsburg &c. R. Co., (Ind. App.) 63 N. E. Rep. 233.....	1369, 1904
Kelly v. So. Minnesota R. Co., 28 Minn. 98.... (697)	
Kelly v. Southern &c. R. Co., 28 Minn. 98.... (820)	
Kelly v. Smith, 26 App. Div. 346.....	1353
Kelly v. Union R. & Trans. Co., 11 Mo. App. 1.....	1715
Kelly v. Union Traction Co., 9 Pa. Dist. R. 69.....	1796
Kelly v. Wakefield &c. Street R. Co., 180 Mass. 542.....	2319
Kelly v. Western &c. Teleg. Co., 17 Tex. Civ. App. 344.....	1374
Kelpy v. Triest, 76 N. Y. Supp. 742.....	1218
Kelsey v. Barney, 12 N. Y. 425.....	665
Kelsey v. Chicago &c. R. Co., 106 Iowa, 253.....	1443, 1711
Kelsey v. Jewett, 28 Hun, 51.....	790
Kelsey v. Michigan Central R. Co., 28 Hun, 460.....	569
Kelver v. N. Y. &c. R. Co., 126 N. Y. 365.... (1034)	1051
Kemmerer v. Man. R. Co., 81 Hun, 444.....	1409, 1411
Kemp v. W. U. T. Co., 28 Neb. 661.....	2397, 2439, 2452
Kempster v. Milwaukee, 103 Wis. 421.....	1988
Kendall v. Boston, 113 Mass. 234.....	1095
Kendall v. Milligan, 62 Ark. 629.....	178
Kendell v. Kendell, 147 Mass. 482.....	2361
Kendig v. Chicago &c. R. Co., 79 Mo. 207.... (1018)	
Kendig v. Overhulser, 58 Iowa, 195.....	2053
Kenedy v. Denver &c. R. Co., 10 Colo. 493.... (659)	
Kennard v. Burton, 25 Me. 39.....	1176, 2346, 2348
Kennayde v. Pacific R. Co., 45 Mo. 255.... (761)	
Kennedy v. N. Y. C. & H. R. R. Co., 125 N. Y. 422.....	261, 266
Kennedy v. N. Y. C. & H. R. R. Co., 49 Hun, 535.....	2042
Kennedy v. N. Y. C. & H. R. R. Co., 35 Hun, 186.....	869
Kennedy v. R. C. & B. R. Co., 130 N. Y. 654.....	1175
Kennedy v. Allentown &c. Works, 49 App. Div. 78.....	1638
Kennedy v. Ashwaft, 4 Bush. (Ky.) 530.... (114)	
Kennedy v. Burrier, 36 Mo. 128.....	1369
Kennedy v. Busse, 60 Ill. App. 440.....	937
Kennedy v. Chase, 119 Cal. 637.....	1459
Kennedy v. Chicago &c. R. Co., 68 Iowa, 559.... (700)	
Kennedy v. Chicago &c. R. Co., 58 N. W. (Minn.) 878.....	1466
Kennedy v. County Commissioners &c., 69 Md. 65.....	667
Kennedy v. Crandall, 3 Lansing, 1.....	627
Kennedy v. Fay, 31 Misc. Rep. 776.....	1327
Kennedy v. Frederick, 168 N. Y. 379.....	695, 1070
Kennedy v. Hannibal &c. R. Co., 63 Mo. 99.....	1258
Kennedy v. Hannibal &c. R. Co., 70 Mo. 252.....	1257, 1258
Kennedy v. Hills Bros. Co., 54 App. Div. 29.....	717
Kennedy v. Hingham Cordage Co., 168 Mass. 278.....	1558
Kennedy v. Kansas &c. R. Co., 69 Mo. App. 569.....	2090
Kennedy v. Lake Superior Terminal &c. R. Co., 93 Wis. 32.....	1438, 1589, 1689

	PAGE
Kennedy v. Lane, 9 Tex. Civ. App. 150.....	770
Kennedy v. McAllaster, 31 App. Div. 453.....	1072
Kennedy v. M. R. Co., 33 Hun, 457.....	1551
Kennedy v. Man. R. Co., 145 N. Y. 288.....	1541
Kennedy v. Mayor, 73 N. Y. 365.....	604, 1847
Kennedy v. Morgan, 57 Vt. 146.....	965, 2043
Kennedy v. New York, 34 App. Div. 311.....	2015
Kennedy v. New York, 18 Misc. 303.....	2021
Kennedy v. North Missouri &c. R. Co., 36 Mo. 351.... (756).....	684
Kennedy v. Ryan, 67 N. Y. 379.....	405
Kennedy v. Third Ave. R. Co., 31 App. Div. 30.....	2272, 2305
Kennedy v. Williamsport, 11 Pa. Super. Ct. 91.....	1827, 1992
Kennon v. Gelner, 4 Mont. 433.....	2056
Kennon v. Gilmer, 131 U. S. 22.... (855)	
Kennon v. Vicksburg &c. R. Co., 51 La. Ann. 1599.....	465
Kennon v. Western Union Teleg. Co., 126 N. C. 232.....	2458
Kenny v. Hannibal &c. R. Co., 80 Mo. 573.....	1112
Kent v. R. Co., 45 Oh. St. 284.....	296, 279, 555
Kent v. Barnes, 72 Ill. App. 617.....	190
Kent v. Hudson R. Co., 22 Barb. 278.... (824)	
Kent v. Lincoln, 32 Vt. 591.... (1131).....	1138
Kent v. New York &c. R. Co., 51 App. Div. 508.....	814
Kent v. Yazoo & M. V. R. Co., 77 Miss. 494.....	1411
Kentland v. Hagan, 17 Ind. App. 1.....	1992
Kentucky Lumber Co. v. King, (Ky.) 65 S. W. Rep. 156.....	2086
Kentucky &c. Ins. Co. v. Franklin, 102 Ky. 511.....	1309
Kentucky &c. R. Co. v. Biddle, (Ky.) 34 S. W. Rep. 904.....	667, 902
Kentucky &c. R. Co. v. Carr, (Ky.) 43 S. W. Rep. 193.....	1408
Kentucky &c. R. Co. v. Gastineau, 83 Ky. 119.....	720, 905, 2110
Kentucky &c. R. Co. v. Lebus, 14 Bush. 518.... (1015).....	1017
Kentucky &c. R. Co. v. Thomas, 79 Ky. 160.... (657).....	372
Kenyon v. N. Y. C. & H. R. R. R. Co., 5 Hun, 479.....	662, 713
Kenyon v. National Ass'n, 39 App. Div. 276.....	1315
Keokuk v. Ind. Dist. of Keokuk, 53 Iowa, 352.....	2261
Keopke v. Milwaukee, 112 Wis. 475.....	1204
Keown v. St. Louis R. Co., 141 Mo. 86.....	1445
Kewanee v. Ladd, 68 Ill. App. 154.....	1967
Kewanee Boiler Co. v. Erickson, 78 Ill. App. 35.....	1629, 1738
Kepperly v. Ramsdin, 83 Ill. 354.....	646
Keppleman v. Philadelphia &c. R. Co., 190 Pa. St. 333.....	766
Kepner v. Harrisburg T. Co., 183 Pa. St. 24.....	1065, 1107
Ker v. O'Connor, 63 Pa. St. 341.....	997
Kerlin v. Chicago &c. R. Co., 50 Fed. Rep. 185.....	1609
Kern v. DeCastro &c. Refining Co., 125 N. Y. 50, 55. 1068, 1131, 1403, 1409, 1549	
Kern v. Second Ave. T. Co., 194 Pa. St. 75.....	2317
Kerner v. Baltimore &c. R. Co., 149 Ind. 21.....	1627, 1634
Kerr v. Atlantic Ave. R. Co., 10 Misc. 264.....	2321
Kerr v. Crown Cotton Mills, 105 Ga. 510.....	1602
Kerr v. Georgia R. Co., 105 Ga. 371.....	354
Kerr v. Fargue, 54 Ill. 482.... (720)	
Kerr v. Railway Co., 10 Minn. 264.....	2229
Kerr v. Willan, 2 Starks, 53.... (296)	
Kerr-Murry Man. Co. v. Hess, 98 Fed. Rep. 56.....	1629
Kerrigan v. Chicago &c. R. Co., (Minn.) 90 N. W. Rep. 976.....	1479, 1587
Kerrigan v. Chicago &c. R. Co., 104 Wis. 166.....	1729
Kerrigan v. Hart, 40 Hun, 389.....	1415
Kerrigan v. Pennsylvania R. Co., 194 Pa. St. 98.....	840, 1434
Kerrigan v. Southern Pacific R. Co., 81 Cal. 248.....	342, 356
Kershaw v. Ladd, 34 Or. 375.....	12
Kerwhacker v. Cleveland &c. R. Co., 3 Oh. St. 172.... (1014).....	1013, 1041
Kesee v. Chicago & N. W. R. Co., 30 Iowa, 78.....	1257
Kessel v. Butler, 53 N. Y. 612.....	636, 2227, 2238
Kessler v. Brooklyn &c. R. Co., 3 App. Div. 426.....	728, 2274

## TABLE OF CASES.

clxvii

## PAGE

Kessler v. Citizens' Street R. Co., 20 Ind. 427.....	2328
Kessler v. Lockwood, 62 Hun, 619.....	992
Kessler v. New York Cent. R. Co., 61 N. Y. 58.... (351).....	341, 342, 348, 356
Kester v. Western Union Tel. Co., 29 Oh. L. J. 259.....	858
Ketaltas v. Ketaltas, 72 N. Y. 312.... (947)	
Ketchum v. Texas R. Co., 38 La. Ann. 777.....	910
Ketcheson v. Southern P. R. Co., 19 Tex. Civ. App. 288.....	557
Ketchum v. Merchants' Union Ex. Co., 52 Mo. 390.....	1099
Kettle v. Turl, 162 N. Y. 255.....	2350
Keyes v. Cedar Falls, 107 Iowa, 509.....	894, 1155, 1178, 1870, 1875
Keyes v. Penn. R. Co., 3 Atl. Rep. (Pa.) 15.....	1618
Keyley v. Central R. &c., 64 N. J. L. 355.... (761)	
Keyser v. C. & G. T. R. R. Co., 56 Mich. 559.... (814 )	
Keyser v. Chicago &c. R. Co., 68 Mich. 390.....	2148
Keystone Bridge Co. v. Newberry, 96 Pa. St. 246.....	1614, 1620, 1669
Khron v. Brock, 144 Mass. 516.....	649, 2266
Kibele v. Philadelphia, 105 Pa. St. 41.....	698
Kibler v. Southern R. Co., 64 S. C. 242.....	367, 904
Kidder v. Inhab. of Dunstable, 11 Gray, 342.....	2257
Kiffin v. Wendt, 39 App. Div. 229.....	1666
Kiebele v. The City of Philadelphia, 105 Pa. 41.....	1382, 1384
Kiefer v. Grand Trunk &c. R. Co., 12 App. Div. 28.....	961
Kiefer v. Klinsick, 144 Ind. 46.....	1083
Kiernan v. Manhattan R. Co., 28 Misc. 516.....	425
Kiernan v. Man. &c. Co., 50 How. Pr., (N. Y.) 194.....	2436
Kierzenkowski v. Philadelphia Traction Co., 184 Pa. St. 459.....	2296
Kies v. Erie, 135 Pa. St. 144.....	1866
Kilberg v. Berry, 166 Mass. 488.....	2045
Kilbride v. New York &c. R. Co., 17 App. Div. 177.....	760
Kilbridge v. Carbon Di-Oxide &c. Co., 201 Pa. St. 552.....	2068
Kiley v. Chicago City R. Co., 90 Ill. App. 275.....	561, 592
Kiley v. Kansas, 69 Mo. 102.....	1852
Kiley v. Kansas City, 87 Mo. 103.....	1925
Kiley v. Western Union Telegraph Co., 109 N. Y. 231.....	
.....	2389, 2396, 2399, 2413, 2414
Kilgour v. Wolf, 4 Oh. N. P. 183.....	2101
Killea v. Faxon, 125 Mass. 485.....	1424, 1490
Killen v. Brooklyn Heights R. Co., 48 App. Div. 557.....	2303
Killian v. Georgia R. &c. Co., 97 Ga. 727.....	463, 1117
Killman v. Palmer &c. R. Co., 102 Fed. Rep. 224.....	1478, 1482
Kilmer v. Reckitt & Sons, 77 N. Y. Supp. 395.....	930
Kilpatrick v. Grand Trunk R. Co., 72 Vt. 263.....	685, 1713, 1777
Kilridge v. Carbon Dioxide &c. Co., 201 Pa. St. 552.....	1379
Kilroy v. D. & H. C. Co., 121 N. Y. 22.....	1758
Kilsey v. New York &c. R. Co., (Mass.) 63 N. E. Rep. 80.....	818
Kilvane v. Westchester Electric R. Co., 19 Misc. 184.....	2319
Kimball v. Borden, 95 Va. 203.....	1106, 1112, 1136
Kimball v. Carter, 95 Va. 77.....	1055
Kimball v. Cushman, 103 Mass. 194.....	1399
Kimball v. Dahoney, (Ky.) 38 S. W. Rep. 3.....	113
Kimball v. Friend, 95 Va. 125.... (792)	
Kimball v. Norton, 59 N. H. 1.....	156, 165
Kimball v. Palmer, 80 Fed. Rep. 240.....	517
Kimball v. Rutland &c. R. Co., 28 Vt. 247.....	577
Kimber v. Metropolitan Street R. Co., 69 App. Div. 353.....	470
Kimmel v. Well, 95 Ill. App. 15.....	178
Kimmer v. Webber, 151 N. Y. 417.....	1423, 1664
Kimmer v. Weber, 81 Hun, 599.....	836
Kincade v. Chicago &c. R. Co., 107 Iowa, 682.....	19, 1626
Kincaid v. Kansas City &c. R. Co., 62 Mo. App. 365.....	226
Kinchlow v. Midland Elevator Co., 57 Kan. 374.....	2134
Kindell v. Hall, 8 Colo. App. 63.....	1602
Kindson v. Markle, 171 Pa. St. 138.....	1770

	PAGE
King v. N. Y. C. & H. B. R. Co., 66 N. Y. 181.....	3, 634
King v. N. Y. C. & H. B. R. Co., 72 N. Y. 607.....	1240
King v. American Transportation Co., 1 Flipp. C. C. 1.....	1265
King v. Baldwin, 17 Johns. 384.... (177)	
King v. Boston & W. R. Co., 9 Cush. 112.....	1350
King v. Central &c. R. Co., 107 Ga. 754.....	348
King v. Chicago &c. R. Co., 108 Iowa, 748.....	602
King v. Chicago &c. R. Co., 90 Mo. 520.... (1036)	
King v. Colon, 125 Mich. 511.....	1950
King v. Granger, 21 R. I. 93.....	1903
King v. Henker, 80 Ala. 505.... (657)	954
King v. Herb, 18 Oh. C. C. 41.....	2351
King v. Illinois Central, 69 Miss. 245.....	11
King v. Illinois C. R. Co., 114 Fed. Rep. 855.... (796)	
King v. Interstate Consol. S. R. Co., (R. I.) 51 Atl. Rep. 301.....	1771
King v. Johnson, 96 Ga. 497.....	58
King v. Kansas City, 58 Kan. 334.....	1904, 1963, 1964
King v. King, 3 Johns. Ch. 552.....	41
King v. Klein, 6 Pa. St. 318.... (989)	99
King v. Livermore and others, 9 Hun, 298.....	63
King v. Manchester R., 12 Jur. (N. S.) 525.... (603)	
King v. National Oil Co., 81 Mo. App. 155.....	2068, 2121
King v. New Brunswick Steamboat Co., 36 Misc. 555.....	321
King v. Ohio &c. R. Co., 14 Fed. Rep. 277.....	1466, 1471
King v. Oregon Short Line R. Co., (Id.) 55 Pac. Rep. 665.....	204
King v. Pedley, 1 Adol. & Ellis, 822.....	223
King v. Second Ave. R. Co., 75 Hun, 17.....	120
King v. Sherwood, 22 App. Div. 548.....	82
King v. Talbot, 40 N. Y. 76.....	4
King v. Wilmington &c. R. Co., 1 Penn. (Del.) 452.....	204
Kingan v. Pittsburg T. Co., 5 Pa. Super. Ct. 436.....	163
Kingman v. Lynn &c. R. Co., (Mass.) 64 N. E. Rep. 79.... (410)	
Kingman v. Reinemer, 166 Ill. 208.....	17
Kingsbury v. Missouri &c. R. Co., 156 Mo. 379.....	103
Kingsley v. Bloomingsdale, 109 Mich. 340.....	184
Kingsley v. Mulhall, 95 Iowa, 754.....	187
Kingston v. Ft. Wayne &c. R. Co., 112 Mich. 40.....	113
Kinion v. Kansas City &c. R. Co., 39 Mo. App. 574.... (1043)	
Kinkel v. Harper, 7 Colo. App. 45.....	14
Kinmoreth v. McDougall, 46 N. Y. S. R. 211.... (983)	
Kinnare v. Chicago, 171 Ill. 332.....	195
Kinnare v. Chicago, 70 Ill. App. 106.....	154
Kinney v. Cent. R. Co. of N. J., 34 N. J. L. 513.... (264)	21
Kinney v. Corbin, 132 Pa. St. 341.....	164
Kinney v. Croker, 18 Wis. 74.... (93)	
Kinney v. Folkert, 78 Mich. 687.....	61
Kinney v. Koppman, 116 Ala. 310.....	2067, 207
Kinney v. Louisville &c. R. Co., 99 Ky. 59.....	51
Kinney v. North Carolina R. Co., 122 N. C. 961.....	171
Kinney v. Onsted, 113 Mich. 96.....	21
Kinney v. Troy, 108 N. Y. 567.....	18
Kinsley v. Pratt, 148 N. Y. 372.....	1409, 17
Kip v. Deniston, 4 Johns. 25.... (63)	
Kippen v. Ollason, (Cal.) 69 Pac. Rep. 293.....	9
Kirby v. Bergun, (S. D.) 90 N. W. Rep. 856.....	1
Kirby v. Boylston Market Co., 14 Gray, 249.....	22
Kirby v. Boylston, 14 Gray, 249.....	13
Kirby v. Penn. R. Co., 76 Pa. St. 506.... (421)	
Kirby v. President &c., 62 N. Y. Supp. 1110.....	20
Kirby v. Southern R. Co., 63 S. C. 494.....	7
Kirby v. Western Union Teleg. Co., 7 S. D. 623.....	201, 547, 24
Kirk v. Homer, 77 Hun, 459.....	18
Kirk v. Kane, 87 Mo. App. 274.....	



	PAGE
Kirk v. Kansas City &c. R. Co., 51 La. Ann. 667.....	2089
Kirk v. Norfolk &c. R. Co., 41 W. Va. 722.....	1024, 1027
Kirk v. Seally, 79 Ill. App. 67.....	1125, 1503
Kirk v. Senzig, 79 Ill. App. 251.....	1634, 1677, 1738
Kirk v. W. U. T. Co., 90 Fed. Rep. 809.....	2394
Kirkhan v. Bank of America, 26 App. Div. 110.....	37
Kirkland v. Dinamore, 62 N. Y. 171.....	278, 280
Kirkland Land &c. Co. v. Jones, 18 Wash. 407.....	181
Kirkpatrick v. N. Y. Cent. R. Co., 79 N. Y. 240.....	1198, 1426, 1482
Kirkpatrick v. Briggs, 78 Hun, 518.....	1141, 1214
Kirkpatrick v. Missouri &c. R. Co., 147 Mo. 171.....	787
Kirkpatrick v. Missouri &c. R. Co., 71 Mo. App. 263.... (787)	
Kirkpatrick v. Montgomery, 1 Swan, (Tenn.) 452.....	416
Kirtley v. Spokane, 20 Wash. 111.....	1830
Kirton v. North Chicago Street R. Co., 91 Ill. App. 554.....	901
Kirwin v. Malone, 45 App. Div. 93.....	2052
Kissam v. Jones, 56 Hun, 432.....	110
Kissan v. Bremnerman, 44 App. Div. 588.....	2176
Kissane v. Detroit &c. R. Co., 121 Mich. 175.....	549
Kissinger v. N. Y. & H. R. R. Co., 56 N. Y. 538.....	806
Kisten v. Hildebrand, 9 B. Morn. 72.... (137)	
Kitay v. Brooklyn &c. R. Co., 23 App. Div. 228.....	2293, 2324
Kitchell v. Brooklyn &c. R. Co., 6 App. Div. 99.....	679
Kitchell v. Brooklyn &c. R. Co., 10 Misc. 277.....	1204
Kitchen v. Carter, 47 Neb. 776.....	2079, 2128
Kitchen v. Place, 41 Barb. 465.... (176)	
Kitchen v. Union, 171 Pa. St. 145.....	1456
Kitchens v. Elliot, 114 Ala. 290.....	981, 2360
Kitteringham v. Sioux City &c. R. Co., 62 Iowa, 285.....	1480
Kittle v. De Lamater, 3 Neb. 325.... (183)	
Kittridge v. Elliott, 16 N. H. 77.... (976)	
Klass Commission Co. v. Wabash R. Co., 80 Mo. App. 164.. 214, 240, 251, 318, 824	
Klages v. Gillette-Herzog Man. Co., (Minn.) 90 N. W. Rep. 1116.....	651, 1721
Klaproth v. Baltic Pier &c. Co., (N. J. L.) 43 Atl. Rep. 981.....	2125
Klatt v. Foster Lumber Co., 92 Wis. 622.....	1682
Klatt v. Foster Lumber Co., 97 Wis. 641.....	1450
Klatt v. Houston &c. R. Co., (Tex. Civ. App.) 57 S. W. Rep. 1112.....	2290
Klansner v. Herter, 36 Misc. 869.....	1325, 1329
Kleebauer v. Western Fuse &c. Co., (Cal.) 69 Pac. Rep. 246.....	2076
Klees v. Chicago &c. R. Co., 68 Ill. App. 244.....	1608
Kleimenhagan v. Chicago &c. R. Co., 65 Wis. 66.....	1102
Kleibaz v. Middletown Paper Co., 180 Mass. 363.....	1461, 1725
Kleiber v. Peoples' R. Co., 107 Mo. 240.....	688
Klein v. Dallas, 71 Tex. 280.....	1946
Klein v. Dunlap, 16 Misc. (N. Y.) 34.... (345)	
Klein v. Jewett, 26 N. J. Eq. 474.....	91, 94, 446, 452, 843, 849
Klein v. Thompson, 19 Oh. St. 569.... (959)	
Kleiner v. Madison, 104 Wis. 339.....	1866
Kleiner v. Third Ave. R. Co., 36 App. Div. 191.....	729
Kleinert v. Rees, 6 Pa. Super. Ct. 594.....	2356
Klenberg v. Russell, 125 Ind. 531.....	1000, 1002, 1012
Kless v. Youghiogehny Min. Co., 18 Pa. Super. Ct. 551.....	1453, 1490
Kletchka v. Minneapolis &c. R. Co., (Minn.) 83 N. W. Rep. 133.....	1589
Kleven v. Great Northern R. Co., 70 Minn. 79.....	935
Kline v. C. P. R. Co., 37 Cal. 400.....	22, 28
Kline v. Electric T. Co., 181 Pa. St. 276.....	2284, 2335
Kline v. Western Union Teleg. Co., 3 Oh. N. W. 143.....	2458
Kling v. Chicago &c. R. Co., (Iowa) 88 N. W. Rep. 355.....	1056
Kling v. Kansas City, 27 Mo. App. 231.....	1190
Klingel v. Aiken, 94 Wis. 432.....	1236
Klix v. Nieman, 68 Wis. 271.....	2109
Klochinaki v. Shores Lumber Co., 93 Wis. 417.....	1508, 1671
Klock v. N. Y. Cent. &c. R. Co., 62 Hun, 291.... (1052)	

	PAGE
Klockenbrink v. St. Louis &c. R. Co., 81 Mo. App. 351.....	661, 667
Klotz v. Winona &c. R. Co., 68 Minn. 341....(762)	
Kluska v. Chicago, 97 Ill. App. 665.....	1840
Knapp v. Chicago &c. R. Co., 114 Mich. 199.....	1707
Knapp v. Jones, 50 Neb. 490.....	1077
Knapp v. Roach, 94 N. Y. 329.....	2202
Knapp v. Sioux City &c. R. Co., 65 Iowa, 91.....	1432
Knapp &c. v. McCaffrey, 178 Ill. 107.....	203
Knauss v. Brua, 107 Pa. St. 85.....	1344
Knauss v. Lake Erie &c. R. Co., (Ind. App.) 64 N. E. Rep. 95.....	540
Knecht v. U. S. Sav. Inst., 2 Mo. App. 563....(73)	
Kneeland v. Beare, (N. D.) 91 N. W. Rep. 56....(1323)	
Kneiss v. Brua, 107 Pa. St. 85.....	1317
Knickerbocker v. Hawes, 8 Cow. 111.....	2201
Knickerbocker Ice Co. v. Bernhardt, 95 Ill. App. 23.....	1455
Knickerbocker Ice Co. v. De Haas, 37 Ill. App. 195.....	1730
Knight v. N. Y. &c. R. Co., 99 N. Y. 25....(1029)	1030
Knight v. N. Y., L. E. & W. R. Co., 30 Hun, 415....(1029)	
Knight v. Finney, 59 Neb. 274.....	192
Knight v. Goodyear's Co., 38 Conn. 441....(767)	
Knight v. Lanier, 69 App. Div. 454.....	2113
Knight v. New Orleans &c. R. Co., 15 La. Ann. 105....(1012)	1017
Knight v. Overman Wheel Co., 174 Mass. 455.....	1126, 1216, 1595
Knight v. Ponchartrain R. Co., 23 La. Ann. 462.....	482
Knight v. Portland &c. R. Co., 56 Maine, 234....(342)	
Knight v. Sadtler Lead &c. Co., 75 Mo. App. 541.....	884, 1701
Knight v. West Jersey R. Co., 108 Pa. St. 250.....	963
Knights v. Brown, 93 Me. 557.....	2384
Knights v. Piella, 111 Mich. 9.....	100, 103, 108, 109
Knightstown v. Musgrove, 116 Ind. 121....(726)	
Knisley v. Pratt, 75 Hun, 323.....	1778
Knitter v. New York &c. R. Co., (N. J. L.) 52 Atl. Rep. 565.....	1634
Knoker v. Canal &c. R. Co., 52 La. Ann. 806.....	2315
Knoll v. Light, 76 Pa. St. 268.....	2085
Knoll v. Third Ave. R. Co., 46 App. Div. 527.....	680, 862, 2306
Knopf v. Philadelphia &c. R. Co., 2 Penn. (Del.) 392.....	751, 761, 774, 837
Knostman &c. Fur. Co. v. Davenport, 99 Iowa, 589.....	1964, 1965
Knott v. Cunningham, 2 Sneed, 204.....	2208
Knott v. McGilvray, 124 Cal. 128.....	2266
Knouff v. Logansport, 26 Ind. App. 202.....	1848
Knowles v. R. R. Co., 38 Me. 55....(102)	
Knowles v. Bullene &c. Co., 71 Mo. App. 341.....	13
Knowles v. Mulder, (Mich.) 16 Am. St. Rep. 627....(986)	
Knowles v. Pennsylvania R. Co., 175 Pa. St. 623.....	2245, 2248
Knowlton v. Des Moines &c. Co., (Iowa) 90 N. W. Rep. 818....(658)	1061
Knox v. N. Y., L. E. & W. R. Co., 69 Hun, 93.....	1418
Knox v. Hall Steam Power Co., 69 Hun, 231.....	1071
Knox v. Philadelphia &c. R. Co., 202 Pa. St. 504.....	762, 788, 1166
Knox v. Southern R. Co., 101 Tenn. 375.....	1646, 1713
Knoxville v. Cox, 103 Tenn. 368.....	684, 1955
Knoxville Iron Co. v. Pace, 101 Tenn. 476.....	1407
Knoxville Traction Co. v. Lane, 103 Tenn. 376.....	527, 593, 904
Knoxville &c. Co. v. Dobson, 7 Lea, (Tenn.) 367.....	1414
Knoxville &c. R. Co. v. Wyrick, 99 Tenn. 500.....	855
Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488.....	1167
Knuth v. Weiss Malting &c. Co., 72 Ill. App. 389.....	1447, 1719
Kobbe v. New Brighton, 23 App. Div. 243.....	2096
Koch v. Edgewater, 14 Hun, 544.....	695
Koch v. Fox, 75 N. Y. Supp. 913.....	2265
Koch v. Williamsport, 195 Pa. St. 488.....	1925, 1955
Koehler v. Rochester & L. O. R. Co., 66 Hun, 566.....	727
Koehler v. Syracuse Specialty Man. Co., 12 App. Div. 50.....	711, 1501
Koehne v. New York &c. R. Co., 32 App. Div. 419.....	391, 921

## TABLE OF CASES.

clxxi

	PAGE
<i>Koeke v. Milwaukee</i> , 112 Wis. 475.....	1864, 2044
<i>Koelsch v. The Philadelphia Co.</i> , 152 Pa. St. 355.....	1382, 1384, 1385, 1961
<i>Koenke v. New York &amp;c. R. Co.</i> , 39 App. Div. 457.....	345
<i>Koeppen v. Sedalia</i> , 89 Mo. App. 648.....	1989
<i>Koester v. Toledo &amp;c. R. Co.</i> , 20 Oh. C. C. 475.... (755)	
<i>Kohler v. West Side R. Co.</i> , 99 Wis. 33.....	476
<i>Kohler Brick Co. v. Northwestern Ohio &amp;c. Co.</i> , 11 Oh. C. C. 319.....	1384, 2068
<i>Kohlhof v. Chicago</i> , 192 Ill. 249.....	1858
<i>Kohn v. Receiver &amp;c.</i> , 147 U. S. 238.....	1474
<i>Kokomo v. Boring</i> , 24 Ind. App. 552.....	1948
<i>Kolb v. Carrington</i> , 75 Ill. App. 159.....	1629
<i>Koltz v. Winona &amp;c. R. Co.</i> , 68 Minn. 341.....	736
<i>Koltinsky v. Wood</i> , (Ky.) 65 S. W. Rep. 848.....	1452
<i>Koney v. Ward</i> , 36 How. Pr. 255.... (987)	
<i>Konold v. Rio Grande W. Ry. Co.</i> , 21 Utah, 379.....	1532, 1675
<i>Koons v. St. Louis &amp;c. R. Co.</i> , 65 Mo. 592.... (719)	
<i>Koons v. Western U. T. Co.</i> , 102 Pa. St. 164.....	2392
<i>Koontz v. Chicago &amp;c. R. Co.</i> , 65 Iowa, 224.....	1413, 1588
<i>Kopelka v. Bay City</i> , 125 Mich. 625.....	1881
<i>Kopitoff v. Wilson</i> , 1 Q. B. Div. 377-380.... (202)	
<i>Koplan v. Boston Gaslight Co.</i> , 177 Mass. 15.....	1383, 2067
<i>Koplitiz v. St. Paul</i> , (Minn.) 90 N. W. Rep. 794.....	731
<i>Kopper v. Willis</i> , 9 Daly, 460.....	149
<i>Koralewski v. Great Northern R. Co.</i> , 85 Minn. 140.....	1696
<i>Korn v. Schedler</i> , 11 Daly, 234.....	149
<i>Koslowski v. Thayer</i> , 66 Minn. 150.... (1099)	
<i>Kosmak v. Mayor</i> , 53 Hun, 329.....	1907
<i>Kossmann v. St. Louis</i> , 153 Mo. 293.....	1821
<i>Koster v. Newman</i> , 8 Daly, 231.....	1168
<i>Kosters v. The Brooklyn, Bath &amp; West End R. Co.</i> , 10 Misc. 18.....	525
<i>Kostuch v. St. Paul City R. Co.</i> , 78 Minn. 459.....	2322
<i>Kowalewaka v. New York, Lake Erie &amp; Western R. Co.</i> , 72 Hun, 611.....	1761
<i>Kowalski v. Chicago &amp;c. R. Co.</i> , 84 Fed. Rep. 586.....	732
<i>Kraemer v. Metropolitan Street R. Co.</i> , 51 App. Div. 475.....	932
<i>Kral v. Burlington &amp;c. R. Co.</i> , 71 Minn. 422.....	442
<i>Krall v. City of New York</i> , 44 App. Div. 259.....	204, 1797, 2010
<i>Kramer v. Chicago &amp;c. R. Co.</i> , 101 Iowa, 178.... (240)	
<i>Kramer v. Fay</i> , 4 Oh. N. P. 233.....	1109
<i>Kramer v. Market St. R. Co.</i> , 25 Cal. 434.... (943)	
<i>Kramer v. New Orleans City &amp;c. R. Co.</i> , 51 La. Ann. 1689.....	2336
<i>Kramer v. Northern Hotel Co.</i> , 185 Ill. 612.....	2100
<i>Kramer v. Southern R. Co.</i> , 127 N. C. 328.....	2134
<i>Krantz v. Rio Grande &amp;c. R. Co.</i> , 12 Utah, 104.....	387, 529
<i>Kranz v. L. I. R. Co.</i> , 123 N. Y. 1.....	1451, 1664
<i>Krause v. Dorrance</i> , 10 Barr. (Pa.) 462.... (12)	
<i>Krause v. Wallkill Valley R. Co.</i> , 69 Hun, 482.....	763
<i>Krebs v. Minneapolis &amp;c. R. Co.</i> , 64 Iowa, 670.... (1039)	
<i>Krebs Man. Co. v. Brown</i> , 108 Ala. 508.....	1034, 1040
<i>Kreis v. Missouri &amp;c. R. Co.</i> , 148 Mo. 321.....	1222
<i>Kreuzer v. The Pittsburgh &amp;c. R. Co.</i> , 151 Ind. 587.....	2157
<i>Krey v. Schlusser</i> , 42 N. Y. S. R. 917.....	676, 771, 2159
<i>Krimmel v. Edison Illum. Co.</i> , (Mich.) 90 N. W. Rep. 336.....	1073
<i>Kripner v. Biehl</i> , 28 Minn. 139.....	1598
<i>Kriwinaki v. Pennsylvania R. Co.</i> , 65 N. J. L. 392.... (766)	
<i>Kroesen v. Newcastle &amp;c. Street R. Co.</i> , 198 Pa. St. 30.... (709)	
<i>Krogg v. Atlanta &amp;c. R. Co.</i> , 77 Ga. 202.....	1247
<i>Krogg v. Chicago &amp;c. R. Co.</i> , 32 Iowa, 357.....	1658
<i>Krohn v. Sweeney</i> , 2 Daly, (N. Y.) 200.....	1543, 1547, 1563, 1572
<i>Kruger v. Chicago &amp;c. R. Co.</i> , 68 Minn. 445.....	149
<i>Krueger v. Chicago &amp;c. R. Co.</i> , 84 Mo. App. 358.....	572
<i>Krueger v. Chicago &amp;c. R. Co.</i> , 94 Mo. App. 458.....	2152
<i>Krueger v. Chicago &amp;c. R. Co.</i> , (Mo. App.) 68 S. W. Rep. 220.....	2052, 2151
<i>Krueger v. Railway Co.</i> , 111 Ind. 51.....	839
	1405

	PAGE
Krueger v. Wisconsin Tel. Co., 106 Wis. 96.....	2249
Krulder v. Ellison, 47 N. Y. 36.....	273
Krum v. Anthony, 115 Pa. St. 431.....	2113
Kucera v. Merrill Lumber Co., 91 Wis. 637.....	1754
Kuechenmeister v. Brown, 1 App. Div. 56.....	2251
Kueckel v. Ryder, 54 App. Div. 252.....	642
Kuehn v. Milwaukee, 92 Wis. 263.....	655, 1983
Kudik v. Lehigh Valley R. Co., 78 Hun, 492.....	1524, 1637
Kuhlman v. Metropolitan Street R. Co., 30 Misc. 417.....	485, 495
Kuhn v. R. Co., 42 Iowa, 420.... (1004).....	1013
Kuhn v. Delaware & C. R. Co., 92 Hun, 74.....	1756
Kuhn v. Jewett, 5 Stewart, (N. J.) 647.....	1263
Kuhn v. Brownfield, 34 W. Va. 252.....	2193
Kuhnen v. Union R. Co., 10 App. Div. 195.....	1089, 1090
Kuhnert v. Angel, 8 N. D. 198.....	2243
Kumba v. Gilham, 103 Wis. 312.....	2025, 2249
Kumberger v. Miller, 36 Misc. 204.... (1199).....	156, 157, 160
Kummel v. G. S. Bank, 127 N. Y. 488.....	1935
Kunkel v. Chicago, 37 Ill. App. 325.....	2038
Kunsman v. Harris, 6 Northampton Co., Rep. (Pa.) 230.....	1373
Kuntsch v. New Haven, 83 Mo. App. 174.....	1665
Kuntter v. New York & C. T. Co., (N. J. L.) 52 Atl. Rep. 565.....	1990
Kunz v. Troy, 104 N. Y. 344.....	705, 715, 1939
Kunz v. Troy, 36 Hun, 615.....	1984
Kunzman v. Lehigh Valley R. Co., 10 Pa. Super. Ct. 1.....	1602
Kurfess v. Harris, 195 Pa. St. 385.....	429
Kuss v. Freid, 32 Misc. 628.....	1785, 1804
Kutchen v. Goodwillie, 93 Wis. 448.....	1806
Kyne v. Wilmington & C. R. Co., 13 Cent. (Del.) 391.....	729
L. R. Co. v. Brooks, 83 Ky. 129.....	925
L. R. Co. v. Moore, 83 Ky. 675.....	913
L. N. & C. R. Co. v. Bigger, 66 Miss. 319.....	925
L. & N. R. Co. v. Commonwealth, 13 Bush. (Ky.) 388.... (784).....	219
L. & N. R. Co. v. Bell, 13 Ky. L. R. 393.....	(906)
L. & N. R. Co. v. McCoy, 81 Ky. 403.....	739
L. & N. R. Co. v. Melton, 2 Lea, (Tenn.) 262.....	776
L. & N. R. Co. v. Milam, 9 Lea, (Tenn.) 223.... (742).....	1215
L. & C. R. Co. v. Falvey, 104 Ind. 409.....	1992
Laager v. San Antonio, (Tex. Civ. App.) 57 S. W. Rep. 61.....	1865
Labarre v. New Orleans, 106 La. 458.....	1492
La Belle v. Montague, 174 Mass. 453.....	(129)
Labenstein v. Pritchett, 8 Kan. 213.....	153
Labold v. Southern Hotel Co., 54 Mo. App. 567.....	19
Lachat & C. v. Lutz, 15 Ky. L. R. 75.....	940, 1112, 2044
Lachner Bros. v. Adams Exp. Co., 72 Mo. App. 13.....	(1251)
Lackawanna & B. R. Co. v. Doak, 52 Pa. St. 379.....	939
Lackin v. D. & H. C. Co., 22 Hun, 309.....	1481
Lacking v. Washington Mills Co., 45 App. Div. 6.....	1986
La Clef v. Concordia, 41 Kan. 323.....	1726, 1731, 1732
Lacroy v. N. Y. & C. R. Co., 132 N. Y. 570.....	1966
Lacour v. New York, 3 Duer, 406.....	1692, 1712
Ladd v. Brockton Street R. Co., 180 Mass. 454.....	1415, 1474, 1544
Ladd v. New Bedford & C. R. Co., 119 Mass. 412.....	60
Ladd v. Stephens, 147 Mo. 319.....	1190
Lader v. Whippley, 111 N. Y. 239.....	693
Ladonia Cotton Oil Co. v. Shaw, (Tex. Civ. Ap.) 65 S. W. Rep. 693.....	1449, 1494, 1559
Ladue v. Griffith, 25 N. Y. 364.....	207, 308, 324
La Fave v. Superior, 104 Wis. 454.... (1054).....	1862
Lafayette & C. R. Co. v. Adams, 26 Ind. 76.... (776).....	706
Lafayette & C. R. Co. v. Huffman, 28 Ind. 287.... (705).....	(1026)
Lafayette & C. R. Co. v. Shriner, 6 Ind. 141.... (1026).....	

	PAGE
Lafayette &c. R. Co. v. Sims, 27 Ind. 59.... (575) .....	515
Lafayette Carpet Co. v. Stafford, 25 Ind. App. 187.....	2046
Lafferty v. Hannibal &c. R. Co., 44 Mo. 291.... (1029) .....	1030
Laffite v. R. Co., 43 La. Ann. 34.....	527
La Flamme v. Detroit &c. R. Co. 100 Mich. 509.... (1039) .....	1040
Lafiam v. Missisquoi Pulp Co., (Vt.) 52 Atl. Rep. 526.....	670, 1201, 1505
Laffin v. B. & S. W. R. Co., 106 N. Y. 136.....	433, 1128, 1410, 2117
Laffin &c. Co. v. Tearney, (Ill.) 21 N. E. 516.....	1108
La Fortune v. Jolly, 167 Mass. 170.....	1504, 1639, 1740
Lafourche Packet Co. v. Henderson, 94 Fed. Rep. 871.....	1564
Lafrois v. Monroe County, 162 New York, 563.....	1987
Lagerman v. New York &c. R. Co., 53 App. Div. 283.....	2156
Lago v. Walsh, 98 Wis. 348.....	1230, 1673
La Grange v. S. W. Tel. Co., 25 La. Ann. 383.....	2391, 2426, 2430
Lagutta v. Chisholm, 65 App. Div. 326.....	979
Lahey v. Ottman & Co., 73 Hun, 61.....	1141
Lahner v. Williams, 112 Iowa, 428.....	1984
Lahti v. Fitchburg &c. Street R. Co., 172 Mass. 147.....	2322
Laible v. New York &c. R. Co., 13 App. Div. 574.....	765
Laidlaw v. Sage, 80 Hun, 550.....	1090
Laing v. Colder, 8 Pa. St. 479.... (441) .....	411
Laing v. Evans, (Neb.) 90 N. W. Rep. 246.....	1084
Laird v. Chicago &c. R. Co., 100 Iowa, 336.....	1196
Laird v. Eichbold, 10 Ind. 212.....	141
Laird v. McGeorge, 16 Misc. 70.....	1325
La Blanc v. Sweet, 107 La. 355.....	1102
Lake v. Milligan, 62 Me. 240.....	2366, 2367
Lake v. Cincinnati &c. R. Co., 13 Oh. C. C. 494.....	510
Lake v. Reed, 29 Iowa, 258.... (182) .....	
Lake v. Sioux City R. Co., 46 Iowa, 109.... (657) .....	
Lake Erie R. Co. v. Mugg, (Ind.) 31 N. E. Rep. 564.... (871) .....	
Lake Erie &c. R. Co. v. Acres, 108 Ind. 548.... (389) .....	
Lake Erie &c. R. Co. v. Arnold, 26 Ind. App. 190.....	533
Lake Erie &c. R. Co. v. Beam, 60 Ill. App. 68.....	1048
Lake Erie &c. R. Co. v. Brafford, 15 Ind. App. 655.....	1169, 2137, 2145
Lake Erie &c. R. Co. v. Craig, 73 Fed. Rep. 642.....	1708, 1777
Lake Erie &c. R. Co. v. Craig, 80 Fed. Rep. 488.....	1124, 1730
Lake Erie &c. R. Co. v. Falk, 62 Oh. St. 297.... (938) .....	1252, 1308
Lake Erie &c. R. Co. v. Fishback, 5 Ind. App. 403.... (1037) .....	
Lake Erie &c. R. Co. v. Gaughan, 26 Ind. App. 1.....	2162
Lake Erie &c. R. Co. v. Gossard, 14 Ind. App. 244.....	1107
Lake Erie &c. R. Co. v. Gould, 18 Ind. App. 275.....	1143
Lake Erie &c. R. Co. v. Hancock, 15 Jud. App. 104.....	2045
Lake Erie &c. R. Co. v. Juday, 19 Ind. App. 436.....	741
Lake Erie &c. R. Co. v. Lucas, 18 Ind. App. 239.....	567
Lake Erie &c. R. Co. v. McHenry, (Ind.) 10 N. E. Rep. 186.....	1470
Lake Erie &c. R. Co. v. Mackay, 53 Oh. St. 370.... (712) .....	
Lake Erie &c. R. Co. v. Matthews, 13 Ind. App. 355.....	419, 584
Lake Erie &c. R. Co. v. Maus, 22 Ind. App. 36.....	2111, 2126
Lake Erie &c. R. Co. v. Morrissey, 177 Ill. 376.....	1418, 1432
Lake Erie &c. R. Co. v. Naron, 18 Ind. App. 193.....	1245
Lake Erie &c. R. Co. v. Noblesville, 15 Ind. App. 697.....	2342
Lake Erie &c. R. Co. v. Norris, 60 Ill. App. 112.....	1015, 2342
Lake Erie &c. R. Co. v. Pence, 24 Ind. App. 12.....	779
Lake Erie &c. R. Co. v. Purcell, 75 Ill. App. 573.....	888
Lake Erie &c. R. Co. v. Rooker, 13 Ind. App. 600.....	1062, 2048
Lake Erie &c. R. Co. v. Weisel, 55 Oh. St. 155.....	1015, 1049
Lake Erie &c. R. Co. v. Wilson, 189 Ill. 89.....	1125, 1238
Lake Erie &c. R. Co. v. Zoffinger, 10 Ill. App. 252.....	2140
Lake Shore &c. R. Co. v. Andrews, 58 Oh. St. 426.....	1165
Lake Shore &c. R. Co. v. Baldwin, 10 Oh. C. D. 333.....	1510, 1753
Lake Shore &c. R. Co. v. Bangs, 47 Mich. 470.....	493
Lake Shore &c. R. Co. v. Boyte, 16 Ind. App. 649.....	730, 753, 787, 2055

Lake Shore &c. R. Co. v. Butts, (Ind. App.) 62 N. E. Rep. 647.... (739).....	769
Lake Shore &c. R. Co. v. Conway, 169 Ill. 505.....	1484, 1677
Lake Shore &c. R. Co. v. Corcoran, 3 Oh. Dec. 641.....	1407, 1675
Lake Shore &c. R. Co. v. Egan, 18 Oh. C. C. 886.....	1710
Lake Shore &c. R. Co. v. Ehlert, 63 Oh. St. 320.....	711, 805, 856, 874
Lake Shore &c. R. Co. v. Elson, 15 Ill. App. 80.....	796
Lake Shore &c. R. Co. v. Foster, 74 Ill. App. 387.... (751).....	611
Lake Shore &c. R. Co. v. Gilday, 16 Oh. C. C. 665.....	1408, 1486, 1692, 1734
Lake Shore &c. R. Co. v. Greenwood, 29 Smith, (Pa.) 373.....	547, 579
Lake Shore &c. R. Co. v. Hessions, 150 Ill. 546.... (659)	
Lake Shore &c. R. Co. v. Hochstim, 67 Ill. App. 514.... (613)	
Lake Shore &c. R. Co. v. Hunter, 13 Oh. C. C. 441.....	1718
Lake Shore &c. R. Co. v. Kelsey, 180 Ill. 530.....	502
Lake Shore &c. R. Co. v. Lavalley, 36 Oh. St. 221.....	1525, 1645
Lake Shore &c. R. Co. v. Litz, 7 Oh. Dec. 282.....	1563, 1735
Lake Shore &c. R. Co. v. Luce, 11 Oh. C. C. 543.....	318
Lake Shore &c. R. Co. v. McCormick, 74 Ind. 440.....	1550
Lake Shore &c. R. Co. v. Miller, 25 Mich. 274.... (794).....	1039
Lake Shore &c. R. Co. v. Mortal, 8 Oh. C. D. 134.....	557
Lake Shore &c. R. Co. v. National Livestock Bank, 178 Ill. 508.....	316
Lake Shore &c. R. Co. v. Ney, 8 Oh. C. D. 567.....	1727
Lake Shore &c. R. Co. v. Orndoff, 55 Oh. St. 589.....	550
Lake Shore &c. R. Co. v. Perkins, 25 Mich. 329.... (249)	
Lake Shore &c. R. Co. v. Peterson, 144 Ind. 214.....	419
Lake Shore &c. R. Co. v. Pinchin, 112 Ind. 592.....	697, 766
Lake Shore &c. R. Co. v. Prentice, 147 U. S. 101.....	905
Lake Shore &c. R. Co. v. Reynolds, 23 Oh. C. C. 199.... (751).....	803
Lake Shore &c. R. Co. v. Rosenzweig, 113 Pa. St. 519.... (906)	
Lake Shore &c. R. Co. v. Roy, 5 Ill. App. 82.....	543, 1711
Lake Shore &c. R. Co. v. Ryan, 70 Ill. App. 45.....	919, 1428, 1755
Lake Shore &c. R. Co. v. Schade, 15 Oh. C. C. 424.....	166, 736, 776
Lake Shore &c. R. Co. v. Schultz, 19 Oh. C. C. 639.....	668, 927, 1539
Lake Shore &c. R. Co. v. Starkey, 18 Oh. C. C. 700.....	915
Lake Shore &c. R. Co. v. Stupak, 123 Ind. 210.....	1479
Lake Shore &c. R. Co. v. Sunderland, 2 Bradw. (Ill.) 307.... (737)	
Lake Shore &c. R. Co. v. Terry, 14 Oh. C. C. 536.....	1217
Lake Shore &c. R. Co. v. Topliff, 18 Oh. C. C. 709.....	923, 1525
Lake Shore &c. R. Co. v. Whidden, 23 Oh. C. C. 85.....	1092, 1556, 1718, 1728
Lake Side &c. R. Co. v. Kelley, 10 Oh. C. C. 322.....	1257
Lake Street El. R. Co. v. Brooks, 90 Ill. App. 173.....	2339
Lake Street El. R. Co. v. Burgess, 99 Ill. App. 499.....	458, 915
Lake Street El. R. Co. v. Johnson, 70 Ill. App. 413.....	931
Lake Superior &c. R. Co. v. Erickson, 39 Mich. 492.....	1570
Lally v. Crookston Lumber Co., 82 Minn. 407.....	1558
LaLonde v. Peake, 82 Minn. 124.....	2256
Lalor v. Chicago &c. R. Co., 52 Ill. 401.....	1544, 1599, 1600
Lamb v. Camden &c. R. Co., 46 N. Y. 271.... (241).....	130, 324, 358, 359
Lamb v. Cedar Rapids, 108 Iowa, 629.... (860).....	1820
Lamb v. Chicago &c. R. Co., 101 Wis. 138.....	230, 258, 307
Lamb v. Davidson, 69 Mo. App. 107.....	13
Lamb v. Missouri &c. R. Co., 147 Mo. 171.....	787
Lamb v. New York &c. R. Co., 18 App. Div. 579.....	773, 804
Lamb v. Wilmington &c. R. Co., 122 N. C. 862.....	2145
Lamb v. Worcester, 177 Mass. 82.....	1880
Lambeck v. Grand Rapids &c. R. Co., 106 Mich. 512.....	2247
Lambert v. Missisquoi Pulp Co., 72 Vt. 278.....	1425, 1746
Lambert v. S. I. R. Co., 70 N. Y. 104.....	1171
Lambeth v. North Car. &c. R. Co., 66 N. C. 499.....	442, 476
Lambrecht v. Pfizer, 49 App. Div. 82.....	1484
Lammers v. Great Northern R. Co., 82 Minn. 120.....	931
Lammert v. Chicago &c. R. Co., 9 Ill. App. 388.... (11)	
Lamoureaux v. Detroit &c. Street R. Co., 112 Mich. 602.....	849, 1144, 1189
Lamoure v. Caryl, 4 Denio, 370.....	1212, 1222

## TABLE OF CASES.

clxxv

	PAGE
Lamparter v. Wallbaum, 45 Ill. 444.....	1317, 1362
Lampe v. San Francisco, 124 Cal. 546.....	1962
Lampert v. Laclede Gas Co., 14 Mo. App. 276..... (1384).....	1927
Lamphear v. Buckingham, 33 Conn. 237.....	91, 92
Lampley v. Atlantic Coast Line Co., 63 S. C. 462.....	2086
Lamport v. Lake Shore &c. R. Co., 142 Ind. 269.....	1091, 1111
Lampson v. Illinois Trust &c. Bank, 62 Ill. App. 371.....	190
Lamson v. American Axe &c. Co., 177 Mass. 144.....	1583
Lamson v. Beard, 94 Fed. Rep. 30.....	75
Lamson v. Illinois Trust &c. Bank, 166 Ill. 162.....	682
Lan v. Lake Shore &c. R. Co., 120 Mich. 115.... (761)	
Lanabough v. Anderson, 22 Oh. C. C. 178.....	2102
Lanark Bank v. Eitenmiller, 14 Ill. App. 22.....	2266
Lancaster v. Reisner, 14 Lanc. L. Rev. 193.....	1916
Lancaster Bank v. Smith, 62 Pa. St. 47.....	102
Lancaster County Nat. Bank v. Garber, 178 Pa. St. 91.....	193
Land v. Fitzgerald, (N. J. L.) 52 Atl. Rep. 229.....	2112
Landa v. McDermott, (Tex.) 16 S. W. Rep. 80.....	2359
Lander v. Bath, 85 Me. 141.....	1908
Lander v. R. Co., 33 Wis. 640.... (1040)	
Landerbach v. People's R. Co., 4 Penn. (Pa.) 406.... (541)	
Landers v. Missouri &c. R. Co., (Tex. Civ. App.) 50 S. W. Rep. 528.....	573
Landgraf v. Kuh, 188 Ill. 484.....	1364, 1595
Lando v. Chicago &c. R. Co., 81 Minn. 279.....	2141, 2169
Landreaux v. Bell, 5 La. (O. S.) 275.... (527)	
Landreth Co. v. Schevenal, 102 Tenn. 486.....	629
Landrigan v. Brooklyn &c. R. Co., 23 App. Div. 43.....	451
Landsberger v. Magnetic Tel. Co., 35 Barb. 530.....	2448
Lane v. Atlantic Works, 111 Mass. 130.....	674, 720, 1166
Lane v. Boston &c. R. Co., 112 Mass. 455.....	1147
Lane v. Boycourt, (Ind. App.) 27 N. E. Rep. 1111.....	1194
Lane v. Cotton, 1 Salk. 17.....	77
Lane v. E. T. &c. R. Co., 5 Lea, (Tenn.) 124.....	579
Lane v. Hancock, 142 N. Y. 510.....	1950
Lane v. Lamke, 53 App. Div. 395.....	1012, 2268
Lane v. Lewiston, 91 Me. 292.....	1914, 1915
Lane v. Minnesota &c. Soc., 67 Minn. 65.....	1216
Lane v. Missouri &c. R. Co., 132 Mo. 4.... (771)	
Lane v. Spokane &c. R. Co., 21 Wash. 119.....	518, 685, 2038
Lane v. Syracuse, 12 App. Div. 118.....	1933, 2252
Lane v. Wheeler, 35 Hun, 606.....	1923
Lane v. Woodbury, 58 Iowa, 462.....	1853
Laney v. Kansas City &c. R. Co., 83 Mo. 466.... (1036)	
Lanier v. Bridgeport T. Co., 68 Conn. 475.....	2284
Lang v. Holiday Creek R. Co., 49 Iowa, 469.... (794)	
Lang v. Houston &c. R. Co., 75 Hun, 151.... (944)	
Lang v. Metropolitan Street R. Co., 26 Misc. 754.....	961, 2310
Lang v. Metzger, 86 Ill. App. 117.....	2312
Lang v. New York &c. R. Co., 80 Hun, 275.....	190
Lang v. N. Y. &c. R. Co., 51 Hun, 603.....	26
Lang v. Williams T. Line, 119 Mich. 80.....	26
Langan v. Potter, 28 N. Y. Supp. 752.....	1563
Langan v. Tyler, 114 Fed. Rep. 716.....	827
Langs v. Schoettler, 115 Cal. 388.....	1396
Langford v. Gascoyne, 11 Ves. 335.... (63)	
Langford v. Jones, 18 Ore. 307.....	901
Langford v. Jones, (Ore.) 22 Pac. Rep. 1064.....	2191
Langhammer v. Manchester, 99 Iowa, 295.....	2189
Langin v. New York &c. Bridge, 10 App. Div. 529.....	1215, 1829, 1898
Langley v. Metropolitan Street R. Co., 36 Misc. 804.... (408)	
Langley v. Sixth Ave. R. Co., 48 N. Y. Super. Ct. 542.....	434
Langley v. Wheelock, 181 Mass. 474.....	1101
Langlois v. B. &c. R. Co., 19 Barb. 364.... (1043)	
	930
	1558

	PAGE
Langlois v. Cohoes, 58 Hun, 226.....	1844
Langridge v. Levy, 2 M. & W. 519.....	1380
Lanier v. Youngblood, 73 Ala. 587.....	146
Lanigan v. N. Y. G. L. Co., 71 N. Y. 29.....	692
Laning v. N. Y. C. R. Co., 49 N. Y. 521.....	1487, 1511, 1514, 1545, 1571, 1578
Lannen v. Albany Gas Light Co., 44 N. Y. 459.....	692, 714, 1384
Lanniman v. Detroit &c. Street R. Co., 112 Mich. 602.....	(959)
Lanning v. Sussex R. Co., 1 N. J. Law J. 21.....	207, 825
Lanpher v. Phipos, 8 C. & P. 475.....	2191, 2173, 2174
Lansing v. Coney Island &c. R. Co., 16 App. Div. 146.....	469
Lansing v. Smith, 8 Cow. 151.....	77
Lansing v. N. Y. &c. R. Co., 49 N. Y. 525.....	(2)
Lansing v. Toolan, 37 Mich. 152.....	1812, 1813
Lant v. Rasines, 16 Misc. 504.....	1234
Lantry Sons v. Lowrie, (Tex. Civ. App.) 58 S. W. Rep. 837.....	1563, 1681
Lanyon Zinc Co. v. Bell, 64 Kan. 739.....	1479, 1494
Lanza v. Le Grand Quarry Co., 115 Iowa, 299.....	1408, 1419
Lapante v. Warren Cotton Milla, 165 Mass. 487.....	1206
Lapelle v. International Paper Co., 71 N. H. 346.....	1505
La Pierre v. Chicago &c. R. Co., 58 N. W. (Mich.) 60.....	1743
LaPlaine v. Morgan's &c. Co., 40 La. Ann. 661.....	896
La Pointe v. Boston &c. R. Co., 179 Mass. 535.....	492
Lapointe v. Middlesex R. Co., 144 Mass. 18.....	509
La Pontney v. Shedden Cartage Co., 116 Mich. 514.....	2283
Laporte v. Cook, 21 R. I. 158.....	1629, 1740, 2043, 2047
Laporte v. Wells &c. Co., 23 App. Div. 267.....	329
Lapp v. Gutenkunst, (Ky.) 44 S. W. Rep. 964.....	2100
Lapsley v. Union Pac. R. Co., 50 Fed. Rep. 172.....	732
Laredo &c. R. Co. v. Hamilton, (Tex. Civ. App.) 56 S. W. Rep. 998.....	1821
Larimore v. Chicago &c. R. Co., 65 Mo. App. 167.....	334, 350
LaRiviere v. Pemberton, (Minn.) 48 N. W. Rep. 406.....	700
Larkin v. Burlington &c. R. Co., 52 N. W. (Iowa) 480.....	(730)
Larkin v. New York &c. R. Co., 166 Mass 110.....	1711
Larkin v. O'Neill, 119 N. Y. 221.....	2117
Larkin v. Taylor, 5 Kan. 260.....	1000, 1007
Larkin v. Washington Mills Co., 45 App. Div. 6.....	1465, 1479, 1511, 1537
Larmore v. Crown Point Iron Co., 101 N. Y. 391.....	813, 2103, 2105, 2106, 2132
Larock v. Ogdensburgh &c. R. Co., 26 Hun, 382.....	1406
Larow v. N. Y. &c. R. Co., 61 Hun, 11.....	1524
Larrabee v. Cloverdale, 131 Cal. 96.....	1965, 1967
Larrabee v. Sewell, 66 Me. 376.....	(688)
Larson v. Center Creek Min. Co., 71 Mo. App. 512.....	740
Larson v. Central R. Co., 56 Ill. App. 263.....	(1058)
Larson v. Knapp &c. Co., 98 Wis. 178.....	678, 1750
Larson v. Minneapolis &c. R. Co., 85 Minn. 387.....	442
Larson v. Railroad Co., 43 Minn. 423.....	1567
Larsson v. McClure, 95 Wis. 533.....	1702
Lary v. Chicago &c. R. Co., 78 Ind. 323.....	2140
Lasala v. Holbrook, 4 Paige, 170.....	2070, 2101
La Salle Restaurant &c. v. McMasters, 85 Ill. App. 677.....	100
Lasch v. Stratton, 101 Ky. 672.....	739
Laschinger v. St. Paul &c. R. Co., 84 Minn. 333.....	2323
Lasiter v. Norfolk &c. R. Co., 126 N. C. 509.....	1369
Lasiker v. Third Ave. R. Co., 27 Misc. 824.....	548
Lassiter v. W. U. T. Co., 89 N. C. 334.....	2390
Last Chance Min. &c. Co. v. Ames, 23 Colo. 167.....	1737
Lasure v. Graniteville Man. Co., 18 S. C. 275.....	1466
Latham v. B., H. &c. R. Co., 38 Hun, 265.....	2027
Latham v. Missisquoi Pulp Co., (Vt.) 52 Atl. Rep. 526.....	1163
Latham v. Roach, 72 Ill. 179.....	2124
Lathrope v. Flood, (Cal.) 63 Pac. Rep. 1007.....	922, 2192
Latimer v. Bard, 76 Fed. Rep. 536.....	1085



## TABLE OF CASES.

clxxvii

	PAGE
Latorre v. Central S. Co., 9 App. Div. 145.....	1496, 1507, 1749
Laubheim v. DeKoninglyke, 107 N. Y. 228.....	606, 607
Lauder v. St. Clair, 125 Mich. 479.....	1835
Laudie v. Western &c. Tele. Co., 124 N. C. 528.....	858
Laudie v. Western Union Tele. Co., 126 N. C. 431.....	2460
Lauer v. Palms, (Mich.) 89 N. W. Rep. 694.....	2079
Lauffer v. Bridgeport Traction Co., 68 Conn. 475.....	1125, 1215, 2333
Laughter v. Pointer, 5 Barn. & Cress. 578.....	1399
Laughran v. Brewer, 113 Ala. 509.....	1802
Laurel v. Blue, 1 Ind. App. 128.....	1987
Laurie v. Metropolitan Street R. Co., 18 Misc. 81.....	2312
Lauro v. Standard Oil Co., 76 N. Y. Supp. 800.....	1602
Lauter v. Duckworth, 19 Ind. App. 535.....	1406, 1629, 1743
Laverdure v. New York, 28 App. Div. 65.....	1875
Laverenz v. Chicago &c. R. Co., 56 Iowa, 689.... (753)	
Laverone v. Mangianti, 41 Cal. 438.... (985)	986
Lavery v. Hannigan, 52 N. Y. Supr. Ct. 463.....	2244
Lavin v. Second Ave. R. Co., 12 App. Div. 381.....	2292
Law v. Illinois Cent. R. Co., 32 Iowa, 534.....	584
Law v. Kingsley, 82 Hun, 76.....	1860
Lawhorn v. Millen &c. R. Co., 97 Ga. 742.....	1548
Lawler v. Hartford Street R. Co., 72 Conn. 74.....	2272, 2282, 2299
Lawless v. Connecticut R. Co., 136 Mass. 1.....	657, 1403, 1490, 1567, 1685
Lawless v. Detroit &c. R. Co., 65 Mich. 292.....	2289, 2366
Lawless v. Laclede Gas Light Co., 72 Mo. App. 679.....	1456
Lawlor v. French, 2 App. Div. 140.....	974
Lawlor v. French, 14 Misc. 497.....	994, 1675
Lawrence v. Atchison &c. R. Co., 57 Kan. 585.... (751)	
Lawrence v. American National Bank, 54 N. Y. 432.....	1079
Lawrence v. Barker, 5 Wend. 301-305.....	1199
Lawrence v. Combs, 37 N. H. 366.... (1008)	
Lawrence v. Davis, 8 Kan. App. 225.....	1861
Lawrence v. Fairhaven, 5 Gray, 110.....	2007
Lawrence v. Great Northern R. Co., 16 Ad. & El. 643.....	2071, 2099
Lawrence v. Littell, 9 Kan. App. 130.....	1862, 1869
Lawrence v. Mt. Vernon, 35 Me. 100.....	1915
Lawrence v. N. Y. R. Co., 36 Conn. 63.... (244)	
Lawrence v. Samuels, 20 Misc. 278.....	2035, 2036
Lawrence v. Scranton Traction Co., 3 Lack. L. News, 101.....	1126
Lawrence v. Shipman, 39 Conn. 586.... (649)	
Lawrence v. W. & St. P. Railway, 15 Minn. 390.... (208)	
Lawrenceburgh &c. R. Co. v. Montgomery, 7 Port. (Ind.) 475.... (381)	
Lawson v. Chicago &c. R. Co., 57 Iowa, 672.... (1022)	
Lawson v. Conaway, 37 W. Va. 159.....	2192, 2196
Lawson v. Copeland, 2 Brown's Ch. C. 156.... (91)	
Lawson v. Merrill, 69 Hun, 278.....	1107, 1460
Lawson v. Metropolitan Street R. Co., 40 App. Div. 307.....	2274, 2325
Lawson v. Metropolitan Street R. Co., 36 Misc. 824.....	2335
Lawton v. Giles, 90 N. C. 374.... (1256)	
Lawton v. Lawton, 35 App. Div. 389.....	45
Lawton v. Olmstead, 40 App. Div. 544.....	2244
Lawton v. South Bound R. Co., 61 S. C. 548.....	2089
Lax v. Forty-second Street &c. R. Co., 46 Supr. Ct. (J. & S.) 448.....	507
Laying v. Mt. Shasta &c. Co., 135 Cal. 141.....	1462, 1725
Lazelle v. Newfane, 70 Vt. 440.....	875, 1835
Lazinsky v. Metropolitan Street R. Co., 88 Fed. Rep. 437.....	19
Lea v. Greenwich, 48 App. Div. 391.....	2018
Leach v. Detroit &c. R. Co., 125 Mich. 373.....	864
Leader v. Moxon, 3 Wils. 460.....	2071, 2099
Leahy v. Davis, 121 Mo. 227.....	903
Leahy v. So. Pacific R. Co., 65 Cal. 150.....	1717
Leak v. Carolina C. R. Co., 124 N. C. 455.....	1404, 1473

	PAGE
Leake's Law of Real Property, 248.....	2099
Learned v. New York, 21 Misc. 601.....	2017
Learoyd v. Godfrey, 138 Mass. 315.....	1318, 1344
Leary v. Boston El. R. Co., 180 Mass. 203.....	2339
Leary v. Boston &c. R. Co., 139 Mass. 580.....	1483, 1544, 1600
Leary v. Fitchburg R. Co., 53 App. Div. 52.....	766, 1121
Leary v. Lehigh Valley R. Co., 76 Hun, 575.....	1410
Leary v. R. Co., 139 Mass. 580.....	1406
Leary v. Woodruff, 4 Hun, 99.....	1319, 1338, 1340, 2122
Leary v. U. S. 14 Wall..... (204)	
Leavenworth v. Hatch, 57 Kan. 57..... (730)	
Leavenworth Coal Co. v. Ratchford, 5 Kan. App. 150.....	1062
Leavenworth Electric R. Co. v. Cusick, 60 Kan. 590.....	472
Leavenworth &c. R. Co. v. Forbes, 37 Kan. 445.....	1042
Leavenworth &c. R. Co. v. Rice, 10 Kan. 426..... (784)	
Leavitt v. Bangor &c. R. Co., 89 Me. 509.....	649
Leavitt v. Fletcher, 10 Allen, (Mass.) 119..... (1316)	1322, 1324
Leavitt v. Mudge Shoe Co., 69 N. H. 597.....	2109
Leawell v. Raleigh &c. R. Co., 106 N. C. 272..... (1076)	
Leazotte v. Boston &c. R. Co., 70 N. H. 5.....	1546
Le Barron v. Le Barron, 35 Vt. 365.....	2032
Lebanon Coal &c. Asso. v. Zerwick, 77 Ill. App. 486.....	1606
Lebanon &c. R. Co. v. Purdy, (Ky.) 37 S. W. Rep. 588.....	1851
Le Beau v. People, 34 N. Y. 223.....	1233
Le Beau v. Pittsburg &c. R. Co., 69 Ill. App. 557.....	2150, 2160
Leber v. Campbell Stores, 62 N. Y. Supp. 1124.....	132
Lebkeucher v. Bolanson, 69 Ill. App. 297.....	1543
Lechner v. Newark, 19 Misc. 452.....	1917
Lechowitzer v. Hamburg Am. Packet Co., 6 Misc. 536.....	295
Lechowitzer v. The Hamburg American Packet Co., 8 Misc. 213.....	262
Le Clair v. First Division &c. R. Co., 29 Minn. 9.....	1572
Lecourt v. Gaster, 50 La. Ann. 521.....	84
Ledman v. Dry Dock &c. R. Co., 28 App. Div. 197.....	2302
Ledwich v. McKim, 53 N. Y. 307..... (520)	
Ledwidge v. Hathaway, 170 Mass. 348.....	1134, 1513
Lee v. Burk, 15 Ill. App. 651..... (1000)	
Lee v. Chicago &c. R. Co., 101 Wis. 352.....	1204
Lee v. Chesapeake &c. R. Co., (Ky.) 38 S. W. Rep. 509.....	1549
Lee v. Delaware &c. R. Co., 57 App. Div. 378.....	1832
Lee v. Greenwich, 43 App. Div. 39.....	2010
Lee v. Huff, 61 Ark. 494.....	83
Lee v. International &c. R. Co., 89 Texas, 583.....	2150
Lee v. Knapp & Co., 137 Mo. 385.....	1077
Lee v. Market Street R. Co., 135 Cal. 293.....	2325
Lee v. Minneapolis &c. R. Co., 66 Iowa, 131..... (1031)	
Lee v. Port Huron, 128 Mich. 533.....	1819
Lee v. Publishers, 155 Mo. 610.....	2049
Lee v. Reliance Mills, 21 R. I. 322.....	2048, 2054
Lee v. Riley, 18 Com. B. (N. S.) 722..... (1005)	2364
Lee v. R. Co., 87 Mich. 574.....	1512
Lee v. Sandy Hill, 40 N. Y. 442.....	2003
Lee v. Schuylkill Valley T. Co., 13 Mont. Co. L. Rep. 91.....	2289
Lee v. Smith, 42 Oh. St. 458.....	1459
Lee v. Troy City G. L. Co., 98 N. Y. 115.....	693, 2055
Lee v. Union &c. R. Co., 12 R. I. 383.....	2248, 2362
Lee v. Vacuum Oil Co., 54 Hun, 156.....	2268
Leeds v. Mechanics' Ins. Co., 4 Seld. 351..... (347)	
Leeds v. Met. Gaslight Co., 90 N. Y. 26.....	834, 837
Leeds v. New York &c. R. Co., 32 Misc. 671.....	1060
Leeds v. Richmond, 102 Ind. 372.....	1993
Lefkowitz v. Metropolitan Street R. Co., 26 Misc. 787.....	2330
Lefrano v. N. Y. & Mt. Vernon Water Co., 55 Hun, 462.....	1496
Lefrois v. Monroe Co., 24 App. Div. 421.....	2096

## TABLE OF CASES.

CIXXIX

	PAGE
Legates v. Lingo, 8 Houst. (Del.) 154.....	84
Legg v. Britton, 64 Vt. 652.... (954)	
Leggett v. Illinois C. R. Co., 72 Ill. App. 577.....	1056, 1146
Leggett v. Rome &c. R. Co., 41 Hun, 80.... (1043)	
Leggett v. Watertown, 55 App. Div. 321.....	1857, 1862, 1871
Leggett v. Western &c. R. Co., 143 Pa. St. 39.... (492)	
Le Grand v. Wilkesbarre &c. T. Co., 10 Pa. Super. Ct. 12.....	2131
Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.... (878)	
Lehigh &c. Co. v. Lear, 8 Central R. (Pa.) 107.....	777, 798
Lehigh &c. Co. v. Rupp, 100 Pa. St. 95.... (875)	
Lehigh &c. R. Co. v. Brandtmier, 113 Pa. St. 610.... (768)	808
Lehigh &c. R. Co. v. Jones, 86 Pa. St. 432.....	1669
Lehigh &c. R. Co. v. Lazarus, 28 Pa. St. 203.....	1255
Lehigh &c. R. Co. v. McKim, 90 Pa. St. 122.....	1268
Lehigh &c. R. Co. v. Merchant, 84 Fed. Rep. 870.....	1230
Lehigh Valley Coal Co. v. Kiesel, 80 Fed. Rep. 470.....	1466
Lehigh Valley Coal Co. v. Warrek, 84 Fed. Rep. 866.....	1572, 1629, 1745
Lehman v. Bagley, 82 Ill. App. 197.....	1397
Lehman v. Brooklyn City R. Co., 47 Hun, 355.....	2307
Lehman v. Bagley, 82 Ill. App. 197.....	1743
Lehman v. Eureka Iron Works, 114 Mich. 260.....	712, 771, 2247
Lehman v. Great Eastern Casualty & I. Co., 7 App. Div. 424.....	1309
Lehman v. Press, 106 Iowa, 389.....	191
Lehman v. Van Nostrand, 165 Mass. 233.....	1557
Lehmann v. Brooklyn, 30 App. Div. 305.....	1820, 1898
Lehr v. S. & H. P. R. R. Co., 118 N. Y. 556.....	505
Leidy v. Quaker City &c. Co., 180 Pa. St. 323.....	134
Leier v. Minnesota Belt Line R. & T. Co., 63 Minn. 203.....	1798
Leigh v. Smith, 1 Carr. & P. 640.... (609)	
Leinkauf v. Lombard &c. Co., 12 App. Div. 302.....	275
Leinkauf v. Morris, 66 Ala. 406.... (900)	
Leiter v. Kinnare, 68 Ill. App. 558.....	934, 1624, 1643
Lellis v. Michigan Cent. R. Co., (Mich.) 82 N. W. Rep. 828.....	1631
Lemasters v. Southern Pac. Co., 131 Cal. 105.....	2165
Lemb v. Worcester, 177 Mass. 82.....	1865
Lemoine v. Aldrich, 177 Mass. 89.....	1411, 1495
Lemmon v. Chicago &c. R. Co., 32 Iowa, 151.... (1035)	
Lemon v. Chicago &c. R. Co., 59 Mich. 618.....	1049
Lemon v. Pullman Palace Car Co., 52 Fed. Rep. 262.....	602, 907
Lemp Brew. Co. v. Ort, 113 Fed. Rep. 482.....	1220
Lemser v. St. Joseph &c. Man. Co., 70 Mo. App. 209.....	1449, 1506
Lendle v. Robinson, 53 App. Div. 140.....	1321, 1322, 1324
Lendly v. Detroit, (Mich.) 90 N. W. Rep. 665.....	1144
Lenk v. Kansas &c. Coal Co., 80 Mo. App. 374.....	1723
Lennan v. Hamburg &c. S. S. Co., 73 App. Div. 357.... (970)	
Lennon v. Chicago &c. R. Co., (Iowa) 75 N. W. Rep. 671.... (491)	
Lennon v. Grauer, 159 N. Y. 433.....	166
Lennon v. Railway Co., 65 Hun, 578.....	2231, 2292
Lennox v. Greenwich Ins. Co., 2 Pa. Super. Ct. 431.....	1311, 1312
Lent v. N. Y. C. & H. R. R. Co., 120 N. Y. 467.....	499
Lentz v. St. Paul, (Minn.) 91 N. W. Rep. 256.....	1837
Lenz v. Aldrich, 6 App. Div. 178.....	1325
Lenz v. Whitcomb, 96 Wis. 310.... (752)	
Lenzen v. New Braunfels, 13 Tex. Civ. App. 335.....	1853
Leonard v. Brooklyn &c. R. Co., 57 App. Div. 125.....	393, 408, 917
Leonard v. Boston &c. R. Co., 170 Mass. 310.....	419
Leonard v. California S. N. Co., 84 N. Y. 48.....	958
Leonard v. Collins, 70 N. Y. 90.....	1406, 1446
Leonard v. Columbus Steam Navigation Co., 84 N. Y. 48.... (960)	
Leonard v. Decker, 22 Fed. Rep. 741.....	1318, 1360
Leonard v. Gunther, 47 App. Div. 104.....	1329
Leonard v. Hermann, 195 Pa. St. 222.....	1419
Leonard v. Hornellsville, 41 App. Div. 106.....	1332, 1814

	PAGE
Leonard v. Kinnare, 174 Ill. 532.....	1629, 1675
Leonard v. Marshall, 82 Fed. Rep. 396.....	1665
Leonard v. Minneapolis &c. R. Co., 63 Minn. 489.....	1589, 1705
Leonard v. N. Y. &c. Co., 41 N. Y. 544.....	2390, 2391, 2429, 2441, 2448, 2450
Leonard v. Tel. Co., 41 N. Y. 544.....	2389
Leonard v. Whitcomb, 95 Wis. 646.....	258
Lepp v. St. Louis &c. R. Co., 87 Mo. 139.....	683
Leppala v. Cleveland Iron Min. Co., 122 Mich. 633.....	1723
Leroy v. North German Lloyd S. Co., 16 Misc. 162.....	408
Lesah v. Maine &c. R. Co., 77 Me. 85..... (753)	
Lesan v. Maine &c. R. Co., 77 Me. 85.....	808, 2049
Leseure v. Weaver, 99 Ill. App. 375.....	176
Lesher v. Wabash Nav. Co., 14 Ill. 85.....	1335
Lesler v. Rolfe &c. Co., (W. Va.) 41 S. E. Rep. 216.....	850
Leslie v. Grand Rapids, 120 Mich. 28.....	1822
Leslie v. Granite R. Co., 172 Mass. 468.....	1216
Leslie v. Moser, 163 Ill. 502.....	59
Leslie v. Wabash &c. R. Co., 88 Mo. 50..... (493)	474, 487
Leslie's Appeal, 63 Pa. St. 355..... (47)	
Lessard v. Boston &c. R. Co., 69 N. H. 648.... (343)	
Lesser Cotton Co. v. St. Louis &c. R. Co., 114 Fed. Rep. 133.....	1124, 1253
Lester v. Kansas City &c. R. Co., 60 Mo. 265.....	1259
Lett v. St. Lawrence &c. R. Co., 1 Ont. 545.... (846)	847
Lettis v. Horning, 67 Hun, 627.....	993, 1364
Leubke v. Chicago &c. R. Co., 63 Wis. 91.....	1536
Leukner v. Citizens' T. Co., 179 Pa. St. 486.....	2327, 2332
Levene v. Standard Oil Co., 64 N. J. L. 63.....	1683
Levering v. Union Transp. Co., 42 Mo. 88.....	250
Levesque v. Janson, 165 Mass. 16.....	1743
Levi v. Brooks, 121 Mass. 501.....	19, 29
Levi v. Lynn &c. R. Co., 11 Allen, 300.....	200
Levien v. Webb, 30 Misc. 196.....	599
Levin v. Second Ave. T. Co., 194 Pa. St. 156.....	421, 2154, 2297
Levin v. Second Ave. T. Co., 201 Pa. St. 58.....	2153
Levinson v. Bernheimer, 31 Misc. 26.....	928
Levinson v. Texas &c. R. Co., 17 Tex. Civ. App. 617.....	573
Levison v. Metropolitan Street R. Co., 36 Misc. 827.....	2307
Levitt v. Nassau &c. R. Co., 14 App. Div. 83.....	932
Levy v. Clark, 90 Md. 146.....	1416
Levy v. Ely, 48 App. Div. 554.....	27
Levy v. Express Co., 4 So. Car. 234.... (358)	
Levy v. Franklin Savings Bank, 117 Mass. 448.... (156)	164
Levy v. Korn, 30 Misc. Rep. 199.....	1323
Levy v. Pike, 25 La. Ann. 630.....	108
Lewall v. Groman, 180 Pa. St. 532.....	2178
Lewin v. Lehigh Valley R. Co., 41 App. Div. 89.....	761
Lewin v. Lehigh Valley R. Co., 52 App. Div. 69.....	718
Lewin v. Pauli, 19 Pa. Super. Ct. 447.... (657)	1092, 1322
Lewis v. Atlanta, 77 Ga. 756.....	848
Lewis v. Baltimore &c. R. Co., 13 Am. L. Reg. N. S. (Md.) 284.... (815)	
Lewis v. Binghamton R. Co., 35 App. Div. 12.....	2322
Lewis v. Brooklyn &c. R. Co., 7 Misc. 286.....	1229
Lewis v. Chesapeake &c. R. Co., 47 W. Va. 656.....	258
Lewis v. Cincinnati Street R. Co., 10 Oh. S. & C. P. Dec. 53.....	2274
Lewis v. Delaware &c. Canal Co., 80 Hun, 192.....	496
Lewis v. Douglass, 58 Hun, 587.....	83
Lewis v. Dunlap, 5 Pa. Super. Ct. 625.....	627
Lewis v. Dwinell, 84 Me. 497.....	2190
Lewis v. Emery, 108 Mich. 641.....	1514
Lewis v. Flint &c. R. Co., 54 Mich. 58.... (428)	
Lewis v. Gt. West. R. Co., 5 H. & N. 867.....	273, 283
Lewis v. London &c. R. Co., L. R. 9 Q. B. 66.... (472)	
Lewis v. Long Island R. Co., 162 N. Y. 52.....	725, 737, 741, 758, 794

## TABLE OF CASES.

clxxxi

	PAGE
Lewis v. N. Y. Sleeping Car Co., 143 Mass. 267.....	596, 597, 600
Lewis v. N. Y. &c. R. Co., 123 N. Y. 496.....	780
Lewis v. Peck, 10 Ala. 142.....	38, 2180
Lewis v. St. Louis &c. R. Co., 59 Mo. 495.....	1466
Lewis v. Schultz, 98 Iowa, 344.....	12
Lewis v. Seifert, 116 Pa. St. 628.....	1405, 1489, 1525, 1657, 1658
Lewis v. State, 96 N. Y. 71.....	2217, 2218
Lewis v. Taylor Coal Co., (Ky.) 66 S. W. Rep. 1044.....	1374
Lewis v. Western Union Teleg. Co., 57 S. C. 325.....	2458
Lewisville v. Batson, (Ind. App.) 63 N. E. Rep. 861.....	1869, 1872
Lewke v. Dry Dock &c. R. Co., 46 Hun, 283.....	1176
Lexington &c. R. Co. v. Cozine, (Ky.) 64 S. W. Rep. 848.....	902
Lexington &c. R. Co. v. Huffman, (Ky.) 32 S. W. Rep. 611.....	951, 2145
Lexington &c. R. Co. v. Lyons, (Ky.) 46 S. W. Rep. 209.....	832
Lexington &c. Co. v. Stephens, (Ky.) 47 S. W. Rep. 321..... (1094)	
Leydecker v. Brintnall, (Mass.) 33 N. E. Rep. 399.....	1322
Leyden v. N. Y. &c. R. Co., 55 Hun, 114.....	1056
Lerh v. Newburgh &c. R. Co., 41 App. Div. 218.....	407
L. Gas Company v. Gutenkuntz, 82 Ky. 432.....	2126
L'Herault v. Minneapolis, 69 Minn. 261.....	864, 1872
Lowe v. Third Ave. R. Co., 14 Misc. 612.....	2304
Lias v. Rochester &c. R. Co., 169 N. Y. 118.....	535
Liberty Ins. Co. v. Central Vt. R. Co., 19 App. Div. 509.....	107, 1090, 1105
Lichtenstein v. Jarvis, 31 App. Div. 33.....	107
Lichtenstein v. New York, 159 N. Y. 500.....	1897
Liddall v. Jansen, 168 Ill. 43.....	2133
Liebold v. Green, 69 Ill. App. 527.....	2125
Liefert v. Galveston &c. R. Co., (Tex. Civ. App.) 57 S. W. Rep. 899.....	1301
Liekens v. Staten Island &c. R. Co., 64 App. Div. 327.....	2162
Lien v. Chicago &c. R. Co., 79 Mo. App. 475..... (751)	
Lienan v. Dinsmore, 3 Daly, 365.....	38
Lieuallen v. Musgrove, 37 Ore. 446.....	1248
Life v. Blackwelder, 25 Ill. App. 119.....	989
Light v. Harrisburg &c. R. Co., 4 Pa. Super. Ct. 427.....	592
Light Co. v. Orr, 59 Ark. 215..... (1064)	
Lika v. R. Co., 21 Wis. 370..... (1040)	
Lillibridge v. McCann, 117 Mich. 84.....	683, 1247
Lillis v. St. Louis &c. R. Co., 60 Mo. 646.....	572
Lilly v. N. Y. &c. R. Co., 107 N. Y. 566.....	1426
Lilly v. Scranton, 18 Pa. Co. Ct. 433.....	1987
Limberg v. Glenwood Lumber Co., 127 Cal. 598.....	1145, 1563
Limerick Nat. Bank v. Adams, 70 Vt. 133.....	193, 196
Limon v. Penn. Ry. Co., 54 N. Y. St. R. 245.....	829
Limpus v. London &c. Co., 1 H. & Colt. 526..... (518)	
Linch v. Nurdin, 1 Ad. & Ell., (N. S.) 31.....	2133
Linch v. Sagamore &c. Co., 143 Mass. 206.....	1544, 1557
Linck v. Louisville &c. R. Co., (Ky.) 54 S. W. Rep. 184.....	1438, 1661
Linck v. Litchfield, 31 Ill. App. 118.....	1908
Lincoln v. Boston, 148 Mass. 578.....	1910
Lincoln v. Gay, 164 Mass. 537.....	113
Lincoln v. Koenig, 10 Kan. App. 504.....	1936
Lincoln v. Janesch, 63 Neb. 707.....	2237
Lincoln v. Koenig, 10 Kan. App. 504.....	1829
Lincoln v. New York &c. S. S. Co., 30 Misc. Rep. 752.....	609
Lincoln v. O'Brien, 56 Neb. 761.....	1823
Lincoln v. Pirner, 59 Neb. 634.....	1861, 1869, 1872, 2018
Lincoln v. Saratoga & S. R. Co., 23 N. Y. 425..... (1224)	
Lincoln v. Staley, 32 Neb. 63.....	2182
Lincoln Street R. Co. v. Cox, 48 Neb. 807.....	1465
Lincoln S. R. Co. v. McClellan, 54 Neb. 672.....	398, 1094
Lincoln Street R. Co. v. Lincoln, 61 Neb. 109.....	2007
Lind v. Brick, 37 Ill. App. 430.....	2346, 2357
Lindberg v. Chicago City R. Co., 83 Ill. App. 433..... (657)	

	PAGE
Lindem v. Northern P. R. Co., 85 Minn. 391.....	740
Lindeman v. Brooklyn &c. R. Co., 69 App. Div. 442.... (893)	
Lindemann v. N. Y. &c. R. Co., 42 Hun, 306.... (807)	
Linden v. Anchor Min. Co., 20 Utah, 134.....	685
Lindhauf v. Lombard, 137 N. Y. 417.....	205
Lindwell v. Woods, 41 Minn. 212.....	1620, 1661, 1670
Lindley v. Detroit, (Mich.) 90 N. W. Rep. 665.....	2015
Lindsay v. Central R. &c. Co., 46 Ga. 448.....	30
Lindsay v. Canadian &c. R. Co., 68 Vt. 556.....	2151, 2154, 2160
Lindsay v. Cundy, 1 Q. B. Div. 348.....	2419
Lindsay v. Leighton, 150 Mass. 285.... (1319)	
Lindsay v. New York &c. R. Co., 112 Fed. Rep. 384.....	1639
Lindsay v. Sherman, (Tex. Civ. App.) 36 S. W. Rep. 101.....	1908
Lindsay v. Southern R. Co., (Ga.) 41 S. E. Rep. 46.....	491
Lindsey v. Chicago &c. R. Co., 64 Iowa, 407.....	472, 492
Line v. Nelson, 38 N. J. L. 358.....	2202, 2206
Lineburg v. St. Paul, 71 Minn. 245.....	1841
Linehen v. Western Electric Co., 29 App. Div. 462.....	2240
Linfield v. Old Colony &c. R. Co., 10 Cush. 562.... (784)	808
Ling v. Railroad Co., 50 Minn. 160.....	1620
Lingenfelter v. Baltimore &c. R. Co., 154 Ind. 49.....	2165
Lingreen v. Illinois C. R. Co., 61 Ill. App. 174.....	1121
Link v. Louisville &c. R. Co., (Ky.) 54 S. W. Rep. 184.....	951
Link v. Sheldon, 136 N. Y. 1.....	1226, 2185
Linn v. Massillon Bridge Co., 78 Mo. App. 111.....	683
Linnehan v. Rollins, 137 Mass. 123.....	649
Linnehan v. Sampson, 126 Mass. 506.....	691, 2359, 2361
Linsa v. Chesapeake &c. R. Co., 91 Fed. Rep. 964.....	842
Linton Coal &c. Co. v. Persons, 15 Ind. App. 69.....	1584
Lintz v. Holy Terror Min. Co., 13 S. D. 489.....	953
Linyall v. Wood, 44 Fed. Rep. 855.....	1703
Lion v. Baltimore City Pass. R. Co., 90 Md. 266.....	2085
Lipan v. Hall, (Mich.) 87 N. W. Rep. 619.....	1607
Lippert v. Lippert, 110 Iowa, 550.....	50
Lipscomb v. Houston &c. R. Co., (Tex.) 64 S. W. Rep. 923.....	955
Liquidators &c. v. Douglas, 11 Session Cases (3rd Series), 12 (Scotch).... (68)	
Lisabelle v. Hubert, (R. I.) 50 Atl. Rep. 837.... (86)	
Liscomb v. J. R. Trans. Co., 6 Lansing, 75.....	424
Lissak v. Coker &c. Co., 119 Cal. 442.....	1158, 1194
Litchfield v. Anglim, 83 Ill. App. 55.....	1876
Litchfield v. Southworth, 67 Ill. App. 398.....	1613
Litchfield v. White, 7 N. Y. 438.... (69)	
Litchfield v. White, 3 Seld. 438, 443.... (91)	
Litchfield v. White, 3 Sandf. 545.... (68)	
Litchfield &c. R. Co., v. Romine, 39 Ill. App. 642.....	1546
Littell v. Young, 5 Pa. Supr. Ct. 205.....	668, 672
Little v. Carolina &c. R. Co., 118 N. C. 1072.....	2142, 2157
Little v. Crescent News &c. Co., (Tex. Civ. App.) 66 S. W. Rep. 240.....	21
Little v. Fargo, 43 Hun, 233.....	219
Little v. Hackett, 116 U. S. 366.... (726)	732
Little v. Holyoke, 177 Mass. 114.....	1853, 1997
Little v. Lathrop, 5 Greenl. 356.... (1008)	1010
Little v. Railroad Co., 84 Mich. 289.....	1656
Little v. Wirth, 6 Misc. 301.....	1317, 1327
Little Miami R. Co. v. Fitzpatrick, 42 Oh. St. 318.....	1404, 1405, 1616
Little Miami R. Co. v. Stevens, 20 Oh. St. 415.....	1669
Little Miami R. Co. v. Wetmore, 19 Oh. St. 110.... (19)	32
Little Rock Co. v. Barker, 33 Ark. 350.....	876
Little Rock &c. R. Co. v. Atkins, 46 Ark. 423.....	485
Little Rock &c. R. Co. v. Barker, 39 Ark. 491.....	742, 877
Little Rock &c. R. Co. v. Barry, 84 Fed. Rep. 944.....	1529, 1539, 1553
Little Rock &c. R. Co. v. Blewitt, 65 Ark. 235.... (751)	

## TABLE OF CASES.

clxxxiii

	PAGE
Little Rock &c. R. Co. v. Cavenesse, 48 Ark. 106....(809)	
Little Rock &c. R. Co. v. Canatser, 61 Ark. 560.....	824
Little Rock &c. R. Co. v. Daniels, 68 Ark. 171.....	1325
Little Rock &c. R. Co. v. Davis, 41 Ark. 79.....	2437
Little Rock &c. R. Co. v. Dick, 52 Ark. 402....(1027)	
Little Rock &c. R. Co. v. Finley, 37 Ark. 562....(999)	1015, 1019
Little Rock &c. R. Co. v. Holland, 40 Ark. 336....(1023)	
Little Rock &c. R. Co. v. Lavert, 38 Kan. 333....(1181)	
Little Rock &c. R. Co. v. Locke, (Ark.) 45 S. W. Rep. 909....(1092)	
Little Rock &c. R. Co. v. Miller Coal Co., 66 Ark. 645....(824)	
Little Rock &c. R. Co. v. Nelson, 66 Ark. 494.....	1158
Little Rock &c. R. Co. v. Odom, 63 Ark. 326.....	244
Little Rock &c. R. Co. v. Parkhurst, 36 Ark. 371.....	663, 809
Little Rock &c. R. Co. v. Talbot, 39 Ark. 523.....	244
Little Rock &c. R. Co. v. Wilson, 66 Ark. 414.....	1142
Little Rock &c. T. Co. v. Davis, 41 Ark. 79.....	2391
Little Rock &c. Co. v. Nelson, 66 Ark. 494.....	380, 418, 722
Little Rock &c. Co. v. Walker, 65 Ark. 144.....	525
Littlefield v. Webster, 90 Me. 213.....	1871
Littlejohn v. Arbohast, 95 Ill. App. 605.....	2196
Littlejohn v. Richmond &c. R. Co., 45 S. C. 181.....	787, 1162
Littlejohn v. Richmond &c. R. Co., 49 S. C. 12.....	766
Littleton v. Richardson, 34 N. H. 179.....	2261
Littlewood v. Mayor &c., 89 N. Y. 24.....	939, 956
Littman v. Dry Dock &c. R. Co., 6 Misc. 34.....	539, 1381
Livermore Foundry &c. Co. v. Union Storage &c. Co., 105 Tenn. 187.....	1239
Liverpool &c. Co. v. Kearney, 180 U. S. 132.....	1314
Liverpool &c. Ins. Co. v. McNeill, 89 Fed. Rep. 131.....	257
Liverpool &c. Steam Co. v. Phenix Ins. Co., 129 U. S. 397.....	237
Livestock &c. Co. v. Chicago &c. R. Co., 87 Mo. App. 330.....	210, 355
Livezey v. Philadelphia, 64 Pa. St. 106.....	1107
Livingston v. Bishop, 1 Johns. 129.....	2201, 2202, 2207
Livingston v. Cox, 6 Barr. 360.....	2183
Livingston v. Woods, 20 Mont. 91.....	86
Lloyd v. Albemarle &c. R. Co., 118 N. C. 1010.....	2147
Lloyd v. City &c. R. Co., 110 Ga. 165.....	681, 2244
Lloyd v. H. & St. J. R. Co., 53 Mo. 509....(487)	
Lloyd v. Hanes & Co., 126 N. C. 359.....	1412, 1564, 1568
Lloyd v. Hannibal &c. R. Co., 53 Mo. 509.....	486
Lloyd v. Osborne, 92 Wis. 93.....	182
Lloyd v. W. B. Bank, 15 Penn. St. 172....(124)	
Lloyd v. Walton, 57 App. Div. 288.....	1866, 1868
Lobenz v. Metropolitan Street R. Co., 72 App. Div. 181.....	483
Lochbaum v. Oregon R. &c. Co., 104 Fed. Rep. 852.....	1646
Locher v. Kluga, 97 Ill. App. 518.....	873
Locke v. First Division &c. R. Co., 15 Minn. 350....(809)	1001, 1013
Locke v. International &c. R. Co., (Tex. Civ. App.) 60 S. W. Rep. 314...864	1221
Locke v. Sioux City R. Co., 46 Iowa, 109.....	667
Locke v. State, 140 N. Y. 480.....	2217, 2223
Loeker v. Damon, 17 Pick. 284....(665)	
Loekhart v. Lichtenthaler, 10 Wright, (Pa.) 151....(536)	
Lockport v. Richards, 81 Ill. App. 533.....	920, 1861, 1872
Lockridge v. Fesler, (Ky.) 37 S. W. Rep. 65.....	2367
Lockwood v. Belle City Street R. Co., 92 Wis. 97.....	2327
Lockwood v. Bull, 1 Cowen, 322....(104)	112
Lockwood v. Chicago &c. R. Co., 55 Wis. 50.....	1112, 1727
Lockwood v. Manhattan Storage &c. Co., 28 App. Div. 68.....	106
Lockwood v. N. Y. &c. R. Co., 98 N. Y. 523.....	882, 1180
Loeuer v. Chicago &c. R. Co., 94 Wis. 571.....	258
Loeuer v. Humphrey, 41 Ohio St. 378.....	898
Loeuer v. Sedalia, 77 Mo. 431.....	698
Lofrano v. N. Y. &c. Co., 54 Hun. 452.....	1559
Lofthus v. Union Ferry Co., 84 N. Y. 555....(455)	604, 605, 1128

	PAGE
Logan v. Field, 75 Mo. App. 594.....	2193
Logan v. Gedney, 38 Cal. 579.....	999
Logan v. Hannibal &c. R. Co., 77 Mo. 663.....	551
Logan v. Matthews, 6 Pa. St. 417.... (105).....	107, 2139
Logan v. North Carolina R. Co., 116 N. C. 940.... (1336)	
Logan v. R. Co., 11 Rob. L. A. 24.... (610)	
Logansport &c. R. Co. v. Caldwell, 38 Ill. 280.... (1041)	
Lohman v. McManus, 9 Pa. Dist. 223.....	731
London v. Cunningham, 1 Misc. 408.....	844
London v. Humphrey, 9 Conn. 209.....	2149
London v. N. W. R. Co., 7 H. & N. 600.... (273)	
London &c. Corp. v. Russell, 1 Pa. Super. Ct. 320.....	1305
London &c. Ins. Co. v. Rome &c. R. Co., 144 N. Y. 200.... (304).....	205, 1307
Lonegran v. Martin, 4 Misc. 624.....	2350
Long v. Bank of Commerce, (Ky.) 38 S. W. Rep. 886.....	41
Long v. Central Iowa R. Co., 64 Iowa, 657.... (1053)	
Long v. Chicago &c. R. Co., (Tex.) 57 S. W. Rep. 802.....	1799
Long v. Illinois C. R. Co., (Ky.) 68 S. W. Rep. 1095.....	1570
Long v. Morrison, 14 Ind. 595.... (848).....	2189, 2198
Long v. New York &c. R. Co., 50 N. Y. 76.....	298
Long v. Richmond, 68 App. Div. 466.....	18
Long v. R. Co., 65 Mo. 225.....	1615
Long Bros. v. Eckert, 73 Mo. App. 445.....	150
Longabaugh v. Va. City &c. R. Co., 9 Nev. 271.....	1253, 1257, 1265
Longemecker v. Pennsylvania R. Co., 105 Pa. St. 328.....	793
Longfellow v. Quimby, 33 Me. 457.... (888)	
Longmeid v. Holliday, 6 Exch. 766.... (1380)	
Lonzer v. Lehigh &c. R. Co., 196 Pa. St. 610.....	1730
Loomis v. Jewett, 35 Hun, 313.....	540
Loomis v. Terry, 17 Wend. 49.... (983).....	985, 986, 991
Loonan v. Brockway, 3 Robertson, 74.....	1547, 1684
Looney v. McLean, 129 Mass. 33.....	697, 1317, 1319, 1322
Loop v. Litchfield, 42 N. Y. 351.....	1376, 1487
Loper v. W. U. T. Co., 70 Tex. 689.....	2428, 2432
Lopez v. Central R. Co., 1 Ala. 464.....	2054
Lorance v. Hillyer, 57 Neb. 266.....	1005, 1007
Lord v. Lamonte, 72 Conn. 37.....	2347
Lord v. Mobile, 113 Ala. 360.....	1823, 1824, 1857, 1871, 1875, 2047
Lord v. Saco, 87 Me. 231.....	2019
Lord v. Tiffany, 98 N. Y. 412.....	2202
Lord v. Wilkinson, 56 Barb. 593.... (183)	
Lord v. Wormwood, 29 Me. 282.... (1008).....	1010
Lorence v. Ellenburgh, 13 Wash. 341.....	913, 1824, 1946
Lorenz v. Burlington &c. R. Co., (Ia.) 88 N. W. Rep. 835.....	737
Lorenzo v. Wirth, 170 Mass. 596.....	2256
Lorillard v. Monroe, 11 N. Y. 392.....	1957, 1990
Los Angeles v. Pomeroy, 124 Cal. 597.....	2085, 2096
Losee v. Buchanan, 51 N. Y. 476.....	1108, 2059, 2060, 2061, 2062, 2069, 2073, 2085, 2096
Losee v. Clute, 51 N. Y. 494.....	1376, 1487
Losee v. Watervliet &c. R. Co., 63 Hun, 404.....	489
Lottman v. Barnett, 62 Mo. 159.....	1767
Lou v. Nash. R. Co., 11 Ky. L. R. 419.....	564
Loucks v. Chicago &c. R. Co., 31 Minn. 526.....	772, 784
Loud &c. Lumber Co. v. Peter, 20 Oh. C. C. 73.... (827)	828
Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380.....	543, 1100, 1132, 2272, 2276
Loughlin v. People, 18 Ill. 266.....	1165
Loughlin v. State, 105 N. Y. 159.....	1569, 1661, 1664, 2219
Louis &c. R. Co. v. Dorsey, 189 Ill. 251.....	1133
Louisiana Western Extension R. Co. v. Carstens, 19 Tex. Civ. App. 190.....	1673
Louisiana &c. R. Co. v. Carstens, 19 Tex. Civ. App. 190.... (884)	1740
Louisiana &c. R. Co. v. McDonald, (Tex. Civ. App.) 52 S. W. Rep. 649.....	2144
Louisville v. Coleburne, (Ky.) 56 S. W. Rep. 681.....	1372



## TABLE OF CASES.

clxxxv

	PAGE
Louisville v. Connor, 9 Heisk. (Tenn.) 19.....	877
Louisville v. Gimpel, (Ky.) 59 S. W. Rep. 1096.....	1908
Louisville v. McGill, (Ky.) 52 S. W. Rep. 1053.....	2010
Louisville v. Malone, 109 Ala. 509.....	1142
Louisville v. Norris, (Ky.) 64 S. W. Rep. 958.....	1904
Louisville v. O'Malley, (Ky.) 53 S. W. Rep. 287.....	1908, 2010
Louisville v. Siebert, (Ky.) 51 S. W. Rep. 310.....	1965
Louisville R. Co. v. Blaydes, (Ky.) 51 S. W. Rep. 820.....	2286
Louisville R. Co. v. Blaydes, (Ky.) 52 S. W. Rep. 960.....	2325, 2331
Louisville R. Co. v. Collins, 2 Duv. 117.....	1660
Louisville R. Co. v. Meyer, 78 Ala. 597.... (279)	
Louisville R. Co. v. Murphy, 9 Bush. 531.....	1660
Louisville R. Co. v. Orr, 84 Ind. 50.....	1543, 1573
Louisville R. Co. v. Phillips, (Ky.) 58 S. W. Rep. 995.....	2299
Louisville R. Co. v. Rammacker, (Ky.) 51 S. W. Rep. 175.....	472
Louisville R. Co. v. Sanders, 86 Ky. 259.....	1369
Louisville Southern R. Co. v. Torian, 95 Va. 453.... (793)	
Louisville S. R. Co. v. Tucker, (Ky.) 49 S. W. Rep. 314.....	1734
Louisville &c. Co. v. Goodykuntz, 119 Ind. 111.....	948
Louisville &c. Co. v. Hiltner, (Ky.) 56 S. W. Rep. 654.....	1528
Louisville &c. Co. v. Rogers, 20 Ind. App. 594.....	301
Louisville &c. E. Co. v. Taaffe, 106 Ky. 535.... (874).....	2143, 2156, 2165
Louisville &c. Ferry Co. v. Nolan, 135 Ind. 60.....	605
Louisville &c. L. Co. v. Hartwell, 99 Ky. 436.....	317, 825
Louisville &c. Packet Co. v. Samuels, (Ky.) 59 S. W. Rep. 3.....	1155, 1463
Louisville &c. R. Co. v. Adams, (Ky.) 51 S. W. Rep. 333.....	1442
Louisville &c. R. Co. v. Allen, 47 Ill. App. 465.....	1479
Louisville &c. R. Co. v. Allgood, 113 Ala. 163.....	274
Louisville &c. R. Co. v. Alumbaugh, (Ky.) 51 S. W. Rep. 18.....	1199
Louisville &c. R. Co. v. Anchors, 114 Ala. 492.....	2046
Louisville &c. R. Co. v. Ballard, 85 Ky. 307.....	849
Louisville &c. R. Co. v. Ballard, 88 Ky. 159.....	901
Louisville &c. R. Co. v. Ballard, 2 Mete. (Ky.) 177.... (1000)....	1012, 1017, 1042
Louisville &c. R. Co. v. Banks, 132 Ala. 471.....	883, 1181, 1442
Louisville &c. R. Co. v. Banks, (Ky.) 33 S. W. Rep. 627.... (932)	
Louisville &c. R. Co. v. Bass, (Ky.) 43 S. W. Rep. 403.....	1443
Louisville &c. R. Co. v. Bates, 146 Ind. 564.....	1470, 1473, 1477, 1631
Louisville &c. R. Co. v. Beauchamp, (Ky.) 55 S. W. Rep. 716.....	1038, 1159
Louisville &c. R. Co. v. Bell, 100 Ky. 203.....	374
Louisville &c. R. Co. v. Berg, (Ky.) 32 S. W. Rep. 616.....	396, 512
Louisville &c. R. Co. v. Bernard, (Ky.) 37 S. W. Rep. 841.....	419
Louisville &c. R. Co. v. Bernheim, 113 Ala. 489.....	314
Louisville &c. R. Co. v. Binion, 107 Ala. 645.....	850, 1428
Louisville &c. R. Co. v. Bisch, 120 Ind. 549.....	510
Louisville &c. R. Co. v. Bizzell, 131 Ala. 429.....	2044
Louisville &c. R. Co. v. Blair, 104 Tenn. 212.....	555, 935
Louisville &c. R. Co. v. Bloyd, (Ky.) 55 S. W. Rep. 694.....	818
Louisville &c. R. Co. v. Bodine, (Ky.) 59 S. W. Rep. 740.... (814)	
Louisville &c. R. Co. v. Bouldin, 121 Ala. 197.....	1437, 1589, 1691, 1733
Louisville &c. R. Co. v. Bouldin, 110 Ala. 185.....	2044
Louisville &c. R. Co. v. Bowcock, (Ky.) 51 S. W. Rep. 580.....	1433, 1588
Louisville &c. R. Co. v. Bowen, (Ky.) 39 S. W. Rep. 31.....	1028, 1146
Louisville &c. R. Co. v. Bowlds, (Ky.) 64 S. W. Rep. 957.....	666
Louisville &c. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866.....	698, 1647
Louisville &c. R. Co. v. Brantley, 106 Ky. 849.....	1372
Louisville &c. R. Co. v. Breckinridge, 99 Ky. 1.....	587, 935
Louisville &c. R. Co. v. Breder, (Ky.) 64 S. W. Rep. 667.....	737
Louisville &c. R. Co. v. Brice, 84 Ky. 298.....	660
Louisville &c. R. Co. v. Brinkerhoff, 119 Ala. 606.... (1020).....	1023, 1094
Louisville &c. R. Co. v. Brown, 121 Ala. 221.....	661, 2056
Louisville &c. R. Co. v. Buck, 116 Ind. 566.....	1403, 1543, 1616, 2382
Louisville &c. R. Co. v. Cahill, 63 Ill. 640.... (1040).....	672
Louisville &c. R. Co. v. Campbell, 7 Heisk. 253.... (338).....	351

	PAGE
Louisville &c. R. Co. v. Carothers, (Ky.) 65 S. W. Rep. 833.....	938, 1155
Louisville &c. R. Co. v. Carothers, (Ky.) 66 S. W. Rep. 385.....	1155
Louisville &c. R. Co. v. Case, 9 Bush. (Ky.) 728.....	202
Louisville &c. R. Co. v. Catron, 102 Ky. 323.....	357
Louisville &c. R. Co. v. Cavens, 9 Bush. 559.....	1608, 1609
Louisville &c. R. Co. v. Cayce, (Ky.) 34 S. W. Rep. 896.....	546, 575
Louisville &c. R. Co. v. Chaffin, 84 Ga. 519.....	901, 905
Louisville &c. R. Co. v. Chesapeake &c. R. Co., (Ky.) 53 S. W. Rep. 277.....	1405
Louisville &c. R. Co. v. Clark, 105 Ky. 571.....	737, 775
Louisville &c. R. Co. v. Clark, (Ky.) 49 S. W. Rep. 323.....	737, 739, 751, 874, 1111
Louisville &c. R. Co. v. Collier, 104 Tenn. 189.....	444, 490
Louisville &c. R. Co. v. Cooley, (Ky.) 49 S. W. Rep. 339.....	1430
Louisville &c. R. Co. v. Cooper, (Ky.) 65 S. W. Rep. 795.....	(768).....789, 920
Louisville &c. R. Co. v. Cooper, (Ky.) 42 S. W. Rep. 1134.....	(345)
Louisville &c. R. Co. v. Cornelius, 14 Ind. App. 399.....	1372, 1690
Louisville &c. R. Co. v. Corps, 124 Ind. 427.....	1543
Louisville &c. R. Co. v. Cowherd, 120 Ala. 51.....	321, 1094, 1099
Louisville &c. R. Co. v. Creek, 29 N. E. (Ind.) 481.....	(726)
Louisville &c. R. Co. v. Creighton, 106 Ky. 42.....	874, 931, 934, 2142, 2147, 2150
Louisville &c. R. Co. v. Cunningham, 88 Ill. App. 289.....	305
Louisville &c. R. Co. v. Dallon, (Ky.) 43 S. W. Rep. 431.....	1170
Louisville &c. R. Co. v. Dalton, (Ky.) 43 S. W. Rep. 431.....	1254
Louisville &c. R. Co. v. Depp, (Ky.) 33 S. W. Rep. 417.....	491
Louisville &c. R. Co. v. Eakin, 103 Ky. 465.....	464, 874
Louisville &c. R. Co. v. Edmonds, (Ky.) 64 S. W. Rep. 727.....	1606
Louisville &c. R. Co. v. Espencheid, 17 Ind. App. 558.....	3-3
Louisville &c. R. Co. v. Falvey, 104 Ind. 409.....	896, 895
Louisville &c. R. Co. v. Farmer's &c. Firm, (Ky.) 52 S. W. Rep. 972.....	224
Louisville &c. R. Co. v. Foley, 15 Ky. L. R. 17.....	1532
Louisville &c. R. Co. v. Ft. Wayne Electric Co., (Ky.) 55 S. W. Rep. 918....	317
Louisville &c. R. Co. v. Fox, 11 Bush. 493.....	(1138)
Louisville &c. R. Co. v. Fox, (Ky.) 42 S. W. Rep. 922.....	1674, 1705
Louisville &c. R. Co. v. Frawley, 110 Ind. 18.....	1751, 2382
Louisville &c. R. Co. v. Gaines, 99 Ky. 411.....	564
Louisville &c. R. Co. v. Gaylor, 126 Ind. 126.....	416
Louisville &c. R. Co. v. Gidley, 119 Ala. 523.....	213, 244, 272
Louisville &c. R. Co. v. Ginley, 100 Tenn. 472.....	1396
Louisville &c. R. Co. v. Goblen, 15 Ind. App. 123.....	549, 584, 630
Louisville &c. R. Co. v. Goetz, 79 Ky. 442.....	(768)
Louisville &c. R. Co. v. Goodbar, 102 Ind. 596.....	(1041).....1047
Louisville &c. R. Co. v. Graham, 98 Ky. 688.....	884, 925, 1798
Louisville &c. R. Co. v. Grubbs, (Ky.) 49 S. W. Rep. 3.....	1442
Louisville &c. R. Co. v. Guthrie, 10 Lea, (Tenn.) 432.....	1301
Louisville &c. R. Co. v. Guy, (Ky.) 37 S. W. Rep. 1043.....	830
Louisville &c. R. Co. v. Hale, 102 Ky. 600.....	464
Louisville &c. R. Co. v. Hall, 110 Ga. 49.....	1015, 1026
Louisville &c. R. Co. v. Harmon, (Ky.) 64 S. W. Rep. 640.....	396, 445
Louisville &c. R. Co. v. Harned, (Ky.) 66 S. W. Rep. 25.....	224, 1091
Louisville &c. R. Co. v. Harris, 9 Lea, (Tenn.) 180.....	(574).....556
Louisville &c. R. Co. v. Hawkins, 92 Ala. 241.....	1511, 1732
Louisville &c. R. Co. v. Head, (Ky.) 59 S. W. Rep. 23.....	(492)
Louisville &c. R. Co. v. Heck, 151 Ind. 292.....	1531, 1642, 1657, 1673
Louisville &c. R. Co. v. Heilprin, 95 Ill. App. 402.....	316, 824
Louisville &c. R. Co. v. Henry, (Ky.) 44 S. W. Rep. 428.....	1137
Louisville &c. R. Co. v. Hiltner, (Ky.) 60 S. W. Rep. 2.....	1729
Louisville &c. R. Co. v. Hine, 121 Ala. 234.....	552, 666, 830, 832
Louisville &c. R. Co. v. Howell, 147 Ind. 266.....	1484, 1676
Louisville &c. R. Co. v. Hull, (Ky.) 68 S. W. Rep. 433.....	213, 855, 938
Louisville &c. R. Co. v. Jackson, (Ky.) 36 S. W. Rep. 173.....	576
Louisville &c. R. Co. v. Johnson, 108 Ala. 62.....	580, 681
Louisville &c. R. Co. v. Johnson, 92 Ala. 204.....	551
Louisville &c. R. Co. v. Johnson, 81 Fed. Rep. 679.....	677
Louisville &c. R. Co. v. Jones, 83 Ala. 376.....	408

## TABLE OF CASES.

elxxxvii

	PAGE
Louisville &c. R. Co. v. Jones, 130 Ala. 456.....	837, 872, 877
Louisville &c. R. Co. v. Jones, 7 West, (Ind.) 33.... (896)	
Louisville &c. R. Co. v. Jones, (Ky.) 52 S. W. Rep. 938.....	1017, 1223
Louisville &c. R. Co. v. Joplin, (Ky.) 55 S. W. Rep. 206.....	551, 902, 927
Louisville &c. R. Co. v. Jordan, (Ky.) 66 S. W. Rep. 27.....	576, 936
Louisville &c. R. Co. v. Katzenberger, 16 Lea, (Tenn.) 380.... (602)	
Louisville &c. R. Co. v. Keefer, 146 Ind. 21.....	203, 263
Louisville &c. R. Co. v. Geimery, (Ky.) 66 S. W. Rep. 20.....	2144
Louisville &c. R. Co. v. Keith, (Ky.) 58 S. W. Rep. 468.....	441, 576
Louisville &c. R. Co. v. Keller, (Ky.) 47 S. W. Rep. 1072.....	427, 926
Louisville &c. R. Co. v. Kelton, 112 Ala. 533.....	1023
Louisville &c. R. Co. v. Kelly, 92 Ind. 371.... (895)	
Louisville &c. R. Co. v. Kelly, 100 Ky. 421.... (902)	
Louisville &c. R. Co. v. Kemper, 147 Ind. 561.....	1541
Louisville &c. R. Co. v. Kemper, 153 Ind. 618.....	1432
Louisville &c. R. Co. v. Kice, (Ky.) 60 S. W. Rep. 705.... (1032)	
Louisville &c. R. Co. v. Kingman, (Ky.) 35 S. W. Rep. 264.... (896).....	902
Louisville &c. R. Co. v. Klyman, (Tenn.) 67 S. W. Rep. 472.....	572
Louisville &c. R. Co. v. Levi, 8 Oh. C. D. 373.....	271
Louisville &c. R. Co. v. Logan, 88 Ky. 232.... (532).....	364
Louisville &c. R. Co. v. Lowe, (Ky.) 66 S. W. Rep. 736.....	929, 1511, 1615
Louisville &c. R. Co. v. Lynch, 147 Ind. 165.....	2067
Louisville &c. R. Co. v. Lyon, (Ky.) 58 S. W. Rep. 434.... (784).....	922
Louisville &c. R. Co. v. McClain, (Ky.) 66 S. W. 391.....	902, 1091, 2037
Louisville &c. R. Co. v. McCombs, (Ky.) 54 S. W. Rep. 179.... (779).....	
Louisville &c. R. Co. v. McElwain, 98 Ky. 700.....	2150, 2154, 2158, 2159
Louisville &c. R. Co. v. McEwan, (Ky.) 51 S. W. Rep. 619.....	957
Louisville &c. R. Co. v. Mack, 64 Miss. 738.... (472).....	532, 918
Louisville &c. R. Co. v. Mahan, 8 Bush. 184.....	473
Louisville &c. R. Co. v. Malone, 109 Ala. 509.....	620
Louisville &c. R. Co. v. Malone, 116 Ala. 600.....	1145, 1260
Louisville &c. R. Co. v. Maloney, 7 Bush. (Ky.) 235.....	1261
Louisville &c. R. Co. v. Marbury Lumber Co., (Ala.) 28 South. Rep. 438....	661, 682
Louisville &c. R. Co. v. Maris, 16 Kan. 333.... (313).....	1092, 1264
Louisville &c. R. Co. v. Mattingly, (Ky.) 38 S. W. Rep. 686.....	
Louisville &c. R. Co. v. Maybin, 66 Miss. 83.....	932
Louisville &c. R. Co. v. Miller, 109 Ala. 500.....	849
Louisville &c. R. Co. v. Miller, 104 Fed. Rep. 124.....	1106, 1254, 1257
Louisville &c. R. Co. v. Miles, 100 Ky. 84.....	1506, 1754
Louisville &c. R. Co. v. Milliken, (Ky.) 51 S. W. Rep. 796.....	567
Louisville &c. R. Co. v. Miniard, (Ky.) 50 S. W. Rep. 962.....	682, 1589
Louisville &c. R. Co. v. Mitchell, 87 Ky. 327.....	857
Louisville &c. R. Co. v. Morgan, 114 Ala. 449.....	849
Louisville &c. R. Co. v. Morley, 86 Fed. Rep. 240.....	872, 1195, 1530, 1710
Louisville &c. R. Co. v. Mothershed, 110 Ala. 143.....	2144
Louisville &c. R. Co. v. Nitsche, 126 Ind. 229.....	1527, 1531, 1733
Louisville &c. R. Co. v. Odil, 96 Tenn. 61.....	1245
Louisville &c. R. Co. v. Orr, 121 Ala. 489.....	301
Louisville &c. R. Co. v. Orr, 91 Ala. 548.....	660, 691, 736, 774
Louisville &c. R. Co. v. Patchen, 66 Ill. App. 206.....	908, 1773
Louisville &c. R. Co. v. Patterson, 69 Miss. 421.....	755, 924
Louisville &c. R. Co. v. Patton, 104 Tenn. 40.....	554
Louisville &c. R. Co. v. Pedigo, 108 Ind. 481.....	1057
Louisville &c. R. Co. v. Penrod, (Ky.) 56 S. W. Rep. 1.....	410, 2048
Louisville &c. R. Co. v. Penrod, (Ky.) 66 S. W. Rep. 1013, 1042.....	769, 786
Louisville &c. R. Co. v. Pirschbacher, 63 Ill. App. 144.....	739
Louisville &c. R. Co. v. Pittman, (Ky.) 53 S. W. Rep. 1040.....	775, 792
Louisville &c. R. Co. v. Plummer, (Ky.) 35 S. W. Rep. 1113.....	1372
Louisville &c. R. Co. v. Quade, 101 Ind. 364.....	247
Louisville &c. R. Co. v. Queen City Coal Co., 99 Ky. 217.....	1054
Louisville &c. R. Co. v. Quick, 125 Ala. 553.....	219
	576, 830

	PAGE
Louisville &c. R. Co. v. Quinn, 14 Ind. App. 554.....	1541
Louisville &c. R. Co. v. Ray, 101 Tenn. 1.....	527, 601
Louisville &c. R. Co. v. Reagan, 96 Tenn. 128.....	1735
Louisville &c. R. Co. v. Rice, (Ky.) 60 S. W. Rep. 705....(1017)	
Louisville &c. R. Co. v. Richardson, 66 Ind. 43.....	1263
Louisville &c. R. Co. v. Richmond, (Ky.) 67 S. W. Rep. 25.....	403
Louisville &c. R. Co. v. Ricketts, 93 Ky. 116....(427)	
Louisville &c. R. Co. v. Ricketts, (Ky.) 37 S. W. Rep. 952.....	437
Louisville &c. R. Co. v. Ricketts, (Ky.) 52 S. W. Rep. 939.....	427, 441, 464
Louisville &c. R. Co. v. Roberts, 13 Ind. App. 692.....	2045
Louisville &c. R. Co. v. Robinson, (Ky.) 36 S. W. Rep. 6....(825)	
Louisville &c. R. Co. v. Ross, (Ky.) 56 S. W. Rep. 14.....	1685
Louisville &c. R. Co. v. Rush, 127 Ind. 545.....	840
Louisville &c. R. Co. v. Samuel, (Ky.) 57 S. W. Rep. 235.....	1251, 1263
Louisville &c. R. Co. v. Sander, (Ky.) 44 S. W. Rep. 644.....	829, 1606
Louisville &c. R. Co. v. Schmidt, 81 Ind. 264....(767)	
Louisville &c. R. Co. v. Schmidt, 147 Ind. 638.....	739
Louisville &c. R. Co. v. Schumaker, (Ky.) 67 S. W. Rep. 829.....	1693
Louisville &c. R. Co. v. Scanlon, (Ky.) 60 S. W. Rep. 643.....	1532, 1734
Louisville &c. R. Co. v. Scott, (Ky.) 56 S. W. Rep. 674.....	376, 413, 925, 1216
Louisville &c. R. Co. v. Shaw, (Ky.) 53 S. W. Rep. 1048.....	1156
Louisville &c. R. Co. v. Shearer, (Ky.) 59 S. W. Rep. 330....(793)	
Louisville &c. R. Co. v. Shelton, 43 Ill. App. 220.....	1037
Louisville &c. R. Co. v. Sherrod, 84 Ala. 178.....	243
Louisville &c. R. Co. v. Sickness, 5 Bush. 1.....	541
Louisville &c. R. Co. v. Simpson, (Ky.) 64 S. W. Rep. 733....(902)	
	1425, 2037
Louisville &c. R. Co. v. Smith, 129 Ala. 553.....	1590
Louisville &c. R. Co. v. Smith, (Ky.) 53 S. W. Rep. 269.....	785, 793
Louisville &c. R. Co. v. Southwick, 16 Ind. App. 496.....	1459, 1666
Louisville &c. R. Co. v. Spinks, 104 Ga. 692.....	365
Louisville &c. R. Co. v. Stevens, 87 Ind. 198.....	1256
Louisville &c. R. Co. v. Stone, 7 Heisk. 468.....	1021
Louisville &c. R. Co. v. Stounnd, 126 Ind. 35....(1041)	
Louisville &c. R. Co. v. Stout, 66 Ill. App. 298.....	409, 502
Louisville &c. R. Co. v. Sullivan, 81 Ky. 624.....	581
Louisville &c. R. Co. v. Survant, (Ky.) 44 S. W. Rep. 88.....	667, 755, 815
Louisville &c. R. Co. v. Taylor, 126 Ind. 126.....	263
Louisville &c. R. Co. v. Tarter, 39 S. W. Rep. 698.....	248
Louisville &c. R. Co. v. Tegner, 125 Ala. 594.....	572
Louisville &c. R. Co. v. Thomas, 106 Ind. 10.....	1029
Louisville &c. R. Co. v. Thornton, 117 Ala. 274.....	1746, 2147
Louisville &c. R. Co. v. Thornton, (Ky.) 58 S. W. Rep. 796.....	2163
Louisville &c. R. Co. v. Tinkham, (Ky.) 44 S. W. Rep. 439.....	2145
Louisville &c. R. Co. v. Trammell, 9 South Rep. 870.....	2052
Louisville &c. R. Co. v. Truett, 111 Fed. Rep. 876.....	672, 796
Louisville &c. R. Co. v. Trunk, 119 Ind. 542.....	414
Louisville &c. R. Co. v. Tucker, (Ky.) 65 S. W. Rep. 453.....	874, 1439
Louisville &c. R. Co. v. Turner, 100 Tenn. 213.....	547
Louisville &c. R. Co. v. Upton, 18 Ill. App. 605.....	1031
Louisville &c. R. Co. v. Utz, (Ind.) 32 N. E. 881.....	1732
Louisville &c. R. Co. v. Veach, (Ky.) 46 S. W. Rep. 493.....	1503, 1730
Louisville &c. R. Co. v. Vestal, (Ky.) 49 S. W. Rep. 204.....	1558
Louisville &c. R. Co. v. Vittitoe, (Ky.) 41 S. W. Rep. 269....(785)	2138, 2146
Louisville &c. R. Co. v. Wagner, 153 Ind. 420.....	1802
Louisville &c. R. Co. v. Wade, (Ky.) 36 S. W. Rep. 125.....	2141
Louisville &c. R. Co. v. Wainscott, 3 Bush. 149....(1015)	1017
Louisville &c. R. Co. v. Walker, (Ky.) 40 S. W. Rep. 461.....	1724
Louisville &c. R. Co. v. Walton, (Ky.) 67 S. W. Rep. 988.....	1083
Louisville &c. R. Co. v. Ward, 98 Tenn. 123.....	873, 874, 902, 1605
Louisville &c. R. Co. v. Wathen, (Ky.) 66 S. W. Rep. 714.....	224
Louisville &c. R. Co. v. Weams, 80 Ky. 420.....	396
Louisville &c. R. Co. v. Webb, 99 Ky. 332.....	419, 1137
Louisville &c. R. Co. v. Whitesell, 68 Ind. 297....(1039)	671

	PAGE
Louisville &c. R. Co. v. Williams, 20 Ind. App. 576....(791).....	792
Louisville &c. R. Co. v. Wilson, 88 Tenn. 316.....	1728
Louisville &c. R. Co. v. Wolfe, 128 Ind. 347.....	364
Louisville &c. R. Co. v. Wolf, 80 Ky. 82.....	2053
Louisville &c. R. Co. v. Wright, 18 Ind. App. 126.....	552, 556
Louisville &c. R. Co. v. Yniestra, 21 Fla. 700....(657).....	658, 2231, 2342
Louisville &c. R. Co. v. York, 128 Ala. 305.....	883, 1527, 1706, 1754
Lounsbury v. Bridgeport, 66 Conn. 360.....	1999
Louth v. Thompson, 1 Penn. (Del.) 149....(844).....	1117, 2255
Loux v. Fox, 171 Pa. St. 68.....	181
Lovacano v. Jurgens, 50 La. Ann. 441.....	838
Love v. Southern R. Co., 108 Tenn. 104.....	1371
Lovejoy v. Boston &c. R. Co., 125 Mass. 79.....	1692
Lovejoy v. Chesapeake &c. R. Co., 41 W. Va. 693....(1023)	
Lovejoy v. Dolan, 10 Cush. 495.....	2346
Lovejoy v. Murray, 3 Wall. 11.....	2207, 2208
Lovejoy v. R. Co., 125 Mass. 79.....	1492
Lovell v. De Bardolaben &c. Co., 90 Ala. 13.....	948
Lovell v. Minot, 20 Pick. 116....(72)	
Lovenguth v. Bloomington, 71 Ill. App. 238....(699)	
Lovett v. Hobbs, 2 Show. 127.....	609
Lovings v. Norfolk &c. R. Co., 47 W. Va. 582.....	563
Lovington v. Bauchaus, 34 Ill. App. 544.....	11
Lowcock v. Franklin Paper Co., 169 Mass. 313.....	1751
Lowe v. Salt Lake City, 13 Utah, 91.....	2109
Lowell v. Boston &c. R. Co., 23 Pick. 24....(652).....	2261
Lowell v. Central Vermont R. Co., 15 App. Div. 218.....	817
Lowell v. Short, 4 Cush. 275.....	1295, 2261
Lowell v. Spaulding, 4 Cush. 277.....	1317
Lowell v. Watertown, 58 Mich. 568....(697)	
Lowenstein v. Lombard &c. Co., 164 N. Y. 324.....	275
Lower v. Franks, 115 Ind. 334.....	2196
Lowerey v. St. Louis &c. R. Co., 40 Mo. App. 514....(1030).....	1029
Lowery v. Brooklyn City & Newton R. Co., 76 N. Y. 28.....	693, 2026, 2327
Lowery v. Man. R. Co., 99 N. Y. 158.....	1266, 1273, 1277, 2362
Lowery v. New York Ice Co., 26 Misc. 163.....	2354
Lowery v. New York Ice Co., 44 App. Div. 657.....	713
Lowery v. W. U. T. Co., 60 N. Y. 198.....	2444
Lowner v. New York &c. R. Co., 175 Mass. 166.....	2266
Lowry v. Mt. Adams &c. R. Co., 68 Fed. Rep. 827.....	913
Lowy v. Metropolitan Street R. Co., 30 Misc. Rep. 775.....	2321
Loyacano v. Jurgens, 50 La. Ann. 441.....	2348
Loyd v. Columbus, 90 Ga. 20.....	2002
Loyd v. R. Co., 53 Mo. 509.....	2038
Lozano v. Palatine Ins. Co., 78 Fed. Rep. 278.....	1314
Lublimer v. Tiffany & Co., 54 App. Div. 326.....	18
Luby v. H. R. R. Co., 17 N. Y. 131.....	1138
Lucas v. Burlington &c. R. Co., 112 Iowa, 594.....	247
Lucas v. Metropolitan Street R. Co., 56 App. Div. 405.....	507
Lucas v. Michigan Cent. R. Co., 98 Mich. 1....(548)	
Lucas v. N. B. & T. R. Co., 6 Gray, 64....(484)	
Lucas v. New Bedford &c. R. Co., 6 Gray, 64....(700)	
Lucas v. Penn. R. Co., 120 Ind. 205.....	2028
Lucas v. R. Co., 21 Barb. 245....(946)	
Lucas v. Watts, 49 Miss. 380.....	2050
Lucia v. Meech, 68 Vt. 175.....	116, 2050
Lucia v. Ormel, 46 App. Div. 200.....	136, 153
Luck v. Ripon, 52 Wis. 196.....	2052
Lucker v. Iba, 54 App. Div. 566.....	188
Luckie v. Schneider, (Tex. Civ. App.) 57 S. W. Rep. 690.....	2015
Lacy v. Chicago &c. R. Co., 64 Minn. 7.....	532
Ladden v. Columbus &c. R. Co., 7 Oh. N. P. 106....(706).....	
.....	708, 777, 2138, 2142, 2143

	PAGE
Ludlow v. Croton Bridge Co., 71 N. Y. St. Rep. 510.....	1664
Ludlow v. Detweller, (Ky.) 47 S. W. Rep. 881.....	1963
Ludlow v. Frost, (Ky.) 45 S. W. Rep. 661.....	1964
Ludlow v. Mackintosh, (Ky.) 53 S. W. Rep. 524.....	1961
Ludwig v. Metropolitan Street R. Co., 75 N. Y. Supp. 667.....	1960
Ludwig v. Pillsbury, 35 Minn. 256.... (721)	
Luessen v. Oshkosh Electric & Co., 109 Wis. 94.....	681
Luhrs v. Brooklyn & Co. R. Co., 11 App. Div. 173.....	524
Luke v. Calhoun Co., 52 Ala. 115.... (949)	
Luke v. El Paso, (Tex. Civ. App.) 60 S. W. Rep. 363.. 1953, 1954, 2014, 2031,	2247
Luke v. Mining Co., 71 Mich. 364.....	1470
Lumberman's & Co. Ins. Co. v. Kansas City & Co. R. Co., 149 Mo. 165.. 1252, 1253,	1308
Lumis v. Philadelphia T. Co., 181 Pa. St. 268.....	2357
Lumley v. Backus Man. Co., 73 Fed. Rep. 767.....	1329
Lumley v. Caswell, 47 Iowa, 159.....	1542, 1543, 1684
Lumley v. Wabash R. Co., 76 Fed. Rep. 66.....	2208
Lumly v. Wabash R. Co., 71 Fed. Rep. 21.....	2208
Lumpkin v. Southern R. Co., 99 Ga. 111.....	1710
Lund v. Tyler, 115 Iowa, 236.....	851
Lund v. Tyngsboro, 11 Cush. 563.... (688)	
Lundberg v. Shevlin-Carpenter Co., 68 Minn. 135.....	1628, 1802
Lundeen v. Livingston & Co. Light Co., 17 Mont. 32.....	2247
Lundon v. Chicago, 83 Ill. App. 208.....	1870
Lundquist v. Duluth Street R. Co., 65 Minn. 387.....	1610, 1635, 1798
Lundy v. Central Pac. R. Co., 66 Cal. 191.....	571
Lundy v. Railway Co., 1 Misc. 100.....	2229
Lundy v. Second Ave. R. Co., 1 Misc. 100.....	2321
Lung Chung & Co. v. Northern Pac. R. Co., 19 Fed. Rep. 254.....	964
Luse v. Union P. R. Co., 57 Kan. 361.....	464
Lush v. McDaniel, 13 Ind. L. 488.... (1176)	
Lusk v. Belotte, 22 Minn. 468.....	135, 145, 148
Lutz v. Atlantic & Co. R. Co., 16 L. R. A. 819.....	954
Lutz v. Louisville R. Co., (Ky.) 48 S. W. Rep. 1080.....	463
Lycett v. Manhattan R. Co., 12 App. Div. 326.....	424, 678
Lydecker v. Brintall, (Mass.) 33 N. E. Rep. 399.....	1317
Lyle v. Gray, 47 Iowa, 153.... (849)	
Lyman v. Amherst, 107 Mass. 339.....	657
Lyman v. Boston & Co. R. Co., 4 Cush. 288.....	1255
Lyman v. Cent. Vermont R. Co., 59 Vt. 167.....	96
Lyman v. Gipson, 18 Pick. 422.... (1010)	
Lyman v. Green Bay, 91 Wis. 488.....	1820
Lynam v. Union R. Co., 114 Mass. 83.....	2341
Lynch v. Cleveland & Co. R. Co., 20 Oh. C. C. 248.....	811
Lynch v. Commonwealth, 16 Serg. & R. (Pa.) 367.....	2173
Lynch v. Kluher, 20 Misc. 601.....	1094
Lynch v. McNally, 73 N. Y. 347.... (979)	984
Lynch v. Mayor, 76 N. Y. 60.....	703, 1817, 1902, 1960, 1963
Lynch v. Merdin, 1 Ad. & El. (N. S.) 29.....	2361
Lynch v. Metropolitan Elevated R. Co., 90 N. Y. 77.....	524, 594
Lynch v. New York & Co. R. Co., 8 App. Div. 458.....	533
Lynch v. Nordin, 1 Ad. & El. (N. S.) 29.....	1345, 2133
Lynch v. Northern P. R. Co., 69 Fed. Rep. 86.....	76
Lynch v. Nurdin, 4 P. & D. 672.....	2288
Lynch v. Smith, 104 Mass. 52.... (705)	71
Lynch v. Springfield, 174 Mass. 430.....	1994
Lynch v. Southwestern Teleg. & Co., (Tex. Civ. App.) 32 S. W. Rep. 776.... (955)	
Lynchburg v. Wallace, 95 Va. 640.....	1870, 1872, 1878, 1886, 1899
Lyndonville Nat. Bank v. Fletcher, 68 Vt. 81.....	167
Lynds v. Clark, 14 Mo. App. 74.....	2077
Lyndsay v. Conn. & Co. R. Co., 27 Vt. 643.....	1111
Lyne v. Western U. Teleg. Co., 123 N. C. 129.....	858, 2420, 2444
Lynn v. Hooper, 93 Me. 46.....	2367
Lynn & Co. v. Boston & Co. Corp., 114 Mass. 91.....	2230, 2277

## TABLE OF CASES.

exci

	PAGE
Lynt v. Moore, 5 App. Div. 487.....	993
Lyon v. Avis, 5 App. Div. 193.....	2369
Lyon v. Cambridge, 136 Mass. 419.....	1957
Lyon v. Detroit &c. R. Co., 31 Mich. 429.... (700)	
Lyon v. Manhattan R. Co., 7 Misc. 401.....	2035
Lyon v. R. Co., 31 Mich. 429.....	708, 1728
Lyon v. Tevis, 8 Iowa, 79.....	2181
Lyon &c. Co. v. First Nat. Bank, 85 Fed. Rep. 120.....	195
Lyons v. Bay Cities &c. R. Co., 115 Mich. 111.....	677, 2323, 2373
Lyons v. Boston &c. R. Co., (Mass.) 64 N. E. Rep. 404.....	938
Lyons v. Carroll, 107 La. 471.....	85
Lyons v. Desotelle, 124 Mass. 387.....	2377
Lyons v. Erie R. Co., 57 N. Y. 489.... (893)	
Lyons v. Illinois C. R. Co., (Ky.) 59 S. W. Rep. 507.....	763, 815, 2139
Lyons v. Merriek, 105 Mass. 71.....	1001, 1005, 1007
Lyons v. N. Y. &c. R. Co., 39 Hun, 385.....	1516
Lyons v. Nurriek, 105 Mass. Rep. 71.... (1008)	
Lyons v. Red Wing, 76 Minn. 20.....	1873, 1877, 2018, 2022
Lyons v. Second Ave. R. Co., 89 Hun, 374.....	923
Lyons v. Texas &c. R. Co., (Tex. Civ. App.) 36 S. W. Rep. 1007.....	1160
Lyons v. Thomas, 34 Misc. 175.... (106)	
Lyson v. R. Co., 61 Ala. 554.....	1661, 1788
Lytle v. Chicago &c. R. Co., 84 Mich. 289.....	1490, 1492, 1572
M. R. Co. v. Cornell, 54 Hun, 292.....	1761
M. P. R. Co. v. Callbreath, 66 Tex. 526.....	1498
M. & R. Co. v. Mayes, 49 Ga. 355.... (1334)	
M. &c. St. R. Co. v. Arms, 91 U. S. 489.....	906
M. &c. R. Co. v. Blakely, 59 Ala. 471.... (741)	
Maanum v. Madison, 104 Wis. 272.....	1915
Maas v. M. H. & T. R. Co., 83 N. Y. 223.....	184
Maas v. Fauser, 36 Misc. 813.....	2351
Mabbott v. Illinois C. R. Co., 116 Iowa, 490.....	676, 2169
Mabrey v. Cape Girardeau &c. R. Co., (Mo. App.) 69 S. W. Rep. 394.....	839, 923, 2052
Macaulay v. Mayor, 67 N. Y. 602.....	1847, 2116
Macaulay v. Schneider, 9 App. Div. 279.....	2259
Macdonald v. Cool, 134 Cal. 502.....	1082
Machine Co. v. Kaufmann-Latimer Co., 5 Oh. N. P. 505.....	2245
Mack v. Austin, 26 Misc. 198.....	1199
Mack v. Great Western Despatch, 2 Oh. C. D. 22.....	289
Mack v. St. Louis &c. R. Co., 77 Mo. 233.....	2049
Mack v. South Bound R. Co., 52 S. C. 323.... (904)	
Mackay v. Monahan, 13 Colo. App. 144.....	2044
Mackay v. Western U. Tel. Co., 16 Nev. 222.....	2390, 2441, 2447, 2448
Mackey v. Newberry Furnace Co., 119 Mich. 552.....	1557
Mackey v. N. Y. C. R. Co., 35 N. Y. 75.....	738
Mackey v. Vicksburg, 64 Miss. 777.....	707
Mackie v. Brooklyn City R. Co., 10 Misc. 4.....	2318
Mackin v. Boston &c. R. Co., 135 Mass. 201.....	1616
Mackin v. Railway Co., 10 Misc. 4.....	2231
Mackler v. Shaftsborough, 46 Vt. 580.....	1914
Macklin v. N. J. Steamboat Co., 7 Abb. Pr. N. S. 241.....	608, 609, 615
Macklin v. Waterhouse, 5 Bing. 212.... (296)	
Mackull v. Ratchford, 82 Fed. Rep. 41.....	2249
Macomber v. Nichols, 34 Mich. 212.....	2368
Macomber v. Taunton, 100 Mass. 255.....	1957
Macon v. Dyke, 103 Ga. 847.....	1868
Macon &c. R. Co. v. Davis, 18 Ga. 679.....	663
Macon &c. R. Co. v. Holmes, 103 Ga. 655.....	662, 2286
Macon &c. R. Co. v. Johnson, 38 Ga. 409.... (580)	
Macon &c. R. Co. v. Lester, 30 Ga. 911.... (1022)	
Macon &c. R. Co. v. Moore, 108 Ga. 84.....	402, 463, 837
Macrow v. Great Western R. Co., L. R. 6 Q. B. 612.....	619



	PAGE
Mactaggert v. Henry, 3 E. D. Smith, 398.... (204)	
Macy v. St. Paul &c. R. Co., 35 Minn. 200.....	1800
Madan v. Sherard, 73 N. Y. 329.....	294
Madara v. Pottsville Iron &c. Co., 160 Pa. St. 109.....	890
Madden v. N. Y. C. & H. R. R. Co., 47 N. Y. 665.....	768
Madden v. Missouri P. R. Co., 50 Mo. App. 666.....	474, 860
Madden v. Railroad Co., 28 W. Va. 610.....	1609, 1611
Maddox v. Cunningham, 68 Ga. 431.....	2245
Madigan v. Third Ave. R. Co., 68 App. Div. 123.....	2313
Madison v. Scott, 9 Kan. App. 871.....	1942
Madison &c. R. Co. v. Taffe, 37 Ind. 365.... (776)	
Madisonville v. Bishop, (Ky.) 67 S. W. Rep. 269.....	1908
Mad. River R. Co. v. Barber, 5 Oh. St. 541.....	1514, 1543, 1756
Mad. River &c. R. Co. v. Fulton, 20 Oh. St. 318.... (615)	
Maer v. Third Ave. R. Co., 47 N. Y. Spr. Ct. 461.....	1213
Maft v. Chicago &c. R. Co., 57 Kan. 912.... (31)	
Magaha v. Hagerstown, 95 Md. 62.....	1819, 1825, 1882, 1584
Magar v. Hammond, 171 N. Y. 377.....	698
Magar v. Hammond, 54 App. Div. 532.....	2107
Magee v. Badger, 34 N. Y. 247.... (184)	
Magee v. Brooklyn, 18 App. Div. 22.....	1962
Magee v. Chicago &c. R. Co., 82 Iowa, 249.....	1747
Magee v. Oregon R. Co., 46 Fed. Rep. 734.... (548)	
Magee v. Pacific Improvement Co., 98 Cal. 678.....	144
Magee v. Pennsylvania &c. Co., 13 Pa. Super. Ct. 187.....	2030, 2084, 2097
Magee v. Troy, 48 Hun, 383.....	1924, 1925, 2022
Maghee v. The Camden & Amboy R. R. Co., 45 N. Y. 514.....	300, 337, 358
Magilton v. N. Y. C. & H. R. R. Co., 82 Hun, 308.....	2107
Magilton v. New York &c. R. Co., 11 App. Div. 373.....	1054
Maginnis v. N. Y. C. & H. R. R. Co., 52 N. Y. 215.....	734, 2229, 2344
Magner v. Frankford Baptist Church, 174 Pa. St. 84.....	2111
Magnin v. Dinsmore, 56 N. Y. 168.....	239, 269, 279, 309, 310, 1098
Magnin v. Dinsmore, 62 N. Y. 35.....	26
Magnin v. Dinsmore, 70 N. Y. 410.....	27
Magoffin v. Missouri Pac. R. Co., 102 Mo. 540.... (373)	
Maguire v. Middlesex R. Co., 111 Mass. 240.....	1131
Maguire v. Middlesex R. Co., 115 Mass. 239.... (704)	
Mahan v. Everett, 50 La. Ann. 1162.....	224
Mahar v. G. T. R. Co., 19 Hun, 32.....	79
Mahar v. Steuer, 170 Mass. 454.....	649, 722, 1881, 223
Maher v. Central Park N. & E. R. Co., 67 N. Y. 52.....	467, 67
Maher v. McGrath, 58 N. J. L. 469.....	162
Maher v. M. R. Co., 53 Hun, 506.....	2263, 226
Maher v. New York &c. R. Co., 20 App. Div. 161.....	122
Maher v. Railroad Co., 64 Mo. 267.... (776)	
Maher v. Title Guarantee &c. Co., 95 Ill. App. 365.....	108
Maher v. Thropp, 59 N. J. L. 186.....	162
Mahew v. Burns, 103 Ind. 328.... (708)	
Mahlen v. Lake Shore &c. R. Co., 49 Mich. 585.....	76
Mahler v. The Norwich & N. Y. Transportation Co., 35 N. Y. 452.....	967, 96
Mahler v. Stott, (Mich.) 89 N. W. Rep. 340.....	45
Mahnke v. New Orleans &c. R. Co., 104 La. 411.....	153
Mahnken v. Monmouth County Freeholders, 62 N. J. L. 404.....	192
Mahon v. Second Ave. R. Co., 75 N. Y. 231.....	133
Mahoney v. Atlantic &c. R. Co., 63 Me. 68.....	198
Mahoney v. Boston, 171 Mass. 427.....	237
Mahoney v. Cook, 26 Pa. 342.....	207
Mahoney v. Dankwart, 108 Iowa, 321.....	866, 1169, 224
Mahoney v. Helena, 96 Fed. Rep. 790.....	195
Mahony v. Watson, 11 Pa. St. 574.....	214
Mahuke v. New Orleans &c. R. Co., 104 La. 411.....	68
Maier v. Massachusetts &c. Ass'n, 107 Mich. 687.....	1
Maier v. Randolph, 33 Kan. 340.....	



## TABLE OF CASES.

cxcliii

	PAGE
Maimone v. Dry Dock &c. R. Co., 58 App. Div. 383.....	862
Maine v. Birchard, 40 Vt. 326.....	257
Maine v. Chicago &c. R. Co., 109 Iowa, 260.....	1771
Maine v. Weiland, 81 1-2 Pa. St. 243....(673)	
Maine C. R. Co., 96 Me. 136.....	1091
Mairs v. Manhattan Real Estate Ass'n, 89 N. Y. 498.....	2061, 2080, 2220
Maisels v. Dry Dock &c. R. Co., 16 App. Div. 391.....	1121
Maisenbacher v. Society Concordia, 71 Conn. 369.....	901
Maitland v. Citizens' Bank, 40 Md. 540....(182)	
Maitland v. Cleveland &c. R. Co., 3 Oh. Leg. News, 289.....	1480, 1562
Maitland v. Gilbert Paper Co., 97 Wis. 476.....	1218, 1513, 1572
Major v. Burlington &c. R. Co., 115 Iowa, 309.....	943, 951
Major v. Oregon &c. R. Co., 21 Utah, 141.....	401
Makin's Estate, 7 Pa. Dist. 126.....	48
Malay v. Mt. Morris &c. Co., 41 App. Div. 574.....	1518
Malcolm v. Fuller, 152 Mass. 160.....	1670
Malensten v. Marquette &c. R. Co., 49 Mich. 94.....	1102
Malhan v. Everett, 50 La. Ann. 1162.....	1883
Mali v. Lord, 39 N. Y. 381.....	19, 23
Mallory v. Burrett, 1 E. D. Smith, 134....(349)	
Mallory v. Tioga R. Co., 39 Barb. 488.....	608
Mallory v. Hibernia &c. Society, (Cal.) 21 Pac. 525.....	2106, 2122
Mallory v. New York &c. Ass'n, 156 N. Y. 205.....	1069
Mallwood v. Bedford Quarries Co., (Ind. App.) 63 N. E. Rep. 869.....	1669
Malberg v. Bartos, 83 Ill. App. 481.....	2024, 2133
Malone v. B. & A. R. Co., 51 Hun. 532.....	2106
Malone v. Boston &c. R. Co., 12 Gray, 392.....	283, 296
Malone v. Gerth, 100 Wis. 166.....	2176
Malone v. Hathaway, 64 N. Y. 5.....	1408, 1478, 1481, 1487, 1627, 1668
Malone v. Hawley, 46 Cal. 409.....	1684
Malone v. Knowlton, 39 N. Y. R. 901.....	1004
Malone v. Pittsburg R. Co., 152 Pa. St. 390.....	1054
Maloney v. Bacon, 33 Mo. App. 501.....	147
Maloney v. Brady, 18 S. C. 757.....	1301
Maloney v. Cook, 21 R. L. 471.....	2016, 2018
Maloney v. Hansom, 175 Mass. 313.....	1951
Maloney v. Metropolitan &c. R. Co., 104 Mass. 73.....	697
Maloney v. Natick &c. Street R. Co., 173 Mass. 587.....	2337
Maloney v. United States Rubber Co., 169 Mass. 347.....	1744
Malott v. Hawkins, (Ind.) 63 N. E. Rep. 308.....	682, 753, 756, 792
Malott v. Hood, 99 Ill. App. 360.....	1538
Malott v. Laufman, 89 Ill. App. 178.....	1436
Malott v. Shimer, 153 Ind. 35.....	925
Malpass v. Hestonville &c. R. Co., 189 Pa. St. 599.....	517
Malstrom v. Northern P. R. Co., 20 Wash. 195....(787)	821
Malta v. Railroad Co., 69 Ind. 109.....	1708, 1776
Maltbie v. Bolting, 6 Misc. 339.....	638, 2233
Maltbie v. Bolting et al., 6 Misc. 339.....	638, 2233, 2253
Maltby v. Belden, 45 App. Div. 384.....	1497, 1643
Maltson v. Qualey Const. Co., 90 Ill. App. 260.....	1584
Manahan v. Gibbons, 19 Johns. 427....(63)	
Manahan v. Steinway Co., 125 N. Y. 760.....	2301
Manarunk &c. Co. v. Union T. Co., 7 Pa. Super. Ct. 104.....	2318
Manchester v. Warren, 67 N. H. 482.....	652, 2247
Manchester Man. Co. v. Polk, 115 Ga. 542.....	1396, 1750
Mateusco v. Kansas City, 74 Mo. App. 138.....	1857, 2256
Mandel v. Wheeler, 59 Ill. App. 459.....	699, 2067
Maney v. Barnes, 16 Gray, 161.....	1238
Maney v. Chicago, Burlington & Q. R. Co., 49 Ill. App. 105.....	1772
Mangan v. Brooklyn R. Co., 38 N. Y. 455.....	706, 712, 2133, 2228
Mangan v. Foley, 33 Mo. App. 250.....	4
Manum v. Bullion &c. Co., 15 Utah, 534.....	1236, 1407, 1453, 1568
Manhattan Oil Co. v. R. Co., 54 N. Y. 197....(358)	

	PAGE
Manhattan Pie Baking Co. v. Metropolitan Street R. Co., 36 Misc. 855.....	2314
Manhattan Rubber-Shoe Co. v. Chicago &c. R. Co., 9 App. Div. 172.....	313
Manley v. Delaware &c. Canal Co., 69 Vt. 101.... (758)	
Manley v. Minneapolis Paint Co., 76 Minn. 169.....	1495
Manley v. New York &c. R. Co., 18 App. Div. 420.....	6, 760
Manley v. New York &c. R. Co., 39 App. Div. 144.....	690
Manley v. New York &c. R. Co., 18 Misc. 502.....	755, 911
Manley v. St. Helens Canal Co., 2 H. & N. 840.....	2337
Mann Boudoir Car Co. v. Dupre, 54 Fed. Rep. 646.....	602
Mann v. Fuller, 63 Kan. 664.....	1322
Mann v. Moore, (Ky.) 68 S. W. Rep. 402.....	1562
Mann v. Oriental &c. Works, 11 R. I. 152.....	1599, 1600
Mann v. O'Sullivan, 126 Cal. 61.....	1742, 1801
Mann v. Philadelphia Traction Co., 175 Pa. St. 122.....	511
Mann v. Philadelphia &c. R. Co., 1 Daulph. Co. Rep. (Pa.) 51.... (755)	
Mann v. President of D. & H. Canal Co., 91 N. Y. 495.....	1515
Mann v. Retsof Min. Co., 49 App. Div. 454.....	2081
Mann v. Weiland, 81 Penn. St. 243.... (730).....	980, 982
Manning v. Genesee River &c. Steamboat Co., 66 App. Div. 314.....	1637
Manning v. Hogan, 78 N. Y. 615.....	1636
Manning v. Louisville &c. R. Co., 95 Ala. 392.....	587
Manning v. Pt. Henry Iron Co., 91 N. Y. 664.....	939
Manning v. Wells, 9 Humph. 746.....	145, 147
Manning v. West End Street R. Co., 166 Mass. 230.....	2336
Mannion v. Hagan, 9 App. Div. 98.....	1496
Manor v. Bay Cities Consolidated R. Co., 118 Mich. 1.....	2273, 2332
Manross v. Oil City, 178 Pa. St. 276.....	1897
Mans v. Broderick, 51 La. Ann. 1153.....	1202
Mansfield v. Cole, 61 Ill. 191.....	111
Mansfield v. Eagle Box &c. Co., 136 Cal. 622.....	1749
Mansfield v. Hunt, 19 Oh. C. C. 488.....	2097
Mansfield Coal &c. Co. v. McEnery, 91 Pa. St. 185.....	700, 874, 1137, 1421
Mansfield's Estate, 19 Pa. Super. Ct. 26.....	74
Mansur-Tebbetts Implement Co. v. Carey, 1 Ind. Terr. 572.....	114
Manthey v. Ravelbuehler, 75 N. Y. Supp. 714.....	2360, 2370
Manufacturing Co. v. Lindsey, 10 Ill. App. 1083.... (1359)	
Manufacturing Co. v. Morrissey, 40 Oh. St. 148.....	1572
Manville v. Cleveland &c. R. Co., 11 Oh. St. 417.....	1614, 1620, 1645
Manville v. W. U. T. Co., 37 Iowa, 214.....	2399
Manwell v. Burlington &c. R. Co., 80 Iowa, 662.... (1045).....	1042
Mapes v. Union R. Co., 56 App. Div. 508.....	660
Marande v. Texas &c. R. Co., 184 U. S. 173.....	336
Mirande v. Texas &c. R. Co., 102 Fed. Rep. 246.....	302
Marbury Lumber Co. v. Westbrook, 121 Ala. 179.....	711, 1749
Marcadier v. Chesapeake Ins. Co., 8 Cranch. 49.... (204)	
March v. Abel, 3 B. & P. 35.....	2373
March v. Walker, 48 Tex. 375.....	877
Marchal v. Indianapolis Street R. Co., 28 Ind. App. 133.....	2283
Marckwald v. Oceanic Steam Nav. Co., 11 Hun, 462.....	1100
Marcy v. Shults, 29 N. Y. 340.....	1213
Marcom v. Raleigh &c. R. Co., 126 N. C. 200.....	1113, 1465
Marcott v. Marquette &c. R. Co., 47 Mich. 1.....	775, 814
Marcotte v. Lewiston, 94 Me. 233.....	1943
Marcy v. Marcy, 32 Conn. 308.... (958)	
Mareck v. Chicago, 89 Ill. App. 358.....	1870, 1899
Marfall v. South Wales R. Co., (N. S.) 8 Q. B. 525.... (1051)	
"Margaret," 94 U. S. 494-496.... (202)	
Marhull v. Furniture Co., 67 Mich. 167.....	1470
Marian v. Vanaldt, 88 Ill. 132.... (973)	
Marietta R. Co. v. Stephenson, 24 Oh. St. 48.....	1001, 1014, 1019
Marintovich v. Wooley, 128 Cal. 141.....	2260
Marion City R. Co. v. Dubois, 23 Ind. App. 342.....	2337
Marion County v. Woulard, 77 Miss. 343.....	2013

## TABLE OF CASES.

CXCX

	PAGE
Marionaux v. Brugier, 35 La. Ann. 13.....	2269
Mark v. Hudson R. Bridge Co., 103 N. Y. 28.....	102, 665, 826
Mark v. St. Paul &c. R. Co., 30 Minn. 493.....	688
Mark v. St. Paul &c. R. Co., 32 Minn. 208.....	1696
Marker v. Mitchell, 54 Fed. Rep. 637.....	1079
Markey v. Consolidated Traction Co., 65 N. J. L. 82..... (712)	
Markey v. Queens County, 154 N. Y. 675.....	1988
Markham v. Raleigh &c. R. Co., 119 N. C. 715.....	2143
Markle v. Berwick, 142 Pa. St. 84.....	1905
Markle v. W. U. T. Co., 19 Mo. App. 80.....	2438
Markle's Estate, 5 Pa. Dist. 47.....	61
Markley v. Whitman, 95 Mich. 236.....	1294
Markoe v. Tiffany & Co., 26 App. Div. 95.....	132
Markowitz v. Metropolitan Street R. Co., 32 Misc. 751.....	837, 2204
Marks v. New Orleans Cold Storage Co., (La.) 31 South Rep. 671.....	133
Marks v. Rochester R. Co., 41 App. Div. 66.....	379, 1396
Marks v. Semple, 111 Ala. 637.....	71
Marler v. Springfield, 65 Mo. App. 301.....	2037
Maroney v. Old Colony &c. R. Co., 106 Mass. 153.....	547, 564
Marquette v. Chicago &c. R. Co., 33 Iowa, 562.....	546, 682
Marquette v. Cleary, id. 296.....	1813
Marquette &c. R. Co. v. Spear, 44 Mich. 169.....	700, 1283
Marquis v. Wood, 29 Misc. 590.....	243, 824
Marr v. Western Union Teleg. Co., 85 Tenn. 529.....	2397, 2399, 2415
Marriott v. Hampton, 2 Smith's Leading Cases, 403, notes..... (1079)	
Marrus v. New Haven Steamboat Co., 62 N. Y. Supp. 474.....	314
Marrus v. New Haven Steamboat Co., 30 Misc. 421..... (240)	
Mars v. D. & H. C. Co., 54 Hun, 625.....	391
Marsden Co. v. Johnson, 89 Ill. App. 100.....	1503
Marsh v. N. Y. &c. R. Co., 14 Barb. 364..... (1043)	
Marsh v. Chickering, 101 N. Y. 396.....	1403, 1422
Marsh v. Hand, 120 N. Y. 315.....	979, 992, 1001, 1364
Marsh v. Hand, 40 Hun, 339.....	1332
Marsh v. Herman, 47 Minn. 537.....	1422
Marsh v. Home, 5 Barn. & Cress, 322..... (268)	
Marsh v. Jones, 21 Vt. 378..... (983)	977
Marsh v. Philadelphia, 8 Pa. Dist. 340.....	653, 2009
Marshall v. Belle Plaine, 106 Iowa, 508.....	1898
Marshall v. Blackshire, 44 Iowa, 475.....	989
Marshall v. Buffalo, 50 App. Div. 149.....	1911
Marshall v. DeCordova, 26 App. Div. 615.....	188
Marshall v. Herd, 59 Tex. 266.....	1360
Marshall v. Kansas City &c. R. Co., 74 Mo. App. 81.....	350
Marshall v. McAllister, 18 Tex. Civ. App. 159.....	1374, 1831, 1840, 2051
Marshall v. McAllister, 22 Tex. Civ. App. 214.....	1837
Marshall v. Macon Sash &c. Co., 103 Ga. 725.....	950
Marshall v. Murray, 148 Mass. 91..... (719)	
Marshall v. Pontiac &c. R. Co., 126 Mich. 45.....	611
Marshall v. St. Louis &c. R. Co., 78 Mo. 610.....	564
Marshall v. Stewart, 33 L. & E. 1.....	1601
Marshall v. Valley R. Co., 97 Va. 653.....	820
Marshall v. Western Union Teleg. Co., 79 Miss. 154.....	2437
Marshall Nat. Bank v. O'Neal, 11 Tex. Civ. App. 640.....	194
Martello v. Fusco, 21 R. I. 572.....	2046
Marter v. Texas &c. R. Co., 52 La. Ann. 727.....	1159, 1190
Martin v. N. Y. &c. R. Co., 103 N. Y. 626.....	1146
Martin v. N. Y. C. & H. R. R. Co., 27 Hun. 532.....	773
Martin v. N. Y., O. & W. R. Co., 62 Hun, 181.....	1257, 1267, 1287
Martin v. N. Y. C. &c. R. R. Co., 50 N. Y. S. Repr. 553..... (750)	
Martin v. Atchison &c. R. Co., 166 U. S. 399.....	1616
Martin v. Baltimore &c. R. Co., 2 Marv. (Del.) 123.....	736, 810, 1111, 1142, 1205
Martin v. Benoist, 20 Ill. App. 283.....	1767
Martin v. Boston &c. R. Co., 175 Mass. 502.....	951

	PAGE
Martin v. Brooklyn, 32 App. Div. 411.....	1962, 1963
Martin v. Cal. &c. R. Co., 94 Cal. 326.....	1418, 1715
Martin v. Chelsea, 175 Mass. 516.....	1934
Martin v. Chicago &c. R. Co., 194 Ill. 138.....	1408
Martin v. Chicago &c. R. Co., (Iowa), 87 N. W. Rep. 654.....	1584, 1590
Martin v. Coleman, 14 Misc. 505.... (1110)	
Martin v. Courtney, 75 Minn. 255.....	2194
Martin v. Dry Dock &c. R. Co., 92 N. Y. 70.....	966
Martin v. Farrel, 66 App. Div. 177.....	673, 2027
Martin v. Funk, 75 N. Y. 134.... (158)	
Martin v. Georgia &c. Co., 95 Ga. 361.....	2144, 2149, 2156
Martin v. Golden, (Mass.) 62 N. E. Rep. 977.....	85
Martin v. Grand Trunk R. Co., 87 Me. 411.... (1255)	
Martin v. Home Bank, 30 App. Div. 498.....	37
Martin v. Kansas City &c. R. Co., 77 Miss. 720.....	1398
Martin v. Little Rock &c. R. Co., 62 Ark. 156.... (751)	
Martin v. New York &c. R. Co., 20 Misc. 363.....	800, 808
Martin v. Northern &c. Asso., 68 Minn. 521.....	955
Martin v. North Star &c. Works, 31 Minn. 407.....	1718
Martin v. Pennsylvania &c. R. Co., 176 Pa. St. 444.... (764)	
Martin v. Pettit, 117 N. Y. 118.....	1350
Martin v. Philadelphia &c. R. Co., 200 Pa. St. 603.....	373
Martin v. Railway Co., 55 Ark. 510.....	330
Martin v. Railway Co., 87 Me. 411.....	1253
Martin v. Second Ave. R. Co., 3 App. Div. 448.....	469
Martin v. Smylee, 55 Mo. 577.... (172)	
Martin v. St. Louis &c. R. Co., (Tex. Civ. App.) 56 S. W. Rep. 1011.....	461
Martin v. Southern P. Co., 130 Cal. 285.....	1215
Martin v. Southern R. Co., 51 S. C. 150.....	371, 421, 667
Martin v. Stewart, 73 Wis. 553.....	1041, 1043
Martin v. Third Ave. R. Co., 27 App. Div. 52.....	675, 2305, 2311
Martin v. Towle, 59 N. H. 31.....	1144
Martin v. Tribune Association, 30 Hun, 391.....	639
Martin v. Western &c. R. Co., 23 Wis. 437.....	1259
Martin-Brown Co. v. Morris, (Ind. Terr.) 42 S. W. Rep. 423.....	93
Martineau v. National Blank Book Co., 166 Mass. 4.....	1498, 1720
Martineau v. Rochester Railway Company, 81 Hun, 263.....	2230, 2301
Martinez v. Bernhard, 106 La. 368.....	979
Martinowsky v. Hannibal, 35 Mo. App. 70.....	1815
Martz v. Cincinnati &c. R. Co., 12 Oh. C. C. 144.....	1255
Marvin v. Brooks, 94 N. Y. 75.... (70)	
Marvin v. Muller, 25 Hun, 163.....	1535
Marx v. M. R. Co., 56 Hun, 575.....	1192
Maryland v. Westoll, 106 Fed. Rep. 233.....	669
Maryland Clay Co. v. Goodnow, (Md.) 51 Atl. Rep. 292.....	1642, 1673
Maryland Steel Co. v. Marney, 88 Md. 482.....	691
Maryland &c. R. Co. v. Goodnow, (Md.) 51 Atl. Rep. 292.....	1591
Maryland &c. R. Co. v. Newbuer, 62 Md. 391.... (756)	
Mascheck v. R. Co., 3 Mo. App. 600.... (708)	
Mason v. Ashland, 98 Wis. 540.....	2016
Mason v. Howes, (Mich.) 81 N. W. Rep. 111.....	1324
Mason v. Metropolitan Street R. Co., 30 Misc. 108.....	2312
Mason v. Mo. R. Co., 29 Kas. 83.....	1126, 2161
Mason v. Railroad Co., 97 N. C. 16.....	1639
Mason v. Railroad Co., 111 N. C. 377.....	1643
Mason v. Railway Co., 4 Misc. 291.....	2229
Mason v. Richmond &c. R. Co., 111 N. C. 482.....	1610, 1645, 1736
Mason v. Southern R. Co., 58 S. C. 70.....	708, 743, 796
Mason v. Thompson, 9 Pick. 280.... (137)	
Mason v. West, 78 Me. 253.....	1359
Mason &c. R. Co. v. Yockey, 103 Fed. Rep. 265.....	685, 1407, 1680
Massano v. New York, 160 N. Y. 123.....	2021
Massengale v. Atlanta, 113 Ga. 966.....	1907

## TABLE OF CASES.

xcxvii

	PAGE
Masser v. Chicago &c. R. Co., 68 Iowa, 602.....	2110
Massero v. R. Co., 68 Iowa, 602.....	721
Massie v. Peel-Splint Coal Co., 41 W. Va. 620.....	1453, 1541
Massillon Engine &c. Co. v. Akerman, 110 Ga. 570.....	108
Massoth v. D. & H. Canal Co., 64 N. Y. 524.....	673, 740, 745, 773, 1166, 2379
Mast v. Kern, 34 Ore. 247.....	1665, 1670
Masters v. Troy, 50 Hun.....	2017
Masterson v. N. Y. C. & H. R. R. Co., 84 N. Y. 247.....	725
Masterson v. Cauble, 15 Ind. App. 515.....	53
Masterson v. Galveston &c. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 1001.....	1800
Masterton v. Mount Vernon, 58 N. Y. 391.....	834, 835, 1900
Matchett v. Anderson Foundry &c. Works, (Ind. App.) 64 N. E. Rep. 229....	178
Mateer v. Brown, 1 Cal. 221.... (140)	
Mather v. Lord Naidstone, 18 C. B. 273.... (1079)	
Mathes v. Lowell &c. Street R. Co., 177 Mass. 416.....	2316
Matheson v. Kansas City &c. R. Co., 61 Kan. 667.....	962
Mathewson v. Davis, 191 Ill. 391.....	59
Mathiason v. Mayer, 90 Mo. 585.....	1170
Matson v. Alley, 141 Ill. 284.... (182)	
Matson v. Maupin, 75 Ala. 312.....	2360
Matter of Adams, 51 App. Div. 619.....	66
Matter of Ball, 55 App. Div. 284.....	45
Matter of Braunsdorf, 2 App. Div. 73.....	52
Matter of Coleman, 111 N. Y. 220.....	1191
Matter of Darragh, 52 Hun, 591.....	1188
Matter of Dean, 86 N. Y. 398.... (91)	
Matter of Denton v. Sanford, 103 N. Y. 607.... (45)	
Matter of Dohrman, 15 App. Div. 67.... (162)	
Matter of Fargo's Estate, 20 Misc. 137.....	46
Matter of Fidelity Loan &c. Co., 23 Misc. 211.....	53
Matter of Freeman, 46 Hun, 458.....	1186, 1187
Matter of Guldenkirch, 35 Misc. 123.....	50
Matter of Hall's Estate, 16 Misc. 174.....	50
Matter of Hodgman, 11 App. Div. 344.....	57
Matter of Johnson, 57 App. Div. 494.....	46
Matter of McFarlane, 65 App. Div. 93.....	92
Matter of McIntyre, 24 App. Div. 167.....	49
Matter of Muller, 31 App. Div. 80.....	57
Matter of Olmstead, 52 App. Div. 615.....	58
Matter of Oosterhoudt, 15 Misc. 566.....	53
Matter of Peck, 31 App. Div. 407.....	66
Matter of Philp, 29 Misc. 263.....	46, 53
Matter of Rhinland, 68 N. Y. 105.....	1908
Matter of Rochester Water Commissioners, 66 N. Y. 413.....	80
Matter of Scudder, 21 Misc. 179.....	58
Matter of Sheldon, 72 App. Div. 625.....	92
Matter of Sudds, 32 Misc. 182.....	58
Matter of Suess, 37 Misc. 450.....	58
Matter of Talmage, 32 App. Div. 10.....	45
Matter of Te Culver, 22 Misc. 217.....	58
Matter of Thorp, 31 Misc. 581.....	58
Matter of Van Buren, 19 Misc. 373.....	55
Matter of Van Houten, 18 Misc. 524.....	50
Matter of Wachter, 16 Misc. 137.....	53
Matter of Westerfield, 48 App. Div. 542.....	66
Matter of Weston, 91 N. Y. 502.... (45)	
Matter of Wilbur, 27 Misc. 126.....	50
Matter of Yuengling Brewing Co., 24 App. Div. 223.....	1368
Matteson v. N. Y. C. R. Co., 35 N. Y. 487.....	1140, 1173, 1231
Matteson v. N. Y. &c. R. Co., 62 Barb. 364.... (854).....	1148
Matteson v. Whaley, 19 R. I. 648.....	2030
Mattey v. Whittier, 140 Mass. 337.... (711)	
Matther v. Wooley, 69 Ill. App. 654.....	2198



	PAGE
Matthes v. Imperial Acc. Ass'n, 110 Iowa, 222.....	1309
Matthew v. Missouri R. Co., 142 Mo. 645.....	1223
Matthews v. Atchison &c. R. Co., 60 Kan. 11.... (355)	
Matthews v. Atlantic &c. R. Co., 117 N. C. 640.....	2157
Matthews v. Bensel, 51 N. J. L. 30.....	2106
Matthews v. Bull, (Cal.) 47 Pac. Rep. 773.....	1513, 2054
Matthews v. Chicago &c. R. Co., 63 Mo. App. 569.....	2145
Matthews v. Chicopee Co., 3 Rob. 711.....	2203
Matthews v. De Groff, 13 App. Div. 356.....	1340, 2252
Matthews v. Fiertel, 2 E. D. Smith, 90.... (989)	
Matthews v. Howard Ins. Co., 1 Kern, 9.... (1309)	
Matthews v. Kelsey, 58 Me. 56.....	2239
Matthews v. Missouri &c. R. Co., 142 Mo. 645.....	889, 938, 1263
Matthews v. Missouri R. Co., 26 Mo. App. 75.....	870
Matthews v. Missouri &c. R. Co., (Tex. Civ. App.) 66 S. W. Rep. 902.....	1719
Matthews v. Poythress, 4 Ga. 287.... (182)	
Matthews v. Railroad Co., 18 Pa. Super. Ct. 10.....	1099
Matthews v. St. Paul &c. R. Co., 18 Minn. 434.... (1019)	
Matthews v. Stillwater Gas Co., 63 Minn. 493.... (1083)	2097
Matthews v. Toledo, 21 Oh. C. C. 69.....	668, 1819
Matthews v. Warner, 29 Grattan, (Va.) 570.... (883)	
Mattlage v. Hudson County, 63 N. J. L. 583.....	1830, 1836
Mattis v. Philadelphia T. Co., 6 Pa. Dist. 94.....	937
Mattocks v. Moulton, 84 Maine, 545.....	46
Mattoon v. Russell, 91 Ill. App. 252.....	1870
Mattoon v. Worland, 97 Ill. App. 13.....	1869, 1952
Mattson v. Qualey Construction Co., 90 Ill. App. 260.....	1594
Matze v. N. Y. C. & H. R. R. Co., 1 Hun, 417.....	814
Mau v. Morse, 3 Colo. App. 359.....	1075
Mauch v. Hartford, 112 Wis. 40.....	670, 1239, 1871, 2049, 2051
Mauer v. Ferguson, 44 N. Y. St. Rep. 372.....	1454
Mauerman v. Siemerts, 71 Mo. 101.....	2232, 2267
Maughmer v. Bering, 19 Tex. Civ. App. 299.....	1646
Maul v. Queen Anne's R. Co., 1 Penn. (Del.) 561.....	1742
Maule Coal Co. v. Partenheimer, 155 Ind. 100.....	950
Maupin v. Texas &c. R. Co., 99 Fed. Rep. 49.....	1673
Mauritz v. N. Y. &c. R. Co., 23 Fed. Rep. 765.....	297, 615
Maury v. Coyle, 34 Md. 235.... (103)	
Maury v. Talmadge, 2 McLean, (U. S.) 157.... (441)	
Mautner v. Terminal Warehouse Co., 25 Misc. 729.....	109
Maverick v. Eighth Ave. R. Co., 36 N. Y. 378.....	455, 543
Maxey v. Metropolitan Street R. Co., (Mo. App.) W. Rep. 1063.....	474
Maxim v. Town of Champion, 50 Hun, 88.....	1843
Maxmilian v. Mayor &c., 62 N. Y. 160.....	81, 1981
Maxson v. D. L. & W. R. Co., 112 N. Y. 559.....	1367
Maxwell v. Durkin, 185 Ill. 546.....	1133
Maxwell v. Durkin, 86 Ill. App. 257.....	682, 2361
Maxwell v. Palmersten, 21 id. 406.....	991
Maxwell v. Southern P. R. Co., 48 La. Ann. 385.....	247
Maxwell v. Thomas, 31 App. Div. 546.....	1724
Maxwell v. Wilmington &c. R. Co., 1 Marv. (Del.) 199.....	
.....872, 1117, 1169, 2272, 2277, 2298, 2325	
May v. Anaconda, 26 Mont. 140.....	1814, 1824, 1828, 1910, 1943
May v. Berlin Iron-Bridge Co., 43 App. Div. 569.....	2078, 2121
May v. Chapman, 16 M. & N. 355.... (182)	
May v. Chicago &c. R. Co., 102 Wis. 673.....	1050
May v. Hahn, 22 Tex. Civ. App. 365.... (928)	
May v. Iron Bridge Co., 43 App. Div. 569.....	116
May v. Metropolitan Street R. Co., 26 Misc. 748.....	231
May v. Smith, 92 Ga. 95.....	15
May v. Thompson Hutchinson Building Co., 116 Ala. 634.....	22
May v. West Jersey &c. R. Co., 62 N. J. L. 63.....	874, 884, 92
Maydole v. Denver &c. R. Co., (Col. App.) 62 Pac. Rep. 964.....	154

## TABLE OF CASES.

ccxcix

	PAGE
Mayell v. Potter, 2 J. Cas. 371.... (308)	
Mayer v. Brensinger, 180 Ill. 110.....	130
Mayer v. Brooklyn Heights R. Co., 9 App. Div. 79.....	2328
Mayer v. Chicago &c. R. Co., 63 Ill. App. 309.....	766, 2139
Mayer v. Liebmann, 16 App. Div. 54.....	916, 1484, 1745
Mayer v. People, 92 Ill. App. 123.....	84
Mayes v. The Chicago, R. I. & Pacific R. R. Co., 63 Iowa, 566.....	1458, 1690
Mayes v. Chicago &c. R. Co., 14 N. W. R. 340.....	1567
Mayes v. Southern R. Co., 119 N. C. 758.... (792)	
Mayhew v. Burns, 103 Ind. 328.....	718, 878, 948, 1181, 2100
Mayhew v. Sullivan Mining Co., 76 Me. 100.....	1604
Maynard v. Boston &c. R. Co., 115 Mass. 458.... (1013)	1017
Mayo v. Wright, 63 Mich. 32.....	2183, 2191
Mayor v. Bailey, 2 Denio, 433.....	89
Mayor v. Henly, 1 Bing. N. C. 222.....	77
Mayor v. Sheffield, 4 Wall. 189.....	1820
Mayor v. Troy & L. R. R. Co., 49 N. Y. 657.... (1301)	
Mayor &c. v. Brady, 70 Hun, 250.....	1300
Mayor &c. v. Brady, 81 Hun, 440.....	1300
Mayor &c. v. Corlies, 2 Sandf. S. C. R. 301.... (1333)	
Mayor &c. v. Cunliff, 2 N. Y. 165.....	1376, 1487, 1830
Mayor &c. v. Furze, 3 Hill, 612.....	1899
Mays v. Tacoma Street R. Co., 106 Fed. Rep. 48.....	2282
Mayton v. Sonnefeld, (Tex. Civ. App.) 48 S. W. Rep. 608.....	1127, 1598
Meacham v. Galloway, 102 Tenn. 415.....	149, 155
Meacham v. Louisville &c. R. Co., (Ky.) 45 S. W. Rep. 363.....	2143
Meacham v. Sternes, 9 Paige, 398.....	70
Mead v. Bunn, 32 N. Y. 275.....	626
Mead v. Burlington &c. R. Co., 52 Vt. 278.... (1041)	
Meade v. Brooklyn &c. R. Co., 3 App. Div. 432.....	929
Meade v. Chicago &c. R. Co., 68 Mo. App. 92.....	29, 1156, 2029
Meade v. Chicago &c. R. Co., 72 Mo. App. 61.....	870
Meador v. Missouri P. R. Co., (Kan.) 61 Pac. Rep. 442.... (1101)	
Meadows v. Truesdell, (Tex. Civ. App.) 56 S. W. Rep. 932.....	1248, 2031
Meagher v. Cooperstown & Charlotte Valley R. Co., 75 Hun, 455.....	
Meagher v. Driscoll, 99 Mass. 281.....	716, 814, 2229, 2341
Means v. Carolina C. R. Co., 122 N. C. 990.....	902
Means v. Carolina &c. R. Co., 124 N. C. 574.....	1444
Means v. Carolina Cent. R. Co., 126 N. C. 424.....	399, 1156
Meany v. Standard Oil Co., (N. J. L.) 47 Atl. Rep. 803.....	1444, 1520
Meara v. Holbrook, 20 Oh. St. 137.....	1465, 1592
Mearns v. Central R. Co., 163 N. Y. 108.....	94
Mears v. Chicago &c. R. Co., 103 Iowa, 203.....	498
Mears v. Spokane, 22 Wash. 323.....	1021
Mechanics' &c. Co. v. Floyd, 49 S. W. Rep. 543.....	2019
Medberry v. Chicago &c. R. Co., (Wis.) 81 N. W. Rep. 659.....	1314
Medbury v. New York &c. Road, 26 Barb. 564.... (824)	1801
Meegan v. McKay, 1 Okla. 59.....	
Meegand's Appeal, 28 Pa. St. 471.....	673
Meehan v. Chicago &c. R. Co., 67 Ill. App. 39.....	51
Meehan v. Spiers Man. Co., 172 Mass. 375.....	2138
Meek v. N. Y. Cent. R. Co., 69 Hun, 488.....	1637, 1664
Meek v. Penn. Co., 38 Oh. St. 632.... (779)	1431, 1483
Meeker v. Northern Pacific R. Co., 21 Ore. 513.... (1029)	
Meeker v. Remington &c. Co., 53 App. Div. 592.....	1664
Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145.....	945
Meeks v. Southern Pac. R. Co., 52 Cal. 602.... (705)	
Meeks v. Southern &c. R. Co., 56 Cal. 513.... (707)	
Meenagh v. Buckmaster, 26 App. Div. 451.....	696, 729
Meeney v. Kehoe, 181 Mass. 424.....	2359
Meisel v. Lynn &c. R. Co., 8 Allen, 234.... (509)	511
Meet v. Pa. Co., 38 Oh. St. 632.....	1168

	PAGE
Mehan v. S. B. & N. Y. R. Co., 73 N. Y. 585.....	1488, 1677
Mehle v. Vensel, 39 La. Ann. 680.... (103)	
Meier v. Morgan, 82 Wis. 289.....	1491
Meier v. R. Co., 14 P. F. Smith, (Pa.) 225.... (411)	
Meier v. Shrunk, 78 Iowa, 17.....	1012
Meiners v. St. Louis, 130 Mo. 274.....	913, 1827
Meisch v. Rochester Electric Ry. Co., 72 Hun, 604.....	2228, 2271
Meisenheimer v. Kellogg, 106 Wis. 30.....	2198
Meister v. Alber, 85 Md. 72.....	1725
Melbourne v. Louisville & C. R. Co., 88 Ala. 443.....	103
Melchert v. Am. T. Co., 11 Fed. Rep. 193.....	2433
Meldon v. Devlin, 20 Misc. 56.....	66
Mele v. D. & H. C. Co., 39 N. Y. S. R. 153.....	1612
Melhado v. Poughkeepsie Trans. Co., 27 Hun, 99.....	662
Mellen v. Hamilton Fire Ins. Co., 17 N. Y. 609.....	1313
Mellen v. Morrill, 126 Mass. 545.... (652).....	1345
Mellen v. Thomas Wilson & Co., 150 Mass. 88.....	1625
Mellguist v. The Wasco, 53 Fed. Rep. 546.....	431
Mellor v. Bridgeport, 191 Pa. St. 562.....	698
Mellor v. Missouri Pacific R. Co., 105 Mo. 455.....	373
Mellor v. Railroad Co., 105 Mo. 455.....	2051
Mellott v. Louisville & C. R. Co., 101 Ky. 212.....	1416
Mellou v. Merrill, 126 Mass. 545.....	1332
Mellwitz v. Manhattan R. Co., 62 Hun, 622.... (843)	
Meloche v. Chicago & C. R. Co., 116 Mich. 69.....	197
Melott v. Louisville & C. R. Co., 40 S. W. Rep. 696.....	1695
Melsheimer v. Sullivan, 1 Col. App. 22.....	985
Melson v. Western Union Teleg. Co., 72 Mo. App. 111.....	2445
Melton v. Jackson Lumber Co., (Ala.) 31 South. Rep. 848.....	1494
Melvin v. State, 121 Cal. 16.....	2224
Memphis v. Miller, 78 Mo. App. 67.....	2257
Memphis City R. Co. v. Logue, 13 Lea, (Tenn.) 32.....	2229, 2287
Memphis Street R. Co. v. Wilson, (Tenn.) 69 S. W. Rep. 265.....	2280, 2284
Memphis & C. Packing Co. v. Buckner, (Ky.) 57 S. W. Rep. 482.... (374)	
Memphis & C. Packet Co. v. Nagel, 15 Ky. L. R. 742.....	902
Memphis & C. R. Co. v. Benson, 85 Tenn. 627.....	527, 554, 596
Memphis & C. R. Co. v. Copeland, 61 Ala. 376.....	439
Memphis & C. R. Co. v. Graham, 94 Ala. 545.....	1735
Memphis & C. R. Co. v. Kerr, 52 Ark. 162.....	1015, 1021
Memphis & C. R. Co. v. Lyon, 62 Ala. 71.....	741, 1025
Memphis & C. R. Co. v. McCool, 83 Ind. 392.... (1103)	
Memphis & C. R. Co. v. Martin, 117 Ala. 367.....	661, 761, 774, 2044
Memphis & C. R. Co. v. Martin, 131 Ala. 269.....	661, 681
Memphis & C. R. Co. v. Martin, (Ala.) 30 South. Rep. 827.... (736)	
Memphis & C. R. Co. v. Salinger, 46 Ark. 528.... (504)	
Memphis & C. R. Co. v. Sanders, 43 Ark. 225.... (742)	
Memphis & C. R. Co. v. Smith, 9 Heisk. 860.... (1014)	
Memphis & C. R. Co. v. Whitfield, 44 Miss. 466.....	577
Menard v. Bay City, 114 Mich. 450.....	1869
Mendenhall v. North Carolina R. Co., 123 N. C. 275.... (874).....	819
Meney v. Chicago & C. R. Co., 49 Ill. App. 105.....	2205
Mengelle v. Abadie, 48 La. Ann. 669.....	1322
Menner v. Delaware & C. Canal Co., 7 Pa. Super. Ct. 135.....	253, 1099, 1114
Menominie River Sash & C. Co. v. Milwaukee & C. R. Co., 91 Wis. 447....	1112, 1252
Mensing v. Michigan C. R. Co., 117 Mich. 606.....	436
Mentor v. Union Pacific R. Co., 3 Utah, 500.....	2050
Mentz v. Railway Co., 3 Abb. App. Dec. 274.....	2271, 2308, 2368
Mentz v. Schieren, 36 Misc. 813.....	2266
Mercantile Trust Co. v. Pittsburg & C. R. Co., 115 Fed. Rep. 475.....	1490
Mercantile & C. Bank v. Brown, 96 Va. 614.....	1086
Mercer v. Vose, 67 N. Y. 56.....	1222
Merchant v. Pine Woods Lumber Co., 107 La. 463.....	1706
Merchant State Bank v. State Bank, 94 Wis. 444.....	43



# TABLE OF CASES.

cc1

PAGE

Merchants' Bank v. N. J. S. Nav. Co., 6 How. U. S. 380.... (358)	
Merchants' Bank of Canada v. Union R. R. Co., 69 N. Y. 373.... (312)	
Merchants' Despatch &c. Co. v. Bloch, 86 Tenn. 392.....	201
Merchants' Despatch &c. Co. v. Comforth, 3 Colo. 280.... (244)	
Merchants' Despatch &c. Co. v. Furthman, 149 Ill. 66.....	245
Merchants' Nat. Bank v. Carhart, 95 Ga. 394.....	164
Merchants' Nat. Bank v. School District, 94 Fed. Rep. 705.....	95
Merchants' Nat. Bank v. Sullivan, 63 Minn. 468.....	191
Merchants' &c. Assn. v. Wood, 64 Miss. 661.....	1248
Merchants' &c. Bank v. Pennland, 101 Tenn. 445.....	194
Merchants' &c. Ins. Co. v. Dunbar, 88 Ill. App. 674.....	1314
Meridian v. McBeath, 80 Miss. 485.....	1926
Merkle v. N. Y. &c. R. Co., 49 N. J. L. 473.... (762)	
Merriam v. Stainback, 79 Miss. 447.....	1953
Merrick v. Brainard, 34 N. Y. 208.... (1284)	
Merrick v. Brainard, 38 Barb. 589.... (938)	202
Merrick v. Phillips, 58 Mo. 436.... (182)	
Merrick v. Wallace, 19 Ill. 486.... (82)	
Merrifield v. Worcester, 110 Mass. 216.....	1966
Merrill v. American Exp. Co., 62 N. H. 514.....	322
Merrill v. Eastern R. Co., 139 Mass. 238.....	482, 657
Merrill v. Express Co., 62 N. H. 514.... (280)	
Merrill v. Grinnell, 30 N. Y. 544.....	608, 612, 632
Merrill v. Hampden, 26 Me. 234.....	1915
Merrill v. Metropolitan &c. Ry. Co., 73 App. Div. 401.....	393, 1125
Merrill v. Pacific Transfer Co., 131 Cal. 582.....	296
Merrill v. Western U. T. Co., 78 Me. 97.....	2452
Merrimack &c. Bank v. Lowell, 152 Mass. 556.....	1997
Merriman v. Great Northern Ex. Co., 63 Minn. 543.....	234
Merriman v. Rockwood, 47 N. H. 81.... (183)	
Merrinan v. New York &c. R. Co., 13 App. Div. 439.....	1125
Merritt v. Claghorn, 23 Vt. 177.....	137, 142
Merritt v. Earle, 29 N. Y. 115.....	209, 232, 2374
Merritt v. Fitzgibbons, 102 N. Y. 362.....	2239
Merritt v. Foote, 128 Mich. 367.....	2316
Merritt v. Great Northern R. Co., 81 Minn. 496.....	1676, 1729
Merritt v. Jackson, (Mass.) 62 N. E. Rep. 987.....	179
Merryman v. Chicago &c. R. Co., 85 Iowa, 634.....	721
Mersey Dock Trustees v. Gibbs, 3 Hurl. & Colt. 1043.....	78
Mersey Docks v. Trustees L. R., 1 H. of L. 114.....	2250
Mertz v. Brooklyn, 33 N. Y. St. Rep. 577.....	1797, 2020
Mertz v. Detroit E. R. Co., 125 Mich. 11.....	1206, 2272
Merwin v. M. R. Co., 48 Hun, 608.....	501
Merz v. Chicago &c. R. Co., (Minn.) 90 N. W. Rep. 7.....	234, 317
Mesic v. Atlantic &c. R. Co., 120 N. C. 489.... (753)	
Mesick v. Mesick, 7 Barb. 120.... (66)	
Messenger v. Devine, 137 Mass. 197.....	721, 2357
Messenger v. Dennie, 141 Mass. 335.... (711)	
Metcalf v. Baker, 57 N. Y. 662.....	2040
Metcalf v. Baker, 11 Abb. (N. S.) 431.... (726)	
Metcalf v. Draper, 98 Ill. App. 399.....	19, 190
Metcalf v. Cunard Steamship Co., 147 Mass. 66.....	2109
Metcalf v. St. Paul City R. Co., 82 Minn. 18.....	2331
Metcalf v. Rochester R. Co., 12 App. Div. 147.....	728
Metropolitan Life Insurance Co. v. Bender, 124 N. Y. 47.... (175)	
Metropolitan Sav. Bank v. Manion, 87 Md. 68.....	1333
Metropolitan R. Co. v. Hammett, 13 App. D. C. 370.....	2274, 2275, 2278
Metropolitan Street R. Co. v. Hudson, 113 Fed. Rep. 449.....	483, 895
Metropolitan Street R. Co. v. Johnson, 90 Ga. 500.....	848
Metropolitan Street R. Co. v. Kennedy, 82 Fed. Rep. 158.....	2272
Metropolitan Street R. Co. v. Slayman, 64 Kan. 722.....	2315
Metropolitan West Side El. R. Co. v. McDonough, 87 Ill. App. 31.....	1105
Metropolitan West Side El. R. Co. v. Skola, 183 Ill. 454.....	1634

	PAGE
Metropolitan &c. R. Co. v. Dick, 87 Ill. App. 40.....	647
Metropolitan &c. R. Co. v. Kersey, 80 Ill. App. 301.....	707, 714, 912
Metropolitan &c. R. Co. v. Johnson, 91 Ga. 466.....	846
Mettlestadt v. Ninth Ave. R. R. Co., 4 Robt. 377.... (477)	
Metz v. B. C. & P. R. Co., 58 N. Y. 61.....	89
Metz v. California &c. R. Co., 85 Cal. 329.....	619
Metz v. Chicago &c. R. Co., 85 Fed. Rep. 180.....	952
Metzger v. Schnabel, 23 Misc. 698.....	140
Metzger v. Schultz, 16 Ind. App. 454.....	1355
Meunier v. Chemical Paper Co., 180 Mass. 109.....	1720, 1740
Mew v. Charleston &c. R. Co., 55 S. C. 90.....	1553, 1777
Mexican &c. R. Co. v. Goodman, (Tex. Civ. App.) 55 S. W. Rep. 372.....	563, 565, 965, 1374
Mexican &c. R. Co. v. Mitten, 13 Tex. Civ. App. 653.....	915, 1373
Mexican &c. R. Co. v. Murray, 102 Fed. Rep. 264.....	1540, 1561, 1793
Mexican &c. R. Co. v. Savage, (Tex. Civ. App.) 41 S. W. Rep. 663.....	228
Mexican &c. R. Co. v. Slater, 115 Fed. Rep. 593.....	965
Mexican &c. R. Co. v. Townsend, 114 Fed. Rep. 737.....	1486
Mexican &c. R. Co. v. Ware, (Tex. Civ. App.) 60 S. W. Rep. 343.....	278, 614
Meyant v. N. Y. &c. R. Co., 3 Duer, (N. Y.) 360.....	1399
Meyer v. Atlantic &c. R. Co., 64 Mo. 542.... (941)	
Meyer v. Brooklyn &c. R. Co., 47 App. Div. 286.....	1214, 2324, 2329
Meyer v. Gundlach-Nelson Man. Co., 67 Mo. App. 389.....	1580
Meyer v. Haas, 126 Cal. 569.....	2204
Meyer v. Harris, 61 N. J. L. 83.....	1344, 1360
Meyer v. Hart, 23 App. Div. 131.....	927
Meyer v. Haven, 37 App. Div. 194.....	2078
Meyer v. Illinois C. R. Co., 177 Ill. 591.....	1606
Meyer v. Indiana Nat. Bank, 27 Ind. App. 354.....	167
Meyer v. Laux, 18 Misc. 671.....	1364
Meyer v. Lindell R. Co., 6 Mo. App. 27.....	2344
Meyer v. Meyer, 86 Ill. App. 417.....	1214, 1407
Meyer v. Midland &c. R. Co., 2 Neb. 319.... (775)	
Meyer v. Miller, 19 J. & S. 386.....	1379
Meyer v. Peck, 28 N. Y. 590.... (1082)	
Meyer v. Pittsburg &c. T. Co., 189 Pa. St. 414.....	2336
Meyer v. Railway Co., 6 Mo. App. 27.....	2230
Meyer v. Rutland &c. R. Co., 26 Vt. 110.... (338)	
Meyer v. St. Louis &c. R. Co., 54 Fed. Rep. 116.....	366
Meyer Bros. v. Insurance Co., 73 Mo. App. 166.....	1313
Meyers v. Brooklyn &c. R. Co., 10 App. Div. 335.....	561
Meyers v. Chicago &c. R. Co., 59 Mo. 223.... (821)	785
Meyers v. Illinois C. R. Co., 49 La. Ann. 21.....	1444
Meyers v. Menter, (Neb.) 88 N. W. Rep. 662.....	1007
Meyer's Estate, 13 Pa. Super. Ct. 476.....	61
Miami &c. Turnpike Co. v. Bailey, 37 Oh. St. 104.....	2038
Michael v. Roanoke &c. Works, (Va.) 19 S. E. Rep. 26.....	1499
Michael v. Stanley, 75 Md. 464.....	1557
Michaels v. N. Y. Central R. R. Co., 30 N. Y. 564.....	235, 352
Michaelson v. Cautley, 45 W. Va. 533.....	1323
Michalitschke v. Wells, Fargo & Co., 118 Cal. 683.....	244, 281
Michigan Bank v. Eldred, 9 Wall. 544.... (176)	
Michigan City v. Boeckling, 122 Ind. 39.....	730, 1927
Michigan &c. R. Co. v. Austin, 40 Mich. 247.....	1685
Michigan &c. R. Co. v. Coleman, 28 Mich. 439.....	481, 1418
Michigan &c. R. Co. v. Campau, 35 Mich. 468.... (810)	
Michigan &c. R. Co. v. Dolan, 32 Mich. 510.....	1482
Michigan &c. R. Co. v. Fisher, 27 Ind. 96.....	1000, 1023
Michigan &c. R. Co. v. Gilbert, 46 Mich. 176.....	1520
Michigan &c. R. Co. v. McDonough, 21 Mich. 165.....	249
Michigan &c. R. Co. v. Myrick, 107 U. S. 102.....	2440
Michigan &c. R. Co. v. Schurtz, 7 Mich. 515.... (208)	
Michigan &c. R. Co. v. Shea, 8 Oh. C. D. 325.....	1539

## TABLE OF CASES.

cciii

	PAGE
Michigan &c. R. Co. v. Smithson, 45 Mich. 212.....	1474, 1508, 1565, 1685
Mickee v. Wood &c. Co., 70 Hun, 436.....	1561, 1595
Mickoe v. Wood Mowing &c. Co., 60 N. Y. S. R. 282....	(638)
Middaugh v. Mitchell, 120 Mich. 581.....	1558
Middle Georgia &c. R. Co. v. Barnett, 104 Ga. 582.....	1677
Middlesborough R. Co. v. Webster, (Ky.) 50 S. W. Rep. 843.....	464
Midgett v. Bay State Steamboat Co., 1 Daly, 151....	(609)
Midland Nat. Bank v. Missouri P. R. Co., 132 Mo. 492.....	317
Midland R. Co. v. Great Western R. Co., L. R. 8 Ch. App. 841....	(1334)
Mielke v. Chicago &c. R. Co., 103 Wis. 1.....	1560, 1594
Mikelwait v. Western Union Teleg. Co., 113 Iowa, 177.....	2451
Mikkelson v. Truesdale, 63 Minn. 137.....	1798
Miles v. A. &c. R. Co., 4 Hugh, (U. S.) 172.....	2160
Miles v. Cottle, 6 Bing. 743....	(271)
Miles v. Postal Teleg. &c. Co., 55 S. C. 403.....	668
Miles v. Stauke, (Wis.) 89 N. W. Rep. 833.....	1208
Miles v. Worcester, 154 Mass. 511.....	1956
Miley v. Broadway & Seventh Ave. R. Co., 29 N. Y. St. Rep. 107.....	1229
Millard v. M., K. & T. R. Co., 20 Hun, 191.....	625
Millard v. Brown, 35 N. Y. 297.....	1231
Millard v. Webster City, 113 Iowa, 220.....	2006
Millard v. West-End Street R. Co., 173 Mass. 512.....	1740
Millcreek Township v. Perry, 10 Cent. (Pa.) 299.....	698
Millen v. Rainer, 45 N. J. L. 520.....	1360
Miller v. Bradford, 186 Pa. St. 164.....	1857, 1890
Miller v. Benoit, 29 App. Div. 252.....	1361
Miller v. Black Rock Springs Co., 99 Va. 747.....	2086
Miller v. Brewster, 32 App. Div. 559.....	1072
Miller v. Bullion-Beck &c. Min. Co., 18 Utah, 358.....	1726
Miller v. Burl. &c. R. Co., 8 Neb. 219.....	(21)
Miller v. Chicago &c. R. Co., 59 Iowa, 707....	(1013)
Miller v. Coffin, 19 R. I. 164.....	955, 2046
Miller v. Cohen, 473 Pa. St. 488.....	2349
Miller v. Edison Electric Ill. Co., 66 App. Div. 470.....	2096
Miller v. Erie R. Co., 21 App. Div. 45.....	1467
Miller v. Erie R. Co., 34 App. Div. 217.....	916
Miller v. Fano, 134 Cal. 103.....	84
Miller v. Finley, 26 Mich. 249....	(182)
Miller v. Frey, 49 Neb. 472.....	895
Miller v. Great Northern R. Co., 85 Minn. 272.....	1478
Miller v. Grieme, 53 App. Div. 276.....	1703, 1737
Miller v. H. & St. John R. Co., 90 N. Y. 430....	(1082)
Miller v. Hancock, 2 Q. B. 177....	(1893)
Miller v. Inman &c. Co., 40 Or. 161.....	1322
Miller v. Itaaka &c. Co., (Tex. Civ. App.) 41 S. W. Rep. 366.....	1486
Miller v. Lebanon &c. R. Co., 186 Pa. St. 190.....	2048
Miller v. Lezior Man. Co., 19 Oh. C. C. 666.....	1093
Miller v. Mariner's Church, 7 Greenleaf, 51....	1729
Miller v. Michigan Cent. R. Co., (Mich.) 82 N. W. Rep. 58.....	(665)
Miller v. Miller, 19 Ind. App. 605.....	1610
Miller v. Minneapolis, 75 Minn. 131.....	2055
Miller v. Morton, 89 Hun, 574.....	1987
Miller v. N. J. S. Co., 58 Hun, 424.....	1082
Miller v. N. Y. C. & H. R. R. Co., 99 N. Y. 657.....	366
Miller v. N. Y., L. E. & W. R. Co., 125 N. Y. 118.....	1472
Miller v. N. Y. C. & H. R. R. Co., 81 Hun, 152.....	1331
Miller v. New York &c. R. Co., 92 Hun, 282.....	767, 790
Miller v. New York &c. R. Co., 175 Mass. 363.....	1287
Miller v. Ocean S. S. Co., 118 N. Y. 199.....	1465
Miller v. Ohio &c. R. Co., 24 Ill. App. 326.....	389
Miller v. Peoples, 60 Miss. 819.....	1618
Miller v. Proctor, 20 Oh. St. 442.....	148
Miller v. Railroad Co., (Ind.) 27 N. C. 330....	61
	(726)

	PAGE
Miller v. R. Co., 59 Iowa, 707....(1025)	
Miller v. Railroad Co., 109 Mo. 350.....	1642, 1644, 1665
Miller v. Railroad Co., 128 N. C. 26....(739)	
Miller v. St. Louis R. Co., 5 Mo. App. 471....(540)	541
Miller v. St. Paul City R. Co., 66 Minn. 192.....	922
Miller v. Smith, 112 Mass. 470....(1222)	
Miller v. So. Pac. R. Co., 20 Ore. 285.....	1619
Miller v. Smythe, 95 Ga. 288.....	1324, 1343
Miller v. Springfield, 177 Mass. 373.....	2017, 2019
Miller v. Steam Navigation Co., 10 N. Y. 437.....	232, 308, 322, 323
Miller v. Terre Haute &c. R. Co., 144 Ind. 323....(791)	
Miller v. Thomas, 15 App. Div. 105.....	1423
Miller v. Wellington &c. R. Co., 128 N. C. 26....(767)	
Miller v. Western Stone Co., 61 Ill. App. 662.....	1593
Miller v. Whelan, 158 Ill. 544.....	2175
Miller v. Woodhead, 104 N. Y. 471.....	1346, 2132
Miller Grain &c. Co. v. Union P. R. Co., 138 Mo. 658.....	250, 350
Millhiser v. Willard, 96 Iowa, 327.....	2096
Millie v. Manhattan Railway Co., 5 Misc. 301.....	1097
Millie v. Manhattan R. Co., 10 Misc. 734.....	1117, 1214
Milliga v. Chicago &c. R. Co., 79 Mo. App. 393....(787)	
Milligan v. W. U. T. Co., 110 N. Y. 403.....	2418
Milligan v. Wehinger, 58 Pa. St. 235....(1002)	
Milliken v. Woodward, 64 N. J. L. 444.....	1305, 1306
Milliman v. N. Y. C. & H. R. Co., 66 N. Y. 642.....	363, 461
Millon v. Salisbury, 13 Johns. 211.....	109
Mills v. Albany Exch. Sav. Bank, 28 Misc. 251.....	163
Mills v. Brooklyn, 32 N. Y. 489.....	77, 1817, 1899, 1902, 1965
Mills v. Brooklyn City R. Co., 10 Misc. 1.....	2321
Mills v. Gilbreth, 47 Maine, 320....(109)	
Mills v. Gresselle, 4 Oh. C. D. 161.....	1158
Mills v. Johnson, 1 McCord, (S. C.) 157....(606)	
Mills v. Lynn &c. R. Co., 129 Mass. 351.....	515
Mills v. Michigan Central R. Co., 45 N. Y. 622.....	352
Mills v. Mills, 115 N. Y. 80....(57)	
Mills v. Missouri &c. R. Co., (Tex.) 59 S. W. Rep. 874....(477)	
Mills v. Missouri &c. R. Co., (Tex. Civ. App.) 57 S. W. Rep. 291.....	489
Mills v. New York &c. R. Co., 5 App. Div. 11.....	450
Mills v. Philadelphia, 187 Pa. St. 287.....	1939
Mills v. Railway Co., 10 Misc. 1.....	2229
Mills v. Stark, 4 N. Y. 512....(1010)	
Mills v. Talleys, 83 Va. 361.....	52
Mills v. Thomas Elevator Co., 54 App. Div. 124.....	1603
Mills v. Wilmington City R. Co., 1 Marv. (Del.) 269.....	699, 2036, 2073
Mills v. Lumber Co. v. Chicago &c. R. Co., 94 Wis. 336.....	787, 1055
Milnor v. N. Y. & N. H. R. R. Co., 53 N. Y. 363.....	342, 347, 348, 356
Milroy v. Chicago &c. R. Co., 98 Iowa, 188.....	546
Milten v. Fandrye, Pop. 161....(1006)	
Miltmore v. Chicago &c. R. Co., 37 Wis. 190.....	307
Milton v. Denver &c. R. Co., 1 Colo. App. 307.....	244
Milton v. Hudson River Steamboat Co., 37 N. Y. 210.....	665, 1244
Milwaukee &c. R. Co. v. Hunter, 11 Wis. 160....(761)	
Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469.....	1259, 1268
Milwood v. Dekalb County, 106 Ga. 743.....	1982
Mims v. Mims, 35 Ala. 23....(82)	
Miner v. Railroad Co., 153 Mass. 398.....	1545
Miner v. Taggart, 3 Binney, 205.....	1304
Minick v. Troy, 83 N. Y. 514.....	665, 724, 2019
Minkley v. Springwells Twp., 113 Mich. 347.....	1837
Minneapolis Sash &c. Co. v. Metropolitan Bank, 76 Minn. 136.....	40
Minner v. Sedalia &c. R. Co., 167 Mo. 99.....	1572, 1591
Minnesota Butter &c. Co. v. St. Paul Cold Storage &c. Co., 75 Minn. 445.....	134
Minor v. R. Co., 19 Wis. 40.....	620

# TABLE OF CASES.

ccv

	PAGE
<i>Minor v. Clark</i> , (Sup. Ct.) 28 N. Y. S. R. 184.....	1073
<i>Minor v. Lehigh Valley R. Co.</i> , 21 App. Div. 307.....	439
<i>Minor v. Sharon</i> , 112 Mass. 477.....	1328
<i>Minor v. Staples</i> , 71 Me. 316.....	141
<i>Winter v. Chicago &amp;c. R. Co.</i> , 82 Mo. App. 130.....	214, 226
<i>Mintzer v. Hogg</i> , 192 Pa. St. 137.....	2237, 2261
<i>Miotke v. Milwaukee &amp;c. Ins. Co.</i> , 113 Mich. 166.....	1312
<i>Miriam v. Hartford &amp; New Haven R. Co.</i> , 20 Conn. 354....	(208)
<i>Mischke v. Seattle</i> , 26 Wash. 61.....	1925
<i>Miscano v. New York</i> , 160 N. Y. 123.....	1992, 1998, 2022
<i>Mississinewa Co. v. Patton</i> , 129 Ind. 472....	(1382)
<i>Mississippi Logging Co.</i> , 74 Fed. Rep. 195.....	1411, 1494
<i>Mississippi &amp;c. R. C. v. Harrison</i> , Miss. 419.....	473
<i>Missouri Furnace Co. v. Abend</i> , 107 Ill. 44.....	1572, 1583
<i>Missouri Lumberman's Mut. Ins. Co. v. Kansas City &amp;c. R. Co.</i> , 149 Mo. 165	(1255)
<i>Missouri &amp; I. Coal Co. v. Schwalb</i> , 74 Ill. App. 567.....	1783
<i>Missouri &amp;c. R. Co. v. Baker</i> , (Tex. Civ. App.) 37 S. W. Rep. 94.....	1441
<i>Missouri &amp;c. R. Co. v. Baker</i> , (Tex. Civ. App.) 58 S. W. Rep. 964.....	1675
<i>Missouri &amp;c. R. Co. v. Bartlett</i> , 69 Tex. 79....	(1263)
<i>Missouri &amp;c. R. Co. v. Beiley</i> , (Tex. Civ. App.) 68 S. W. Rep. 803.....	1679
<i>Missouri &amp;c. R. Co. v. Belcher</i> , 88 Tex. 549.....	227
<i>Missouri &amp;c. R. Co. v. Belcher</i> , 89 Tex. 428.....	826
<i>Missouri &amp;c. R. Co. v. Belcher</i> , (Tex. Civ. App.) 41 S. W. Rep. 706.....	228
<i>Missouri &amp;c. R. Co. v. Bellew</i> , 22 Tex. Civ. App. 264.....	796, 814, 861, 2343
<i>Missouri &amp;c. R. Co. v. Bellows</i> , (Tex. Civ. App.) 39 S. W. Rep. 1000.....	1049
<i>Missouri &amp;c. R. Co. v. Bennett</i> , 5 Kan. App. 231.....	857, 1374
<i>Missouri &amp;c. R. Co. v. Bishop</i> , (Tex. Civ. App.) 34 S. W. Rep. 323.....	2091
<i>Missouri &amp;c. R. Co. v. Bradshaw</i> , 33 Kan. 533....	(1042)
<i>Missouri &amp;c. R. Co. v. Brown</i> , (Tex. Civ. App.) 39 S. W. Rep. 326.....	503, 548
<i>Missouri &amp;c. R. Co. v. Bryne</i> , (Ind. Terr.) 49 S. W. Rep. 41.....	224
<i>Missouri &amp;c. R. Co. v. Byrne</i> , 100 Fed. Rep. 359.....	229, 685
<i>Missouri &amp;c. R. Co. v. Cardena</i> , 22 Tex. Civ. App. 300.....	777, 2155, 2158
<i>Missouri &amp;c. R. Co. v. Carter</i> , (Tex.) 68 S. W. Rep. 159.....	1252
<i>Missouri &amp;c. R. Co. v. Clark</i> , 6 Kan. App. 922....	(740)
<i>Missouri &amp;c. R. Co. v. Cloninger</i> , (Tex. Civ. App.) 42 S. W. Rep. 632....	(739)
<i>Missouri &amp;c. R. Co. v. Chambers</i> , 17 Tex. Civ. App. 487....	921, 1478, 1679, 1687
<i>Missouri &amp;c. R. Co. v. Chenault</i> , (Tex. Civ. App.) 60 S. W. Rep. 55.....	1049
<i>Missouri &amp;c. R. Co. v. Chick</i> , 6 Kan. App. 480.....	2161, 2342
<i>Missouri &amp;c. R. Co. v. Chittim</i> , 24 Tex. Civ. App. 599.....	229
<i>Missouri &amp;c. R. Co. v. Cobb</i> , 36 Tex. Civ. App. 500....	(824)
<i>Missouri &amp;c. R. Co. v. Collins</i> , 15 Tex. Civ. App. 21.....	1616
<i>Missouri &amp;c. R. Co. v. Columbia</i> , (Kan.) 69 Pac. Rep. 338.....	676
<i>Missouri &amp;c. R. Co. v. Connelly</i> , 14 Tex. Civ. App. 529.....	819
<i>Missouri &amp;c. R. Co. v. Cook</i> , 12 Tex. Civ. App. 203.....	265, 404, 918
<i>Missouri &amp;c. R. Co. v. Cooper</i> , 57 Kan. 185.....	771
<i>Missouri &amp;c. R. Co. v. Cornell</i> , 30 Kan. 35.....	1263
<i>Missouri &amp;c. R. Co. v. Cornwall</i> , 70 Tex. 611.....	254
<i>Missouri &amp;c. R. Co. v. Cox</i> , (Tex. Civ. App.) 55 S. W. Rep. 354.....	855
<i>Missouri &amp;c. R. Co. v. Crane</i> , 13 Tex. Civ. App. 426.....	1124, 1591
<i>Missouri &amp;c. R. Co. v. Crowder</i> , (Tex. Civ. App.) 55 S. W. Rep. 380.....	1108
<i>Missouri &amp;c. R. Co. v. Darlington</i> , (Tex. Civ. App.) 40 S. W. Rep. 550....	289
<i>Missouri &amp;c. R. Co. v. Davidson</i> , (Tex. Civ. App.) 60 S. W. Rep. 278.....	233
<i>Missouri &amp;c. R. Co. v. Dill</i> , (Tex. Civ. App.) 40 S. W. Rep. 347.....	412
<i>Missouri &amp;c. R. Co. v. Dobbins</i> , (Tex. Civ. App.) 40 S. W. Rep. 861.....	2134
<i>Missouri &amp;c. R. Co. v. Durlin</i> , (Tex. Civ. App.) 50 S. W. Rep. 1034.....	1587
<i>Missouri &amp;c. R. Co. v. Dwyer</i> , 36 Kan. 58.....	930, 1615
<i>Missouri &amp;c. R. Co. v. Edwards</i> , 78 Tex. 307....	(823)
<i>Missouri &amp;c. R. Co. v. Edwards</i> , 90 Tex. 65.....	2135
<i>Missouri &amp;c. R. Co. v. Elliot</i> , (I. T.) 51 S. W. Rep. 1067.....	1374, 1610
<i>Missouri &amp;c. R. Co. v. Elliot</i> , 102 Fed. Rep. 96.....	842, 951, 1658
<i>Missouri &amp;c. R. Co. v. Evans</i> , 16 Tex. Civ. App. 68.....	1506, 1753
<i>Missouri &amp;c. R. Co. v. Eyer</i> , (Tex. Civ. App.) 69 S. W. Rep. 453.....	885
<i>Missouri &amp;c. R. Co. v. Faber</i> , 7 Kan. App. 481.....	1683



	PAGE
Missouri &c. R. Co. v. Fagan, 72 Tex. 127.....	306
Missouri &c. R. Co. v. Farrington, (Ind. Terr.) 43 S. W. Rep. 946.....	1020
Missouri &c. R. Co. v. Felts, (Tex. Civ. App.) 50 S. W. Rep. 1031.....	1592
Missouri &c. R. Co. v. Ferch, 18 Tex. Civ. App. 46.....	1400, 1633
Missouri &c. R. Co. v. Ferris, 23 Tex. Civ. App. 215.....	926
Missouri &c. R. Co. v. Finch, 18 Tex. Civ. App. 46.....	1673
Missouri &c. R. Co. v. Follin, (Tex. Civ. App.) 68 S. W. Rep. 810.....	1719
Missouri &c. R. Co. v. Foreman, (Tex. Civ. App.) 46 S. W. Rep. 834.....	477, 1094
Missouri &c. R. Co. v. Fowler, 61 Kan. 320.....	851, 1730
Missouri &c. R. Co. v. Fox, 56 Neb. 746... (659).....	1236
Missouri &c. R. Co. v. Fox, 60 Neb. 531.....	668, 1217
Missouri &c. R. Co. v. Gedney, 44 Kan. 329... (1027)	
Missouri &c. R. Co. v. Geist, 49 Neb. 489... (785)	
Missouri &c. R. Co. v. Gill, 49 Kan. 441... (1031)	
Missouri &c. R. Co. v. Gilmore, (Tex. Civ. App.) 53 S. W. Rep. 61.....	926
Missouri &c. R. Co. v. Goodholm, 61 Kan. 758.....	2205, 2208
Missouri &c. R. Co. v. Gordon, 11 Tex. Civ. App. 672.....	1683
Missouri &c. R. Co. v. Haber, 56 Kan. 694.....	2029
Missouri &c. R. Co. v. Hall, 87 Fed. Rep. 170.....	1223
Missouri &c. R. Co. v. Halton, (Tex.) 65 S. W. Rep. 625.....	2142
Missouri &c. R. Co. v. Hanacek, 93 Tex. 446.....	1044
Missouri &c. R. Co. v. Hanacik, 23 Tex. Civ. App. 394.....	1049
Missouri &c. B. Co. v. Haning, 20 Tex. Civ. App. 649.....	1673
Missouri &c. R. Co. v. Hannig, 91 Tex. 347.....	1075
Missouri &c. R. Co. v. Hannig, 20 Tex. Civ. App. 649.....	852
Missouri &c. R. Co. v. Hansen, 48 Neb. 232.....	2154
Missouri &c. R. Co. v. Hauer, (Tex. Civ. App.) 33 S. W. Rep. 1010.....	910, 1588
Missouri &c. R. Co. v. Hauer, (Tex. Civ. App.) 43 S. W. Rep. 1078.....	
.....	910, 1430, 1687
Missouri &c. R. Co. v. Hay, (Tex. Civ. App.) 67 S. W. Rep. 171.....	458
Missouri &c. R. Co. v. Haynes, 1 Kan. App. 586... (888)	
Missouri &c. R. Co. v. Heidenheimer, 82 Tex. 195.....	235
Missouri &c. R. Co. v. Hemmingway, Neb. 610.....	1369, 2090
Missouri &c. R. Co. v. Hennessey, 20 Tex. Civ. App. 316.....	578
Missouri &c. R. Co. v. Henry, 75 Tex. 220.....	881
Missouri &c. R. Co. v. Hines, (Tex. Civ. App.) 40 S. W. Rep. 152.....	844, 1614
Missouri &c. R. Co. v. Holman, 15 Tex. Civ. App. 18.....	847, 2162, 2167
Missouri &c. R. Co. v. Holwerson, 157 Mo. 216... (659)	
Missouri &c. R. Co. v. Houston, 10 Kan. App. 356... (345)	
Missouri &c. R. Co. v. Huff, (Tex. Civ. App.) 32 S. W. Rep. 551.....	919
Missouri &c. R. Co. v. Jahn, 18 Tex. Civ. App. 74.....	404, 466
Missouri &c. R. Co. v. Johnson, 72 Tex. 95.....	411, 905, 2089
Missouri &c. R. Co. v. Johnson, 92 Tex. 380.....	1127
Missouri &c. R. Co. v. Johnson, (Tex. Civ. App.) 37 S. W. Rep. 771.....	913
Missouri &c. R. Co. v. Johnson, (Tex. Civ. App.) 39 S. W. Rep. 323.....	1119
Missouri &c. R. Co. v. Johnson, (Tex. Civ. App.) 49 S. W. Rep. 265.....	1124
Missouri &c. R. Co. v. Johnson, (Tex. Civ. App.) 67 S. W. Rep. 769.....	
.....	669, 1178, 1630
Missouri &c. R. Co. v. Jones, 13 Tex. Civ. App. 376.....	740
Missouri &c. R. Co. v. Kincaid, 11 Am. & Eng. R. Cas. 83.....	1258
Missouri &c. R. Co. v. Kirkland, 11 Tex. Civ. App. 528.....	911, 1434, 2044
Missouri &c. R. Co. v. Levy & Co., 23 Tex. Civ. App. 686.....	1373
Missouri &c. R. Co. v. Liebold, (Tex. Civ. App.) 55 S. W. Rep. 368.....	215, 224
Missouri &c. R. Co. v. Liveright, 7 Kan. App. 772.....	614
Missouri &c. R. Co. v. Lyons, 54 Neb. 633.....	667, 1596, 1645
Missouri &c. R. Co. v. McElree, 16 Tex. Civ. App. 182.....	464
Missouri &c. R. Co. v. McFadden, 89 Fed. 138.....	307
Missouri &c. R. Co. v. McGlamory, 89 Tex. 635.....	1688
Missouri &c. R. Co. v. McGrath, 7 Kan. App. 710... (1013)	
Missouri &c. R. Co. v. Magee, (Tex. Civ. App.) 49 S. W. Rep. 928.....	1239
Missouri &c. R. Co. v. Mazzie, (Tex. Civ. App.) 68 S. W. 56.....	354
Missouri &c. R. Co. v. Magee, 92 Tex. 616.....	661, 788, 808
Missouri &c. R. Co. v. Mayfield, (Tex. Civ. App.) 68 S. W. Rep. 807.....	1734

# TABLE OF CASES.

ccvii

	PAGE
Missouri &c. R. Co. v. Medaris, 60 Kan. 151.....	1798
Missouri &c. R. Co. v. Meithvein, (Tex. Civ. App.) 33 S. W. Rep. 1093....	(1014)
Missouri &c. R. Co. v. Miles, 20 Tex. Civ. App. 570.....	578
Missouri &c. R. Co. v. Miller, 15 Tex. Civ. App. 428.....	430, 444, 465
Missouri &c. R. Co. v. Mills, (Tex. Civ. App.) 65 S. W. Rep. 74.....	350
Missouri &c. R. Co. v. Meyers, (Tex. Civ. App.) 35 S. W. Rep. 421.....	487
Missouri &c. R. Co. v. Moffat, 56 Kan. 667.... (784).....	796
Missouri &c. R. Co. v. Moffat, 60 Kan. 113.....	873, 1371
Missouri &c. R. Co. v. Moore, (Tex. Civ. App.) 59 S. W. Rep. 282.....	1157
Missouri &c. R. Co. v. Murphy, (Kan.) 52 Pac. Rep. 863.....	1477
Missouri &c. R. Co. v. Nail, 24 Tex. Civ. App. 114.....	919
Missouri &c. R. Co. v. Nordell, 20 Tex. Civ. App. 362.....	677, 1127, 1573
Missouri &c. R. Co. v. O'Connell, (Tex. Civ. App.) 43 S. W. Rep. 66.....	787
Missouri &c. R. Co. v. Overfield, 19 Tex. Civ. App. 440.....	387
Missouri &c. R. Co. v. Parker, 20 Tex. Civ. App. 470.....	914
Missouri &c. R. Co. v. Pawkett, (Tex. Civ. App.) 68 S. W. Rep. 323.....	1719
Missouri &c. R. Co. v. Pfrang, 7 Kan. App. 1.....	1038, 1042
Missouri &c. R. Co. v. Pierce, 33 Kan. 61.....	785
Missouri &c. R. Co. v. Preston, (Kan.) 63 Pac. Rep. 444.....	1094
Missouri &c. R. Co. v. Prewitt, 59 Kan. 734.....	2153
Missouri &c. R. Co. v. Rains, (Tex. Civ. App.) 40 S. W. Rep. 635.. (939) ..	1672
Missouri &c. R. Co. v. Ransom, 15 Tex. Civ. App. 689.....	743, 926
Missouri &c. R. Co. v. Reasor, (Tex. Civ. App.) 68 S. W. Rep. 332....	861, 1396
Missouri &c. R. Co. v. Riggs, 10 Kan. App. 578.....	331
Missouri &c. R. Co. v. Roads, 33 Kan. 640.... (1040).....	1042, 1043
Missouri &c. R. Co. v. Roberts, (Tex. Civ. App.) 46 S. W. Rep. 270.....	1734
Missouri &c. R. Co. v. Rodgers, 89 Tex. 680.... (707).....	1196
Missouri &c. R. Co. v. Rodgers, (Tex. Civ. App.) 39 S. W. Rep. 383.....	382
Missouri &c. R. Co. v. Rogers, 91 Tex. 52.... (731).....	689, 738
Missouri &c. R. Co. v. Rogers, (Tex. Civ. App.) 39 S. W. Rep. 383.....	870
Missouri &c. R. Co. v. Russell, (Tex. Civ. App.) 43 S. W. Rep. 576.. (1013) ..	1014
Missouri &c. R. Co. v. Scarsborough, (Tex. Civ. App.) 51 S. W. Rep. 356..	(400)
Missouri &c. R. Co. v. Scarsborough, (Tex. Civ. App.) 68 S. W. Rep. 196..	841, 1108
Missouri &c. R. Co. v. Schwalb, 77 Ill. App. 593.....	1783
Missouri &c. R. Co. v. Settle, 19 Tex. Civ. App. 357.....	856, 865
Missouri &c. R. Co. v. Simmons, 12 Tex. Civ. App. 500.....	371
Missouri &c. R. Co. v. Simonson, (Kan.) 68 Pac. Rep. 653.....	316
Missouri &c. R. Co. v. St. Clair, 21 Tex. Civ. App. 345.....	840
Missouri &c. R. Co. v. Sparks, (Tex. Civ. App.) 35 S. W. Rep. 745.....	1254
Missouri &c. R. Co. v. Witherspoon, 18 Tex. Civ. App. 615.... (824)	
Missouri &c. R. Co. v. Texas &c. R. Co., 30 Fed. Rep. 167.... (95)	
Missouri &c. R. Co. v. Texas &c. R. Co., (La.) 31 Fed. Rep. 526.....	1259
Missouri &c. R. Co. v. Texas &c. R. Co., 41 Fed. Rep. 316.... (730)	
Missouri &c. R. Co. v. Tietken, 49 Neb. 130.....	264, 404, 476
Missouri &c. R. Co. v. Spellman, (Tex. Civ. App.) 34 S. W. Rep. 298.....	1594
Missouri &c. R. Co. v. St. Clair, 21 Tex. Civ. App. 345.....	1207
Missouri &c. R. Co. v. Steinberger, 6 Kan. App. 585.....	1263
Missouri &c. R. Co. v. Thompson, 11 Tex. Civ. App. 658.....	1430, 1690
Missouri &c. R. Co. v. Sherman, (Tex. Civ. App.) 53 S. W. Rep. 386.....	1217
Missouri &c. R. Co. v. Tonahill, 16 Tex. Civ. App. 625.....	382, 871, 2158
Missouri &c. R. Co. v. Truskett, (Ind. Terr.) 53 S. W. Rep. 444.... (824)	
Missouri &c. R. Co. v. Turley, (Ind. T.) 37 S. W. Rep. 52.....	923
Missouri &c. R. Co. v. Truskett, 104 Fed. Rep. 728.....	216, 1223
Missouri &c. R. Co. v. Tipton, 61 Neb. 49.... (888)	
Missouri &c. R. Co. v. Turley, 85 Fed. Rep. 369.....	430
Missouri &c. R. Co. v. Twiss, 35 Neb. 267.... (349).....	341
Missouri &c. R. Co. v. Vance, (Tex. Civ. App.) 41 S. W. Rep. 167....	
Missouri &c. R. Co. v. Walden, (Tex. Civ. App.) 46 S. W. Rep. 87.....	1157, 1163, 2050
Missouri &c. R. Co. v. Walker, 26 S. W. (Tex.) 513.....	565
Missouri &c. R. Co. v. Warner, 19 Tex. Civ. App. 463.....	1470
Missouri &c. R. Co. v. Warren, 90 Tex. 566.... (855)	14
Missouri &c. R. Co. v. Webb, 20 Tex. Civ. App. 431.... (826)	

	PAGE
Missouri &c. R. Co. v. Weil, 8 Kan. App. 839.....	317
Missouri &c. R. Co. v. Wells, 22 Tex. Civ. App. 255.....	223
Missouri &c. R. Co. v. Wells, 24 Tex. Civ. App. 304.....	215, 227
Missouri &c. R. Co. v. Whitaker, 11 Tex. Civ. App. 668.....	1799
Missouri &c. R. Co. v. White, 76 Texas, 102.....	1409
Missouri &c. R. Co. v. White, 22 Tex. Civ. App. 424.....	413, 445, 841
Missouri &c. R. Co. v. Whitlock, 16 Tex. Civ. App. 176.....	1800
Missouri &c. R. Co. v. Williams, 91 Tex. 255.....	371
Missouri &c. R. Co. v. Willis, 17 Tex. Civ. App. 228.... (1023).....	1033, 1055
Missouri &c. R. Co. v. Wilson, 28 Kan. 455.... (1013, 1022).....	1017
Missouri &c. R. Co. v. Wood, (Tex. Civ. App.) 35 S. W. Rep. 879.....	1544, 1549, 1756
Missouri &c. R. Co. v. Wright, 19 Tex. Civ. App. 47.....	1217
Missouri &c. R. Co. v. Young, 4 Kan. App. 219.....	1480, 1674
Missouri &c. R. Co. v. Zwiener, (Tex. Civ. App.) 38 S. W. Rep. 375....	1156, 1179
Mitchell v. N. Y. C. & H. R. R. Co., 64 N. Y. 655.....	745
Mitchell v. N. Y. &c. R. Co., 146 U. S. 513.....	2160
Mitchell v. Allen & Porter, 25 Hun, 543.....	2203
Mitchell v. Boston &c. R. Co., 68 N. H. 96.....	1123, 2148, 2161
Mitchell v. Broadway & Seventh Ave. R. Co., 70 Hun, 387.....	915
Mitchell v. Champaign County, 9 Oh. S. & C. P. Doc. 821.....	1911
Mitchell v. Carolina C. R. Co., 124 N. C. 236.... (1112)	
Mitchell v. Chase, 87 Me. 172.....	994
Mitchell v. Culver, 7 Cowen, 336.... (175)	
Mitchell v. Hindman, 47 Ill. App. 431.....	2195
Mitchell v. Holman, 30 Or. 280.....	629
Mitchell v. Mississippi &c. Ins. Co., 72 Miss. 53.....	1314
Mitchell v. Nashville &c. R. Co., 100 Tenn. 329.....	793
Mitchell v. Northern P. R. Co., 70 Fed. Rep. 15.....	1809
Mitchell v. Prang, 110 Mich. 78.....	2073
Mitchell v. Railway Co., 4 Misc. 575.....	2229
Mitchell v. Raleigh E. Co., 129 N. C. 166.....	1064
Mitchell v. Rochester, 151 N. Y. 107.....	866
Mitchell v. Rockland, 52 Me. 123.....	1960, 2001
Mitchell v. Stewart, 187 Pa. St. 217.....	1330
Mitchell v. Southern R. Co., 77 Miss. 917.....	572
Mitchell v. Tacoma R. &c. Co., 13 Wash. 560.....	1230, 2299
Mitchell v. Weir, 19 App. Div. 183.....	212
Mitchell v. Weir, 19 Misc. 530.....	824
Mitchell v. Western Union Teleg. Co., (Tex. Civ. App.) 56 S. W. Rep. 439..	2391, 2417, 2424, 2460
Mitchell Trauter Co. v. Emmett, (Ky.) 65 S. W. Rep. 835.....	1396
Mith v. St. Louis &c. R. Co., 87 Mo. App. 422.....	404
Mittelstadt v. Morrison, 76 Wis. 265.....	2359
Mixsell v. New York &c. R. Co., 22 Misc. 73.....	761
Mizell v. McGowan, 129 N. C. 93.....	2084
Mobile R. Co. v. Ashcroft, 48 Ala. 15.....	687, 1131
Mobile R. Co. v. Williams, 53 Ala. 595.... (1015)	
Mobile &c. R. Co. v. Bogle, 101 Tenn. 40.....	517
Mobile &c. R. Co. v. Coever, 112 Fed. Rep. 489.... (752)	
Mobile &c. R. Co. v. Dale, 61 Miss. 206.....	1165
Mobile &c. R. Co. v. Holliday, 79 Miss. 294.....	1021
Mobile &c. R. Co. v. Hopkins, 41 Ala. 486.....	243
Mobile &c. R. Co. v. House, 96 Tenn. 552.....	786, 2149
Mobile &c. R. Co. v. Jurey, 111 U. S. 584.... (940)	
Mobile &c. R. Co. v. Kinsborough, 96 Ala. 127.... (1019)	
Mobile &c. R. Co. v. Klein, 43 Ill. App. 63.....	687
Mobile &c. R. Co. v. McArthur, 43 Miss. 180.....	576
Mobile &c. R. Co. v. Roberts, (Miss.) 23 South. Rep. 393.....	2169
Mobile &c. R. Co. v. Smith, 59 Ala. 245.....	1488, 1619, 1664
Mobile &c. R. Co. v. Stinson, 74 Miss. 453.....	1156, 1246, 1262
Mobile &c. R. Co. v. Stroud, 64 Miss. 784.....	2142
Mobile &c. R. Co. v. Thomas, 42 Ala. 672.....	1488, 1619



## TABLE OF CASES.

ccix

	PAGE
Mobile &c. R. Co. v. Thompson, 101 Tenn. 197.....	1005, 1022
Mobile &c. R. Co. v. Tiernan, 102 Tenn. 704.....	1035, 1038, 1057
Mobile &c. R. Co. v. Watley, 69 Misc. 145.....	880
Mobile &c. R. Co. v. Weems, 74 Miss. 513.... (1023)	
Mobile &c. R. Co. v. Whayne, (Ky.) 64 S. W. Rep. 723.....	1021
Mobile &c. R. Co. v. Wilson, 76 Fed. Rep. 127.... (809)	
Moebus v. Becker, 46 N. J. L. 41.....	1290
Moebus v. Herrman, 108 N. Y. 349.....	2228, 2230, 2292, 2343, 2368, 2370
Moeller v. Brewster, 131 N. Y. 606.....	694
Moeller v. Brewster, 57 Hun, 554.....	1697
Moeller v. Delaware &c. R. Co., 55 App. Div. 636.....	1727
Moenner v. Carroll, 46 Md. 212.... (815)	
McGean v. New York Poultry &c. Ass'n, 28 Misc. 537.....	116
Moffatt v. Kenney, 174 Mass. 311.....	2112
Moffatt v. Loughbridge, 51 Miss. 211.....	51
Moffet v. Koch, 106 La. 371.....	1585
Moffett &c. Co. v. Rochester, 91 Fed. Rep. 28.....	629
Mogk v. Chicago City R. Co., 80 Ill. App. 411.....	31
Mohawk Bk. v. Broderick, 13 Wend. 133.... (35)	
Mohr v. Byrne, 135 Cal. 99.....	192
Mohr v. McKenzie, 60 Ill. App. 575.....	647
Mohr v. Wetherill, 33 Misc. 791.... (673)	917
Moling v. Barnard, 65 Mo. App. 600.....	93, 1336
Molloy v. New York &c. R. Co., 10 Daly, 453.....	28
Molynaux v. Southwest Missouri Electric Ry Co., 81 Mo. App. 25.....	2289
Momence v. Kendall, 14 Ill. App. 229.....	699
Momence Stone Co. v. Groves, 197 Ill. 88.....	1159
Monaghan v. N. Y. C. &c. Co., 45 Hun, 113.....	693
Monahan v. R. Co., 45 Iowa, 523.... (1025)	
Monahan v. Worcester, 150 Mass. 439.....	1519
Monell v. N. C. R. R. Co., 16 Hun, 585.....	312
Monell v. Monell, 5 Johns. Ch. 296.... (63)	62, 66
Monforton v. Detroit Pressed Brick Co., 113 Mich. 39.....	1752
Monje v. Grand Rapids, (Mich.) 81 N. W. Rep. 574.....	1920, 1954
Monk v. Utrecht, 104 N. Y. 552.....	1811, 1850, 2220
Monmouth &c. Man. Co. v. Erling, 148 Ill. 521.....	1470, 1478
Monnier v. New York &c. R. Co., 70 App. Div. 405.....	591
Monongahela Bridge Co. v. Bevard, 10 Cent. (Pa.) 415.....	698
Monroe v. Cannon, 24 Mont. 316.....	1005
Monroe v. Carlisle, 176 Mass. 199.....	1333
Monroe v. Latten, 25 Kan. 354.... (828)	
Monroe v. Pac. &c. Co., 84 Cal. 515.....	2073
Monroe v. Rose, 38 Mich. 347.... (883)	
Monroe v. The Iowa, 50 Fed. Rep. 561.... (244)	
Montague v. Chicago &c. R. Co., 82 Fed. Rep. 787.....	2168
Montague v. Minneapolis &c. R. Co., 96 Wis. 633.....	1249
Montana Co. v. Gebrung, 75 Fed. Rep. 384.....	2097
Montford v. Americus Guano Co., 108 Ga. 12.....	1083
Montgomery v. Bloomingdale, 34 App. Div. 375.....	1461
Montgomery v. Buffalo R. Co., 165 N. Y. 139.....	579
Montgomery v. Furness, 56 Fed. Rep. 268.....	229
Montgomery v. Johnson, (Ky.) 58 S. W. Rep. 476.....	2289
Montgomery v. Ladjing, 30 Misc. Rep. 92.....	99
Montgomery v. Locke, 72 Cal. 75.....	887
Montgomery v. Sartirano, 16 App. Div. 95.....	27
Montgomery v. Wright, 72 Ala. 411.....	697, 737
Montgomery County v. Coffenberry, 14 Ind. App. 701.....	1830
Montgomery Street R. Co. v. Mason, (Ala.) 32 South. Rep. 261.....	439, 859
Montgomery &c. R. Co. v. Boring, 51 Ga. 582.... (441)	
Mouzi v. Friedline, 33 App. Div. 217.....	1749
Mozy v. First Nat. Bank, 19 Tex. Civ. App. 278.....	167
Moody v. Minneapolis &c. R. Co., 77 Iowa, 29.... (1040)	
Moody v. Osgood, 54 N. Y. 488.....	848, 2230, 2369

	PAGE
Moody v. Saratoga Springs, 163 N. Y. 581.....	1906, 1963
Moody v. Smith, 64 Minn. 524.....	1721
Moody v. Sabin, 9 Cush. 505.....	1176
Moody v. Ward, 13 Mass. 299.....	1298
Mooers v. Larry, 15 Gray, 451.... (113)	
Mooers v. Northern &c. R. Co., 69 Minn. 90.....	1018
Mooers v. Northern &c. R. Co., 80 Minn. 24.....	1049
Moon v. N. P. R. Co., 48 N. W. (Minn.) 679.....	1764
Moon v. Burlington &c. R. Co., 72 Iowa, 75.... (1029)	
Moon v. Middletown, 14 Oh. C. C. 498.....	1877, 1920
Moon v. Northern P. R. Co., 46 Minn. 106.....	1764
Moon v. Railroad Co., 78 Va. 745.....	1665
Moon v. Towers, 8 C. B. N. S. 611.....	2025
Moon &c. Mines v. Hopkins, 111 Fed. Rep. 298.....	1585
Mooney v. Beattie, 180 Mass. 451.....	1477
Mooney v. Glens Falls Ins. Co., 4 Pa. Dist. 639.....	1313
Mooney v. Luzerne, 186 Pa. St. 161.....	1066
Mooney v. St. Marks, 15 Oh. C. C. 446.....	1831
Moore v. N. Y. C. & H. R. R. Co., 75 Hun, 381.....	1165
Moore v. N. Y. C. &c. R. Co., 2 Misc. 23.....	809
Moore v. Abbott, 32 Me. 461.... (799)	
Moore v. Chicago &c. R. Co., 102 Iowa, 595.....	758
Moore v. Columbia &c. R. Co., 38 S. C. 1.....	552
Moore v. Copp, 119 Cal. 429.....	627
Moore v. Development Co., 87 Ala. 483.... (140)	
Moore v. Edison Electric Light Co., 43 La. Ann. 792.....	2246, 2301
Moore v. Evans, 14 Barb. 524.... (310)	
Moore v. Gadsden, 87 N. Y. 84.....	1890, 2079
Moore v. Gadsden, 93 N. Y. 12.....	1317, 2079, 2228, 2232
Moore v. Goedel &c., 34 N. Y. 527.....	1359
Moore v. Great Northern R. Co., 67 Minn. 394.....	1442
Moore v. Hazelton, 118 Mich. 425.....	1833, 1836
Moore v. Jones, 15 Tex. Civ. App. 391.....	1108, 1800
Moore v. Kansas City &c. R. Co., 146 Mo. 572.....	1707
Moore v. Korte, 77 Mo. App. 500.....	2128
Moore v. Logan & Steel Co., 4 Cent. (Pa.) 505.....	2109
Moore v. McNeill, 35 App. Div. 323.....	1664
Moore v. Missouri &c. R. Co., 18 Tex. Civ. App. 561.....	358
Moore v. New York &c. R. Co., 173 Mass. 335.....	1100
Moore v. Oceanic &c. Co., 24 Fed. Rep. 237.....	1333
Moore v. Ohio River R. Co., 41 W. Va. 160.....	594
Moore v. Penn. R. Co., 99 Pa. St. 301.....	2342
Moore v. Railroad Co., 4 Gray, 465.... (527)	
Moore v. Railroad Co., 85 Mo. 588.....	1645
Moore v. Saginaw &c. R. Co., 115 Mich. 103.....	403, 1206
Moore v. Saginaw &c. R. Co., 119 Mich. 613.....	453, 465
Moore v. Steljes, 69 Fed. Rep. 518.....	1344
Moore v. Townsend, 76 Minn. 64.....	2247
Moore v. Western U. T. Co., 87 Ga. 613.....	2437
Moore v. Westervelt, 21 N. Y. 103.....	81
Moore v. Westervelt, 27 N. Y. 234.....	81
Moore v. Wilmington &c. R. Co., 124 N. C. 338.....	1251
Moore Lime Co. v. Richardson, 95 Va. 326.....	1585, 1668
Moorehead v. Gilmore, 77 Pa. St. 118.... (183)	
Moors Estate, 15 Lanc. L. Rev. 28.....	51
Mo. Pac. R. Co. v. Kincaid, 29 Kan. 654.....	1258
Mo. Pac. R. Co. v. Kirk, 90 Pa. St. 15.....	1219
Mo. &c. R. Co. v. Bond, 2 Tex. Civ. App. 104.....	1611
Mo. &c. R. Co. v. Herbert, 116 U. S. 642.....	1466
Mo. &c. R. Co. v. Lewis, 24 Neb. 848.....	1435
Mo. &c. R. Co. v. Mitchell, 75 Tex. 77.....	864
Mo. &c. R. Co. v. Peregoy, 36 Kan. 424.... (778)	
Mo. &c. R. Co. v. Williams, 75 Tex. 4.....	1645

## TABLE OF CASES.

ccxi

	PAGE
Moran v. Corliss Steam Engine Co., 21 R. I. 386.....	1462, 1633
Moran v. McClearn, 63 Barb. 185.....	1966
Moran v. Pullman Palace Car Co., 134 Mo. 641.....	1986, 2137
Moran v. Versailles T. Co., 188 Pa. St. 557.....	684
Morange v. Mix, 44 N. Y. 315.....	77
Moratzky v. Wirth, 67 Minn. 46.....	2193
Morbey v. Chicago &c. R. Co., 105 Iowa, 46.....	1112, 1704
Morch v. Toledo &c. R. Co., 113 Mich. 154.....	1646
Morehead v. Bitner, (Ky.) 50 S. W. Rep. 857.....	1374
Morehouse v. Mathews, 2 Comst. 514.... (888)	
Morey v. Gloucester R. Co., 171 Mass. 164.....	2302
Morey v. Newfane, 8 Barb. 645.....	2220
Morewood Co. v. Smith, 25 Ind. App. 264.....	1674, 1750
Morford v. Chicago &c. R. Co., (Ind.) 63 N. E. Rep. 837.... (751)	
Morgan v. Crocker, 3 S. C. 301.....	116
Morgan v. Durfee, 64 Mo. 469.....	1181
Morgan v. Hannas, 49 N. Y. 667.... (54)	
Morgan v. Ill. &c. R. Co., 5 Dillon, (U. S.) 96.....	719
Morgan v. Lewiston, 91 Me. 566.....	1863
Morgan v. Ore. & Iron Co., 133 N. Y. 666.....	1523
Morgan v. Penn. R. Co., 19 Blatch, (U. S.) 239.....	2109
Morgan v. Penn Yan, 42 App. Div. 582.....	1933, 1950
Morgan v. Rhinelander, 105 Wis. 138.....	2016
Morgan v. Roberts, 38 Ill. 65.....	2181
Morgan v. St. Louis &c. R. Co., 34 Ark. 613.....	1101
Morgan v. Smith, 159 Mass. 570.....	638
Morgan v. Thompson, 82 Ky. 383.... (948)	
Morgan v. Wabash R. Co., 159 Mo. App. 262.....	2158
Morganton Man. Co. v. Ohio River &c. R. Co., 121 N. C. 514.....	252, 1099
Morgridge v. Providence Teleph. Co., 20 R. I. 386.....	1671
Moriarty v. Albany, 8 App. Div. 118.....	2016
Moriarty v. Central R. Co., 64 Iowa, 696.... (1014)	
Moriarty v. Porter, 22 Misc. 536.....	111, 114
Morier v. St. Paul &c. R. Co., 31 Minn. 35.....	23
Morley v. Buchannon, 124 Mich. 128.....	1965
Morley v. Chicago &c. R. Co., 105 Iowa, 46.... (1091)	
Mormon v. Rochester &c. Co., 53 App. Div. 497.....	18
Morning Star v. Sterne, 124 Ala. 512.....	118
Morrell v. Peck, 88 N. Y. 398.....	1138, 1850
Morrell v. Peck, 24 Hun, 37.....	1141
Morris v. N. Y. C. & H. R. R. Co., 106 N. Y. 678.....	529
Morris v. N. Y., O. & W. R. Co., 73 Hun, 560.....	1187
Morris v. Brown, 111 N. Y. 318.....	635
Morris v. C. B. &c. R. Co., 45 Iowa, 29.....	663, 809, 850
Morris v. Chicago &c. R. Co., 65 Iowa, 727.....	962, 966
Morris v. Construction Co., 44 Wis. 405.... (280)	
Morris v. Eighth Ave. R. Co., 68 Hun, 39.....	929
Morris v. Ellis, (Tenn.) 62 S. W. Rep. 250.....	94
Morris v. Farmers' Mutual Ins. Co., 63 Minn. 420.....	1219
Morris v. Fraker, 5 Col. 425.....	1000, 1007
Morris v. Gleason, 1 Ill. App. 510.....	1556
Morris v. Grand Ave. R. Co., 144 Mo. 500.....	860
Morris v. Lake Shore &c. R. Co., 148 N. Y. 182.....	691, 1116
Morris v. Louisville &c. R. Co., (Ky.) 61 S. W. Rep. 41.....	2152
Morris v. Lowe, 97 Tenn. 243.....	101
Morris v. Metropolitan Street R. Co., 51 App. Div. 512.....	928
Morris v. Metropolitan Street R. Co., 63 App. Div. 78.....	729, 924, 2313
Morris v. New York &c. R. Co., 148 N. Y. 88.....	1193
Morris v. O'Brien, 81 Ill. App. 202.....	1076
Morris v. Pfeffer, 77 Ill. App. 516.....	1738
Morris v. Philadelphia, 195 Pa. St. 372.....	1881
Morris v. Platt, 32 Conn. 75.....	1289, 2185
Morris v. Roodburn, 57 Oh. St. 330.....	2260

	PAGE
Morris v. Saratoga Springs, 55 App. Div. 263.....	1890
Morris v. Strobel & Wilken Company, 81 Hun, 1.....	2265
Morris v. Summerl, 2 Waah. C. C. 202.....	1307
Morris v. Union Nat. Bank, 13 S. D. 329.....	12
Morris v. Walworth Man. Co., (Mass.) 63 N. E. Rep. 910.....	1779
Morris v. Western U. T. Co., 94 Me. 423.....	2436
Morris v. Wier, 20 Misc. 586.....	243
Morris v. Woodburn, 57 Oh. St. 330.....	2237
Morris v. R. Co. v. Ayers, 5 Dutcher, 393.....	1731
Morris Co. v. Southworth, 50 Ill. App. 429.....	1355
Morris &c. R. Co. v. Ayrea, 29 N. J. L. 393..... (545)	
Morris &c. R. Co. v. State, 36 N. J. L. 553.....	1256
Morrisette v. Canadian P. R. Co., (Vt.) 52 Atl. Rep. 520.....	1435, 1777
Morrissey v. Bridgeport T. Co., 68 Conn. 215.....	2326, 2331
Morrison v. N. Y. C. R. Co., 63 N. Y. 643..... (658)	1516
Morrison v. Broadway & Seventh Ave. R. Co., 130 N. Y. 166.....	468
Morrison v. Burgess &c. Co., 70 N. H. 406.....	1413
Morrison v. Charlotte Electric R. &c. Co., 123 N. C. 414.....	475
Morrison v. Davis, 20 Pa. St. 171.....	236
Morrison v. Erie R. Co., 56 N. Y. 302.....	477, 484, 489, 673
Morrison v. Kansas City &c. R. Co., 27 Mo. App. 418.....	1037
Morrison v. Long Island R. Co., 3 App. Div. 205.....	679
Morrison v. Madison, 96 Wis. 452.....	1888
Morrison v. Met. Tel. Co., 69 Hun. 100.....	1072
Morrison v. Mullin, 10 Casey, 17.....	2183
Morrison v. New York Central &c. R. Co., 63 N. Y. 643.....	1110
Morrison v. Syracuse, 45 App. Div. 421.....	1858, 1867
Morrison v. Western Union Teleg. Co., (Tex. Civ. App.) 59 S. W. 1127.....	2459
Morris v. Bowers, 105 Tenn. 59.....	1469
Morrissey v. Eastern R. Co., 126 Mass. 377.....	815, 2110
Morrissey v. Providence & Wor. R. R. Co., 15 R. I. 271..... (814)	
Morrissey v. Smith, 67 App. Div. 189.....	680
Morrissey v. Westchester Electric R. Co., 18 App. Div. 67.....	2322
Morrissey v. Wiggins Ferry Co., 43 Mo. 380..... (766)	
Morrissey v. Wiggins Ferry Co., 47 Mo. 521.....	1570
Morris v. Ferry Co., 47 Mo. 521..... (671)	
Morrow v. St. Paul City R. Co., 71 Minn. 326.....	1520
Morrow v. Western Union Teleg. Co., (Ky.) 54 S. W. Rep. 853.....	2428, 2445
Morse v. N. Y. C. & H. R. R. Co., 39 Hun, 414.....	1427, 1483
Morse v. Brainard, 41 Vt. 550.....	96
Morse v. Conn. R. R. Co., 6 Gray, 450.....	1147
Morse v. Glover, 68 N. H. 119.....	991
Morse v. Indianapolis &c. R. Co., 30 Minn. 465.....	1134
Morse v. Richmond, 41 Vt. 435.....	1915
Morse v. Rutland &c. R. Co., 27 Vt. 49.....	1004, 1043
Morse v. Southern R. Co., 102 Ga. 302.....	554
Morse v. Sweeney, 15 Bradw. 486.....	2344
Morsman v. Rockland, 91 Me. 264.....	1846
Mortland v. Philadelphia & Reading Railroad Company, 81 Hun, 473.....	621
Morton v. Carlin, 51 Neb. 202.....	2002
Morton v. R. Co., 81 Mich. 423.....	1421, 1470, 1473, 1482, 1615
Morton v. Smith, 48 Wis. 265.....	1172
Morton v. Thurber, 85 N. Y. 550.....	634
Morton v. Western &c. Teleg. Co., 130 N. C. 299.....	1374
Morton v. Western Union Teleg. Co., 53 Oh. St. 431.....	2458
Morton v. Zwierzykowski, 192 Ill. 328.....	1447, 1743
Morton v. Zwierzykowski, 91 App. 462.....	1675
Moseley v. Chamberlain, 18 Wis. 700.....	1616
Moser v. St. Paul &c. R. Co., 42 Minn. 480..... (1040)	
Moses v. Boston & Maine R. R. Co., 32 N. H. 523..... (313)	208
Moses v. East Tennessee &c. R. Co., 73 Ga. 356.....	556
Moses v. Newburgh Elec. R. Co., 91 Hun, 278.....	2034
Moses v. Railroad Co., 39 La. Ann. 649..... (384)	

## TABLE OF CASES.

ccxiii

	PAGE
Moses v. Southern Pac. R. Co., 18 Ore. 385.... (1014)	1013, 1055
Moses v. Teetors, (Kan.) 67 Pac. Rep. 526.....	133
Mosey v. City of Troy, Barb. 581.....	695
Mosgrove v. Zimbleman Coal Co., 110 Iowa, 169.....	1155, 1678, 1701, 1784
Moshenval v. District of Columbia, 17 App. D. C. 401.....	1881
Mosher v. Russell, 44 Hun, 12.....	1176
Mosher v. St. Louis &c. R. Co., 127 U. S. 390.....	352, 555
Mosher v. St. Louis &c. R. Co., 23 Fed. R. 326.... (556)	
Mosher v. St. Paul &c. R. Co., 42 Minn. 480.... (1013)	
Moss v. Johnson, 22 Ill. 642.....	1547
Mossoth v. D. & H. C. Co., 64 N. Y. 524.....	745
Mote v. Chicago &c. R. Co., 27 Iowa, 22.... (940)	622
Motes v. Gila Valley &c. R. Co., (Ariz.) 68 Pac. Rep. 532.....	1369
Motley v. Pickle Marble &c. Co., 74 Fed. Rep. 155.....	1148, 1725
Motley & Co. v. Southern Finishing &c. Co., 122 N. C. 347.....	134
Motley & Co. v. Southern Finishing &c. Co., 126 N. C. 339.....	134
Mott v. Consumers' Ice Company, 73 N. Y. 543.....	8, 19, 24
Mott v. Consumers' Water Co., 188 Pa. St. 521.....	2084
Mott v. Detroit &c. R. Co., 120 Mich. 127.....	752, 769, 1178
Moulton v. Aldrich, 28 Kan. 300.....	2363, 2365
Moulton v. Phillips, 10 R. I. 218.....	1322, 1380
Moulton v. St. Paul &c. R. Co., 31 Minn. 85.....	249
Mount v. Brooklyn Union Gas Co., 72 App. Div. 440.....	1132
Mount v. Derick, 5 Hill, 455.....	624
Mt. Adams &c. R. Co. v. Isaacs, 18 Oh. C. C. 177.....	497, 1103, 1123
Mt. Morris v. Kanode, 98 Ill. App. 373.....	1146, 1161, 1828
Mt. Sterling v. Crummy, 73 Ill. App. 572.....	937, 1876
Mount Sterling v. Jephson, (Ky.) 53 S. W. Rep. 1016.....	1962
Mount Vernon v. Dusonchett, 2 Ind. 586.... (699)	
Mount Vernon Co. v. Alabama &c. R. Co., 92 Ala. 296.....	329
Mount Vernon v. Hoehn, 22 Ind. App. 282.....	1945, 2048, 2245
Mowers v. Fethers, 61 N. Y. 34.....	135, 136, 143
Mowery v. Central City R. Co., 51 N. Y. 666.....	457, 709
Mowery v. Western U. T. Co., 51 Hun, 126.....	2398
Moyer v. N. Y. C. & H. R. R. Co., 98 N. Y. 645.....	1211
Moylan v. Second Ave. R. Co., 128 N. Y. 583.....	483
Moynahan v. Wheeler, 117 N. Y. 285.....	1009, 2230, 2359
Moynahan v. Hills Co., 146 Mass. 586.....	1415, 1489, 1661, 1794
Moynihan v. King's Cement &c. Co., 168 Mass. 450.....	1463
Moynihan v. Whidden, 143 Mass. 287.....	2134
Muckle v. Rochester Ry. Co., 79 Hun, 32.....	558, 899
Muddy Valley Min. Co. v. Parrish, 74 Ill. App. 559.....	1207, 1594
Mueller v. Chicago &c. R. Co., 75 Minn. 109.....	573, 936
Mueller v. Schwecht, 62 Ill. App. 622.....	2125
Mueller's Estate, 190 Pa. St. 601.....	67
Muenchow v. Zschetzsche &c. Co., 113 Wis. 8.....	1700
Mugford v. Boston &c. R. Co., 173 Mass. 10.....	420
Muhlhaue v. Monongahela Street R. Co., 201 Pa. St. 237.....	457
Muirhead v. Hannibal &c. R. Co., 103 Mo. 251.....	1515
Mulberger v. Morgan, (Tex. Civ. App.) 47 S. W. Rep. 379.....	195
Mulcahy v. Electric T. Co., 185 Pa. St. 427.....	2296
Mulcairns v. Janesville, 67 Wis. 24.....	926, 1106, 1181
Mulchey v. Methodist &c. Soc., 128 Mass. 487.....	2127
Muldoon v. Seattle City R. Co., 7 Wash. 528.....	268
Muldowney v. Ill. Cent. R. Co., 36 Iowa, 462.... (686)	1553, 1747
Muldowney v. Ill. Cent. R. Co., 39 Iowa, 615.....	1547
Muldowney v. Pittsburg &c. Traction Co., 8 Pa. Super. Ct. 335.....	547
Mulhado v. B. C. R. Co., 30 N. Y. 370.....	467
Mulhall v. Fallon, 176 Mass. 266.....	881, 951
Mulherrin v. D. L. &c. R. Co., 81 Pa. St. 366.... (700)	
Mulholland v. Brownigg, 2 Hawks, (N. C.) 349.... (814)	
Mulholland v. McKeever, 64 App. Div. 617.....	2367
Mullan v. Wisconsin Cent. Co., 48 Minn. 474.....	532

	PAGE
Mullady v. Brooklyn &c. R. Co., 65 App. Div. 549.....	932, 2050
Mullane v. Houston &c. R. Co., 21 Misc. 10.....	1623
Mullaney v. Spence, 15 Abb. N. S. 319.....	2133
Mullen v. Glens Falls, 11 App. Div. 275.....	1914
Mullen v. Lake Drummond Canal &c. Co., 130 N. C. 496.....	2090
Mullen v. St. John, 57 N. Y. 567.....	1098, 1105, 2077
Mullen v. Springfield Street R. Co., 164 Mass. 450.....	2278, 2304
Muller v. Brooklyn &c. R. Co., 18 App. Div. 177.....	706, 711, 2293
Muller v. McKesson, 73 N. Y. 185.....	980, 986, 987
Muller v. Minken, 5 Misc. (N. Y.) 444.....	1317, 1354
Muller v. Newburgh, 32 Hun. 24.....	1888, 1894
Mulligan v. Crimmins, 75 Hun. 578.....	1423
Mulligan v. Curtis, 100 Mass. 512.... (720)	
Mulligan v. Ill. Cent. R. Co., 36 Iowa, 181.....	283
Mulligan v. Montana U. R. Co., 19 Mont. 135.....	1411, 1607, 1674
Mulligan v. New York &c. R. Co., 129 N. Y. 511.... (18).....	523
Mullin v. Flanders, 73 Vt. 95.....	2197
Mulvaney v. Brooklyn City R. Co., 1 Misc. 425.....	1432
Mulvehill v. Bates, 31 Minn. 364.....	13
Mulvey v. Rhode Island &c. Works, 14 R. I. 204.....	1079
Mulvihill v. Thompson, 114 Iowa, 734.....	2085
Mulville v. Pacific &c. Co., 19 Mont. 95.....	1126
Munal v. Brown, 70 Fed. Rep. 967.....	1374
Munch v. Great Northern R. Co., 75 Minn. 61.....	1477, 1707
Mundt v. Glokner, 24 App. Div. 110, 223.... (945).....	1368
Mundy v. New York &c. R. Co., 75 Hun. 499.....	2087, 2094
Munger v. Marshalltown, 59 Iowa, 763.....	657
Munger v. Sedalia, 66 Mo. App. 628.... (731)	
Munk v. Columbus Sanitary Works Co., 7 Oh. N. P. 542.....	2097
Munk v. Watertown, 67 Hun. 261.....	843, 1904
Munn v. Reed, 4 Allen, 431.... (985)	
Munro v. Pacific Coast &c. R. Co., 84 Cal. 515.....	881, 957
Munson v. New York City R. Co., 32 Misc. 282.....	2027
Murch v. Western New York & Penn. R. Co., 78 Hun. 601.....	2107
Murchinson v. Sargent, 69 Ga. 206.....	152
Murdock v. B. & A. R. Co., 133 Mass. 15.... (896).....	902
Murdock v. Boston &c. R. Co., 137 Mass. 293.....	564
Murdock v. Oakland &c. R. Co., 128 Cal. 22.....	1445
Murdock v. Ward, 67 N. Y. 387.....	947
Murdock v. Warwick, 4 Gray, 178.....	2353
Murdock v. Yazoo &c. R. Co., (Miss.) 29 South. Rep. 25.....	2169
Murphy v. Altman, 28 App. Div. 472.....	1596
Murphy v. Atlanta &c. R. Co., 89 Ga. 832.....	460
Murphy v. B. & A. R. Co., 88 N. Y. 152.....	1451, 1619
Murphy v. Boston &c. R. Co., 133 Mass. 121.....	814
Murphy v. Boston &c. R. Co., 167 Mass. 64.....	1091
Murphy v. Brooklyn, 98 N. Y. 642.....	1906, 2115
Murphy v. Brooklyn, 118 N. Y. 575.....	1906
Murphy v. Chicago &c. R. Co., 45 Wis. 222.....	1265
Murphy v. City Coal Co., 172 Mass. 324.....	1674, 1805
Murphy v. Commissioners, 28 N. Y. 134.... (82)	
Murphy v. Dayton, 7 Oh. N. P. 227.....	657, 668, 1821
Murphy v. Derby Street R. Co., 73 Conn. 249.....	717, 2286
Murphy v. Ganey, (Utah) 66 Pac. Rep. 190.....	1086
Murphy v. Gloucester, 165 Mass. 410.....	1943, 1955
Murphy v. Hays, 68 Hun. 450.....	1071, 1116
Murphy v. Hughes, 1 Penn. (Del.) 250.....	1513, 1524, 1527, 1528, 1635, 1674
Murphy v. Indianapolis, 83 Ind. 76.....	657
Murphy v. Indianapolis, 158 Ind. 238.....	1815
Murphy v. Illinois T. &c. Co., 57 Neb. 519.....	1325
Murphy v. Kaufman, 20 La. 559.... (104).....	115
Murphy v. Lake Shore &c. R. Co., 67 Ill. App. 527.....	1428
Murphy v. Leggett, 29 App. Div. 309.....	2120, 2240

## TABLE OF CASES.

CCXV

	PAGE
Murphy v. Lindell R. Co., 153 Mo. 252.....	2279
Murphy v. Michigan C. R. Co., 107 Mich. 627.....	2247
Murphy v. Nassau Electric R. Co., 19 App. Div. 563.....	2328
Murphy v. Needham, 176 Mass. 422.....	1989
Murphy v. Ninth Ave. R. Co., 6 Misc. 298.....	539
Murphy v. N. Y. & C. R. Co., 88 N. Y. 445.....	875
Murphy v. N. Y. & C. R. Co., 118 N. Y. 527.....	1534, 1757
Murphy v. N. Y. & C. R. Co., 62 Hun, 587.....	1761
Murphy v. N. Y. & C. R. Co., 11 Daly, 122.....	1709
Murphy v. Orr, 96 N. Y. 14.....	2228, 2230, 2355, 2368
Murphy v. Perlstein, 73 App. Div. 257.....	643
Murphy v. Seneca Falls, 57 App. Div. 438.....	1945, 2017
Murphy v. Union R., 118 Mass. 228.... (509)	
Murphy v. Weidman Cooperage Co., 1 App. Div. 283.....	2355
Murray v. Arthur, 98 Ill. App. 331.....	2028, 2096
Murray v. Beekwith, 81 Ill. 43.... (182)	
Murray v. Chicago & C. R. Co., (Minn.) 90 N. W. Rep. 1056.....	1721
Murray v. Crimmins, 14 Misc. 466.....	1669
Murray v. Dwight, 161 N. Y. 301.....	1603
Murray v. Dwight, 15 App. Div. 241.....	1735
Murray v. Fitchburg R. Co., 165 Mass. 448.....	1718
Murray v. Forty-Second Street & C. R. Co., 9 App. Div. 610.....	2334
Murray v. Grass Lake, 125 Mich. 2.....	1988
Murray v. H. R. R. Co., 47 Barb. 200.....	928
Murray v. International S. S. Co., 170 Mass. 166.....	611, 1093
Murray v. Lardner, 2 Wall. 121.... (183).....	182, 184
Murray v. McShane, 52 Md. 217.....	2263, 2269
Murray v. Marshall, 9 Colo. 482.....	154
Murray v. N. Y. & C. R. Co., 3 Abb. Ct. App. Dec. 339.....	1036
Murray v. Richmond & C. R. Co., 93 N. C. 92.... (721)	
Murray v. Salt Lake & C. R. Co., 16 Utah, 356.....	1160
Murray v. S. Car. & C. R. Co., 10 Rich. 227.... (1013)	
Murray v. Usher, 117 N. Y. 542.....	875, 876, 1402, 1764
Murray v. Usher, 48 Hun, 404.....	939, 1132
Murray v. Woodson County, 58 Kan. 1.....	1214, 1833
Murrell v. Pacific Ex. Co., 54 Ark. 22.....	824
Murtaugh v. N. Y. C. R. Co., 49 Hun, 456.....	909, 1118, 1415, 1555
Muschamp v. Lancaster R. Co., 8 M. & W., 421.... (349).....	2437
Musick v. Latrobe, 184 Pa. St. 375.... (851).....	1214, 1820, 1827
Musselman v. Hatfield, 202 Pa. St. 489.....	1878
Musser v. Lancaster City Street R. Co., 176 Pa. St. 621.....	2335
Musser's Executor v. Chase, 29 Oh. St. 577.....	2199
Muster v. C. M. St. P. Ry. Co., 21 N. W. 223.... (424)	
Muth v. Frost, 68 Wis. 425.....	701
Muth v. St. Louis & C. R. Co., 87 Mo. App. 422.....	861, 1206, 2044
Muth v. St. Louis Trust Co., 88 Mo. App. 596.....	180
Mutual Life Ins. Co. v. Duke, 87 N. Y. 257.... (83)	
Mutual Wheel Co. v. Mosher, 85 Ill. App. 240.... (657).....	1703
Myer v. Laux, 18 Misc. 671.....	1325
Myers v. American Steel Co., 64 Ill. App. 187.....	1479
Myers v. Chicago & C. R. Co., 95 Fed. Rep. 406.....	1440
Myers v. Chicago & C. R. Co., 101 Fed. Rep. 915.....	820
Myers v. Concord Lumber Co., 129 N. C. 252.....	1449
Myers v. Erie & C. R. Co., 44 App. Div. 11.....	1733
Myers v. Farmers' State Bank, 53 Neb. 824.....	180
Myers v. Holborn, 58 N. J. L. 193.....	847, 880, 2197
Myers v. Hussenbuth, 32 Misc. 717.....	1357
Myers v. Lockwood, 85 Ill. App. 251.....	1235
Myers v. Lumber Co., 129 N. C. 252.....	1440
Myers v. Minerath, 101 Mass. 366.....	2383
Myers v. Nelson, (Cal.) 44 Pac. Rep. 801.....	2083
Myers v. Parker, 74 Hun, 129.....	115
Myers v. Richmond & C. R. Co., 87 N. C. 345.....	2245



	PAGE
Myhre v. Tromanhauser, 64 Minn. 541.....	1724
Mynard v. Syracuse &c. R. Co., 71 N. Y. 180, 183.....	209, 210, 222, 238, 240
Mynning v. Detroit &c. R. Co., 59 Mich. 257.....	857
Mynning v. Detroit &c. R. Co., 64 Mich. 93..... (658).....	683, 1110, 1708, 1776
Myrick v. Michigan R. Co., 107 U. S. 102; 104 Mass. 122; 96 U. S. 258; 104 U. S. 146..... (342)	
McAdam v. Central R. &c. Co., 67 Conn. 445.....	1462
McAdory v. Louisville &c. R. Co., 10 South. R. 507..... (871)	
McAdow v. Hassard, 58 Kan. 171.....	1083
McAfee v. Huidekoper, 9 App. D. C. 36.....	394
McAlan v. Trustees &c., 43 App. Div. 374.....	460, 485
McAleenan v. Myrick, 68 Ill. App. 225.....	1594
McAllen v. Western Union Tel. Co., 70 Tex. 243.....	905
McAllister v. Bridgeport, 72 Conn. 733.....	1871
McAllister v. Irvine, 69 Mo. App. 442.....	1144
McAllister v. Plant, 54 Miss. 106.....	1334
McAllister v. Sanders, (Tex. Civ. App.) 41 S. W. Rep. 388.....	1333, 1362
McAllister v. Simon, 27 Misc. 214.....	99
McAllister v. Sprague, 34 Me. 296.....	2207
McAlpin v. Powell, 70 N. Y. 126.....	1345, 2132
McAndrew v. Electric Tel. C., 17 C. B. 3.....	2398, 2399
McAndrew et al. v. Whitlock, Jr., 52 id. 45..... (312)	
McAndrews v. Burns, 10 Vroom, 117.....	1615
McAndrews v. Collerd, 42 N. J. L. 189.....	2073
McAndrews v. St. Louis &c. S. R. Co., 88 Mo. App. 97.....	2325
McAnnally v. Pennsylvania R. Co., 194 Pa. St. 464..... (805)	
McArthur Bros. Co. v. Nordstrom, 87 Ill. App. 554.....	1494, 1738
McArthur Bros. Co. v. Troutt, 88 Ill. App. 638.....	1711
McAuliffe v. Gale, 180 Mass. 361.....	1557
McAuliffe v. Victor, 15 Colo. App. 337.....	1984
McBeath v. Rawle, 192 Ill. 626.....	1418
McBride v. Scott, 125 Mich. 517.....	2030
McBride v. Sunset Teleg. Co., 96 Fed. Rep. 81.....	2459
McCabe v. Buffalo, 45 N. Y. S. Repr. 456.....	696
McCabe v. Fowler, 84 N. Y. 314.....	44
McCabe v. Shields, 175 Mass. 438.....	1804
McCadden v. Abbott, 92 Wis. 551.....	769
McCafferty v. Dock Co., 11 Oh. C. C. 457.....	1639, 1661
McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339.....	411, 958, 1102
McCafferty v. S. D. &c. R. Co., 61 N. Y. 178.....	633, 635, 2069
McCaffrey v. Albany, 11 Hun, 613.....	1908
McCaffrey v. Delaware &c. Canal Co., 16 N. Y. Supp. 495..... (730)	
McCaffrey v. Georgia &c. R. Co., 69 Ga. 622.....	1335
McCaffrey v. Mossberg Co., (R. I.) 50 Atl. Rep. 651.....	1380
McCaffrey v. Twenty-third Street R. Co., 47 Hun, 404.....	2229, 2309
McCahill v. Kipp, 2 E. D. Smith, (N. Y.) 413.....	2364
McCaig v. The Erie Railway Co., 8 Hun, 599.....	1260, 1284
McCain v. Chicago &c. R. Co., 76 Fed. Rep. 125.....	1413, 1687, 1745
McCaldin v. Parke, 142 N. Y. 564.....	2117
McCall v. Chamberlain, 13 Wis. 637.....	1002, 1039
McCall v. Mail S. Co., 123 Cal. 42.....	646, 1401
McCall v. N. Y. &c. R. Co., 54..... (707).....	724, 746
McCallum v. Long Island R. Co., 38 Hun, 569.....	727
McCambley v. Staten Island &c. R. Co., 32 App. Div. 346.....	1168, 2360
McCammon v. Shantz, 26 Misc. 476.....	188
McC Campbell v. The Cunard S. S. Co., 69 Hun, 131.....	1463, 1535
McCandless v. Chicago &c. R. Co., 45 Wis. 540..... (1040)	
McCandless v. McWha, 22 Penn. St. 261.....	2185, 2190, 2192, 2197
McCann v. Atlantic Mills, 20 R. I. 566.....	1459, 1725
McCann v. Chicago &c. R. Co., 105 Fed. Rep. 480.....	764
McCann v. Chicago &c. R. Co., 96 Wis. 664.....	1043
McCann v. Consolidated Traction Co., 59 N. J. L. 481.....	13, 2290
McCann v. Eddy, 133 Mo. 59.....	250



## TABLE OF CASES.

ccxvii

	PAGE
McCann v. Kennedy, 167 Mass. 23.....	1508
McCann v. New York &c. R. Co., 56 App. Div. 419.....	2330
McCann v. Sixth Ave. R. Co., 117 N. Y. 505.... (27) .....	22, 25
McCann v. Thileman, 36 Misc. 145.....	697, 2111, 2113
McCanna v. New England R. Co., 20 R. I. 439.... (755)	
McCarv. International &c. R. Co., 84 Tex. 352.....	254
McCarragher v. Gaskell, 42 Hun, 451.....	2027
McCarragher v. Rogers, 120 N. Y. 526.....	1482
McCarrier v. Hollister, (S. D.) 89 N. W. Rep. 862.....	653
McCarroll v. Kansas City, 64 Mo. App. 283.....	1846
McCarthy v. Bank, 74 Me. 315.....	1356
McCarthy v. D. & H. C. Co., 17 Hun, 74.....	2106
McCarthy v. Detroit Citizens' Street R. Co., 120 Mich. 400.....	2314
McCarthy v. Fagan, 42 Mo. App. 619.....	1328
McCarthy v. Far Rockaway, 3 App. Div. 379.....	1965
McCarthy v. Foster, 156 Mass. 511.....	1076
McCarthy v. Mulgrew, 107 Iowa, 76.....	1751
McCarthy v. New York &c. R. Co., 37 App. Div. 187.....	721
McCarthy v. Syracuse, 46 N. Y. 196.....	77, 78, 1346, 1818, 1900
McCarthy v. Washburn, 42 App. Div. 252.....	1594
McCarthy v. Western Union Teleg. Co., (Tex. Civ. App.) 56 S. W. Rep. 568..	2459
McCarthy v. Whitney Iron-Works Co., 48 La. Ann. 978.....	1674
McCarten v. Flagler, 69 Hun, 134.....	2236
McCarty v. Baltimore &c. R. Co., 20 Oh. C. C. 536.....	1716
McCarty v. Houston &c. R. Co., 21 Tex. Civ. App. 568.... (400)	
McCarty v. Imperial Ins. Co., 126 N. C. 820.....	1312
McCarty v. Rood Hotel Co., 144 Mo. 397.....	1625
McCarty v. Springer, 76 Ill. App. 626.....	1091
McCarvel v. Sawyer, 173 Mass. 540.....	1077
McCaskey v. Conn. Savings Bank, 60 Conn. 300.....	164
McCaskey v. Elliott, 5 Strob. 196.... (977)	
McCaughna v. Owosso &c. Electric Co., (Mich.) 89 N. W. Rep. 73.....	1063
McCauley v. Hutkoff, 20 Misc. 97.....	10
McCauley v. Philadelphia T. Co., 13 Pa. Super. Ct. 354.....	2274, 2312
McCauley v. Southern R. Co., 10 App. D. C. 560.....	1412, 1629
McCauley v. Springfield Street R. Co., 169 Mass. 301.....	1549
McCauley v. Tenn. &c. R. Co., 93 Ala. 356.... (508) .....	2162
McCerran v. Alabama &c. R. Co., 72 Miss. 1013.....	2045
McChesney v. Panama R. Co., 74 Hun, 150.....	1681
McChesney v. Railroad Co., 66 Hun, 627.....	1657
McClafferty v. Fisher, 1 Cent. (Pa.) 571.... (700)	
McClain v. Henderson, 187 Pa. St. 283.....	1486
McClain v. Railway Co., 116 N. Y. 459.....	1225, 2228, 2312, 2323, 2330, 2331
McClaren v. Ind. &c. R. Co., 83 Ind. 319.....	2140
McClarney v. Chicago &c. R. Co., 80 Wis. 277.....	1470
McClelland v. Louisville &c. R. Co., 94 Ind. 276.....	581
McClelland v. Scoggin, 48 Neb. 141.....	1248
McClenaghan v. Brock, 5 Rich. Law. (So. Car.) 17.... (1288)	
McClosker v. L. I. R. Co., 84 N. Y. 77.....	1619
McCloskey v. Chautauqua Lake Ice Co., 174 Pa. St. 34.....	2356
McCloskey v. Gleason, 56 Vt. 264.... (52)	
McCloskey v. Moies, 19 R. I. 297.....	1822, 1897
McClosky v. Dubois, 4 Pa. Super. Ct. 181.....	1144, 1872
McClosky v. Garfield &c. Coal Co., 180 Mass. 115.....	1572
McClung v. Dearborne, 134 Pa. St. 396.... (19) .....	30
McClure v. Clifton, 79 Mo. App. 80.....	1980
McClure v. P. W. &c. R. Co. 34 Md. 532.... (569)	
McClure v. Richardson, 1 Rice, (S. C.) 215.....	201
McColl v. W. U. T. Co., 7 Abb. N. C. 151.....	2398
McColl v. W. U. T. Co., 12 J. & S. 487.....	2441, 2448
McCollum v. Cleveland &c. R. Co., 154 Ind. 97.... (766)	
McCombs v. Pittsburg &c. R. Co., 130 Penn. St. 182.....	1404
McConnell v. Bostelmann, 72 Hun, 238.....	1890

	PAGE
McConnell v. Lemley, 48 La. Ann. 1433.....	1355
McConnell v. Lloyd, 9 Pa. Super. Ct. 25.....	975
McConnell v. New York & c. R. Co., 63 App. Div. 545.... (1091)	
McConnell v. Osage, 80 Iowa, 293.....	1194
McConnell v. Rowland, 48 W. Va. 276.....	1086
McCone v. Gallagher, 16 App. Div. 272.....	1636
McCook v. Northrup, 65 Ark. 225.....	548, 560
McCool v. Grand Rapids, (Mich.) 24 N. W. Rep. 631.....	700
McCooley v. The Forty-second St. and Grand St. Ferry Rd. Co., 79 Hun, 255.....	1224
McCord v. W. U. T. Co., 39 Minn. 181.....	2425
McCorkle v. Anheuser-Busch Brewing Ass'n, 107 La. 461.....	2340
McCorkle v. Driskell, (Tenn.) 60 S. W. Rep. 172.....	2103
McCorle v. Chicago & c. R. Co., 61 Iowa, 555.....	481
McCormack v. Nassau Electric R. Co., 16 App. Div. 24.....	2324, 2328
McCormack v. Nassau Electric R. Co., 18 App. Div. 333.....	728
McCormick v. Brooklyn City R. Co., 10 Misc. 8.....	2321
McCormick Harvesting Mach. Co. v. Sendzikowski, 72 Ill. App. 402.....	1530
McCormick v. Hudson R. R. Co., 4 E. D. Smith, (N. Y.) 181.... (615)	
McCormick v. Kinsay, 10 Pa. Super. Ct. 607.....	2084
McCormick v. Monroe, 64 Mo. App. 197.....	1882
McCormick v. P. C. R. Co., 49 N. Y. 303.....	624
McCormick v. Railway Co., 10 Misc. 8.....	2229
McCormick v. W. U. T. Co., 79 Fed. Rep. 449.....	2429
McCormick & Mach. Co. v. Laster, 81 Ill. App. 316.....	1200
McCormick Harvesting Machine Co. v. Liter, (Ky.) 66 S. W. Rep. 761.....	1492
McCosker v. Hilton & c. Lumber Co., 110 Ga. 328.....	1801
McCosker v. L. I. R. Co., 84 N. Y. 77.... (1067)	
McCoster v. R. Co., 84 N. Y. 81.....	1661
McCotter v. Hooker, 8 N. Y. 497.....	231, 297
McCoull v. Manchester, 85 Va. 579.....	1925
McCoy v. Allen, 9 Oh. C. C. 607.....	51
McCoy v. Cal. Pac. R. Co., 40 Cal. 532.... (1034)	
McCoy v. Gouvion, 102 Ky. 386.....	1083
McCoy v. Kokomo R. & c. Co., 158 Ind. 662.....	2319
McCoy v. Penn. & c. R. Co., 5 Houst. (Del.) 599.....	2244
McCoy v. Southern Pac. R. Co., 94 Cal. 568.... (1045)	
McCoy v. Westboro, 172 Mass. 504.....	1594, 1701, 1805
McCracken v. Consolidated T. Co., 201 Pa. St. 378.....	2273, 2274, 2317
McCramer v. Thomson, 21 Iowa, 249.... (173)	
McCray v. Fairmont, 46 W. Va. 442.....	1962
McCray v. Galveston & c. R. Co., 89 Tex. 168.....	1217, 1429
McCray v. Sterling Varnish Co., 7 Pa. Super. Ct. 610.....	1498
McCrea v. Marsh, 12 Gray, 211.....	590
McCready v. Staten Island & c. R. Co., 51 App. Div. 338.....	917
McCreedy v. Chicago & c. R. Co., 31 Fed. Rep. 531.....	762
McCrillis v. Hawes, 38 Me. 566.....	2202
McCue v. Finck, 20 Misc. 506.....	58
McCue v. Klein, 60 Tex. 168.....	953
McCue v. N. S. M. Co., 142 N. Y. 106.....	1507
McCue v. Waupun, 96 Wis. 625.....	2013
McCullen v. Chicago & c. R. Co., 101 Fed. Rep. 66.....	1109
McCullen v. New York & c. R. Co., 68 App. Div. 269.....	58
McCulloch v. Ayer, 96 Fed. Rep. 178.....	1364
McCullough's Lead Co. v. Strong, 3 J. & Sp. 21.... (104)	
McCully v. Clark, 40 Pa. St. 399.... (784)	
McCurdy v. United Traction Co., 15 Pa. Super. Ct. 29.....	473
McCurrie v. Southern P. Co., 122 Cal. 558.....	393, 501, 1108
McCutcheon v. Dittman, 23 App. Div. 285.....	117
McDade v. Chester City, 117 Pa. St. 414.....	1814
McDade v. Georgia R. Co., 60 Ga. 119.... (699)	
McDade v. Washington & c. R. Co., 5 Mack. (D. C.) 144.....	1539
McDaniels v. Robertson, 26 Vt. 340.... (114)	
McDaniels v. Robinson, 28 Vt. 337.... (137)	

	PAGE
McDermott v. Atchison &c. R. Co., 56 Kan. 319.....	1492
McDermott v. Chicago &c. R. Co., 91 Wis. 38.....	820
McDermott v. Hannibal &c. R. Co., 73 Mo. 516.....	1147
McDermott v. Kingston, 19 Hun, 198.....	1824, 1901
McDermott v. N. Y. &c. R. Co., 28 Hun, 325.....	1317, 1320
McDermott v. Third Ave. R. Co., 44 Hun, 107.....	1213
McDevitt v. Des Moines &c. R. Co., 99 Iowa, 141.....	1102, 2307
McDonald v. Alabama Midland R. Co., 123 Ala. 227.....	1706
McDonald v. Boston &c. R. Co., 87 Me. 466.....	492
McDonald v. Chicago &c. R. Co., 26 Iowa, 124.... (431).....	846
McDonald v. Eagle & Phenix Man. Co., 68 Ga. 840.....	1641
McDonald v. Edgerton, 5 Barb. 560.....	137, 146
McDonald v. Edgerton, 27 Vt. 171.....	155
McDonald v. Fitchburg &c. R. Co., 19 App. Div. 577.....	1473
McDonald v. Franchere, 102 Iowa, 496.....	12
McDonald v. Great Northern R. Co., (Id.) 46 Pac. Rep. 766.... (1013)	
McDonald v. Harris, 131 Ala. 359.....	2189
McDonald v. Hospital, 120 Mass. 432.... (606)	
McDonald v. The Long Island R. Co., 116 N. Y. 546.....	462, 1111
McDonald v. Metropolitan Street R. Co., 36 Misc. 703.....	934
McDonald v. Mallory, 77 N. Y. 547.....	958, 960, 968
McDonald v. Michigan C. R. Co., 108 Mich. 7.....	1490
McDonald v. Montgomery Street R. Co., 110 Ala. 161.....	485, 1103
McDonald v. Muscatine Bank, 27 Iowa, 319.... (173)	
McDonald v. New York, 15 Misc. 593.....	2013
McDonald v. N. Y. &c. R. R. Co., 63 Hun, 587.....	1635
McDonald v. New York &c. R. Co., (R. I.) 51 Atl. Rep. 578.....	1253
McDonald v. Norfolk &c. R. Co., 95 Va. 98.....	1547, 1607
McDonald v. North, 47 Barb. 531.... (829)	
McDonald v. Palmer, (Tenn.) 48 S. W. Rep. 338.....	113, 134
McDonald v. Pittsburg &c. R. Co., 144 Ind. 459.....	950, 1012
McDonald v. Postal Teleg. Co., 22 R. I. 131.....	1705, 1756
McDonald v. R. Co., 20 Iowa, 124.... (846)	
McDonald v. St. Paul, 82 Minn. 308.....	1922, 1937
McDonald v. Snelling, 96 Mass. 290.....	896, 1376, 2362, 2363
McDonald v. State, 127 N. Y. 18.....	1213
McDonald v. Third Ave. R. Co., 16 Misc. 52.....	2320
McDonald v. Toledo Consol. Street R. Co., 74 Fed. Rep. 104.....	2290
McDonald v. W. R. R. Co., 34 N. Y. 497.... (324).....	308
McDonnell v. Henry Elias Brew. Co., 10 App. Div. 223.....	2352
McDonnell v. Elias Brew. Co., 16 App. Div. 223.....	916
McDonnell v. Illinois C. R. Co., 105 Iowa, 459.....	1440, 1718
McDonnell v. New York &c. R. Co., 35 App. Div. 147.....	530
McDonough v. Great Northern R. Co., 15 Wash. 244.....	1646
McDonough v. Metropolitan R. Co., 137 Mass. 210.....	478
McDougall v. Ashland &c. Co., 97 Wis. 382.....	1505
McDowell v. N. Y. Cent. R. Co., 37 Barb. 196.... (1037)	
McDowell v. North, 24 Ind. App. 435.....	2052
McDowell v. Potter, 8 Barr. 189.....	2183
McDugal v. Central &c. R. Co., 63 Cal. 431.....	2054
McDugan v. N. Y. C. & H. R. R. Co., 10 Misc. 336.....	1542
McElligott v. Randolph, 61 Conn. 157.....	1641
McElroy v. Albany, 65 Ga. 387.... (30)	
McElroy v. Georgia &c. R. Co., 98 Ga. 257.... (786)	
McElroy v. Railroad Corp., 4 Cush. 400.....	1474
McElveen v. Southern R. Co., 109 Ga. 249.....	340
McEntee v. New Jersey Steamboat Co., 45 N. Y. 34.... (312)	
McEvers v. Sangamon, 22 Mo. 187.....	624
McFadden v. San Antonio, 22 Tex. Civ. App. 140.....	113
McFail v. Barnwell County, 57 S. C. 294.....	1986
McFail v. Iowa C. R. Co., 104 Iowa, 47.....	1841
McFarlan Carriage Co. v. Potter, 153 Ind. 107.....	1433
McFarland v. Edmunds Man. Co., 97 Ill. App. 629.....	1572, 1580, 2048
	1507

	PAGE
McFarland v. Emporia, 59 Kan. 568.....	1841, 1955
McFarland v. Muscatine, 98 Iowa, 199.....	2010
McFarland v. Third Ave. R. Co., 29 Misc. 121.....	2331
McFarlane v. Sullivan, 99 Wis. 361.....	670, 1924
McFaul v. Madera Flume &c. Co., 134 Cal. 313.....	1215
McFee v. Vicksburg R. Co., 42 La. Ann. 790.....	902
McGaffin v. City of Cohoes, 74 N. Y. 387.....	2011
McGahey v. Nassau Electric R. Co., 51 App. Div. 281.....	956
McGar v. Bristol, 71 Conn. 652.....	1237
McGar v. National Providence Worsted Mills, 22 R. I. 347.....	1700
McGar v. National &c. Mills, 22 R. I. 347.....	1217
McGarrahan v. New York &c. R. Co., 171 Mass. 211.....	894, 897
McGarry v. N. Y. & H. R. Co., 28 J. & S. 60 Supreme Court, 367.....	974
McGarry v. Lafayette, 4 La. Ann. 440.....	1063
McGarry v. Loomis, 63 N. Y. 104..... (705)	707
McGarry v. West Chicago Street R. Co., 85 Ill. App. 610.....	2029, 2277
McGatrick v. Wason, 4 Oh. St. 566.....	2362
McGaw v. Lancaster, 14 Lanc. L. Rev. 276.....	2248
McGearty v. Manhattan R. Co., 15 App. Div. 2.....	425
McGeary v. Eastern &c. R. Co., 135 Mass. 363..... (719)	
McGeehan v. Lehigh Valley R. R. Co., 149 Pa. St. 188.....	453
McGehee v. McCarley, 91 Fed. Rep. 462.....	907
McGehee v. McCarley, 103 Fed. Rep. 55.....	906
McGhee v. Bell, (Ky.) 38 S. W. Rep. 702.....	1485
McGhee v. Bell, (Ky.) 39 S. W. Rep. 823.....	546
McGhee v. Campbell, 101 Fed. Rep. 936.....	661, 684
McGhee v. Drisdale, 111 Ala. 597.....	571
McGhee v. Guyn, 98 Ky. 209.....	1035
McGhee v. Reynolds, 17 Ala. 413.....	592
McGhee v. West, (Tex. Civ. App.) 57 S. W. Rep. 928.....	2345, 2353
McGibbon v. Baxter, 51 Hun, 587.....	1244
McGill v. Maine &c. Co., (N. H.) 46 Atl. Rep. 684.....	1397
McGill v. Rowland, 3 Pa. St. 451.....	615
McGinley v. Alliance Trust Co., 168 Mo. 257.....	1323
McGinn v. French, 107 Wis. 54.....	1330, 1356
McGinney v. Canadian Pac. R. Co., 7 Manitoba L. R. 151.....	431
McGinnis v. Medway, 176 Mass. 67.....	1983
McGinnis v. Canadian &c. Co., 49 Mich. 466.....	1411, 1600
McGinty v. Keokuk, 24 N. W. (Iowa) 506.... (699)	
McGinty v. Mayor, 5 Duer, 674.....	1932
McGlaughlin v. McGlaughlin, 43 W. Va. 226.....	54
McGlynn v. Brodie, 31 Cal. 376.....	1547, 1697
McGoldrick v. N. Y. Cent. &c. R. Co., 20 N. Y. Supp. 914.....	1890
McGonigle v. Cauty, 80 Hun, 301.....	1455
McGorty v. Southern &c. Teleph. Co., 69 Conn. 635.....	1584
McGough v. Ropner, 87 Fed. Rep. 534.....	654
McGovern v. Central Vermont R. Co., 123 N. Y. 280.....	1475, 1554
McGovern v. Columbus Man. Co., 80 Ga. 227.....	1642
McGovern v. Hope, 63 N. J. L. 76.....	2033
McGovern v. N. Y. &c. R. Co., 67 N. Y. 417..... (710)	716, 746
McGovern v. Standard Oil Co., 11 App. Div. 588.....	1436
McGovern v. Union T. Co., 192 Pa. St. 344.....	2320
McGowan v. Boston, 170 Mass. 384.....	1896
McGowan v. Chicago &c. R. Co., 91 Wis. 147.....	1407
McGowan v. Smelting Co., 9 Fed. Rep. 861.....	1510
McGowan v. Supreme Court &c., 107 Wis. 462.....	1312
McGowen v. Morgan's Steamship Co., 41 La. Ann. 732.... (552)	
McGrane v. Flushing &c. R. Co., 13 App. Div. 177.....	2328
McGrath v. Eastern R. Co., 74 Minn. 363.....	2165
McGrath v. Merwin, 12 Mass. 469.....	2379
McGrath v. N. Y. &c. R. Co., 59 N. Y. 468.....	809
McGrath v. N. Y. &c. R. Co., 63 N. Y. 522.....	806, 1166, 1524, 2379
McGrath v. N. Y. &c. R. Co., 14 R. I. 357.....	1714

## TABLE OF CASES.

ccxxi

	PAGE
McGrath v. Walker, 64 Hun, 179.....	2232, 2251
McGraw v. Friend &c. Lumber Co., 120 Cal. 574.....	1878
McGraw v. Marion, 98 Ky. 673.....	2002
McGraw v. Texas &c. R. Co., 50 La. Ann. 466.....	1444
McGregor v. Grand Trunk Elevator Co., (Mich.) 89 N. W. Rep. 332.....	2128
McGregor v. Johnson, (Tex. Civ. App.) 34 S. W. Rep. 407.....	629
McGregor v. Reid &c. Co., 178 Ill. 464.....	1075, 1404, 1420, 1477, 1703
McGrell v. Buffalo &c. Build. Co., 153 N. Y. 265.....	1068
McGriffin v. Iron Co., 10 Q. B. Div. 5.....	1637
McGucken v. West. N. Y. R. Co., 77 Hun, 69.....	1728, 2107
McGuerty v. Hale, 161 Mass. 51.....	1448
McGuff v. State, 88 Ala. 147.....	2036
McGuigan v. Beatty, 186 Pa. St. 329.....	1486
McGuinness v. Westchester, 66 Hun, 356.....	1999
McGuire v. Board, 58 App. Div. 388.....	696
McGuire v. Middlesex R. Co., 113 Mass. 239.... (511)	
McGuire v. Ogdensburgh &c. R. Co., 63 Hun, 632.... (1036)	
McGuire v. Ringrose, 41 La. Ann. 1029.....	977, 994
McGuire v. Spence, 91 N. Y. 303.....	693, 1875, 2232
McGuire v. Third Ave. R. Co., 9 App. Div. 529.....	2305
McHale v. Throop, 13 Pa. Super. Ct. 394.....	1820
McHenry v. Marr, 39 Md. 510.....	1317
McHenry Coal Co. v. Sheddon, 98 Ky. 684.....	902
McHugh v. Minocqua, 102 Wis. 291.....	1827, 1873
McHugh v. New York, 31 App. Div. 299.....	974
McHugh v. North Jersey Street R. Co., (N. J. L.) 46 Atl. Rep. 782.....	2330
McHugh v. St. Paul, 67 Minn. 441.....	1956, 1957
McHugh v. Schlosser, 159 Pa. St. 480.....	136
McItaney v. Southern R. Co., 120 N. C. 551.....	2343
McKenney v. Wilmington, 127 N. C. 146.....	1986
McIntire v. McIntire, 14 App. D. C. 337.....	59
McIntire v. White, 171 Mass. 170.....	1703
McIntyre v. Bowne, 1 J. R. 229.... (204)	
McIntyre v. Detroit Safe Co., (Mich.) 89 N. W. Rep. 39.....	683, 2128
McIntyre v. N. Y. C. & H. R. Co., 37 N. Y. 287.... (480).....	499, 673, 836, 882
McIntyre v. Roberts, 149 Mass. 450.....	2106
McIver v. Georgia, 108 Ga. 306.....	2156
McIver v. Florida &c. R. Co., 110 Ga. 223.....	583
McKay v. Buffalo, 74 N. Y. 619.....	1986
McKay v. Buffalo Bill's Wild West Co., 17 Misc. 396.....	10, 102, 1626
McKay v. Hamblin, 40 Miss. 472.... (104)	
McKay v. Hand, 168 Mass. 270.....	1785
McKay v. Hudson River Line, 56 App. Div. 201.....	18
McKay v. Lasher, 121 N. Y. 477.....	1236
McKay v. New England Dredging Co., 92 Me. 454.....	874
McKay v. N. Y. &c. R. Co., 50 Hun, 562.....	242, 345, 346
McKay v. Southern &c. Teleph. Co., 111 Ala. 337.....	1060
McKeague v. Green Bay, 106 Wis. 577.....	2020
McKean v. Binghamton &c. R. Co., 55 Iowa, 192.....	1122, 1219
McKean v. M'Ivor. L. R., 6 Ex. 36.....	2419
McKee v. Bidwell, 24 P. F. Smith, (Pa.) 218.... (700)	
McKee v. Cincinnati &c. R. Co., 102 Ky. 253.....	1032
McKee v. Judd, 2 Kern. 622.....	632
McKee v. McCardle, (R. I.) 46 Atl. Rep. 181.....	1357
McKee v. Owen, 16 Mich. 115.... (609)	
McKee v. Sims, (Tex. Civ. App.) 45 S. W. Rep. 37.....	1323
McKee v. Tourtelotte, 167 Mass. 69.....	1570
McKeering v. Pennsylvania R. Co., 65 N. J. L. 57.....	957
McKeesport Gas Co. v. Carnegie Steel Co., 189 Pa. St. 509.....	2083
McKee v. Homestake Min. Co., 10 S. D. 599.....	1521
McKee v. N. Y. C. &c. R. Co., 88 N. Y. 667.....	1115, 1164
McKeigue v. Janesville, 68 Wis. 50.... (852)	
McKenna v. Bates, 19 R. I. 610.....	2022



McKenna v. Bridgewater Gas Co., 193 Pa. St. 633.....	13
McKenna v. Celunus Nat. Gas Co., 198 Pa. St. 31.....	8
McKenna v. Citizens' Nat. Gas Co., 198 Pa. St. 31.....	8
McKenna v. Citizen's &c. Gas Co., 201 Pa. St. 146.....	8
McKenna v. Kimball, 145 Mass. 555.....	198
McKenna v. N. Y. &c. R. Co., 8 Daly, 304.....	2140, 214
McKenna v. N. Y. C. &c. R. Co., 9 Daly, 262.....	216
McKenna v. North Hudson Count R. Co., 64 N. J. L. 106.....	90
McKenna v. Steel Working Co. v. Lewis, 111 Fed. Rep. 320.....	174
McKenney v. Grand St. R. Co., 104 N. Y. 354.....	118
McKennon v. Pentecost, 8 Okla. 117.....	1
McKeon v. Chicago &c. R. Co., 94 Wis. 477.....	467, 123
McKeon v. Steinway R. Co., 20 App. Div. 601.....	233
McKern v. See, 4 Robt. 450....(827)	
McKibbin v. Great Northern R. Co., 78 Minn. 232.....	61
McKim v. Aulbach, 130 Mass. 481....(43)	
McKimble v. Boston &c. R. Co., 139 Mass. 542.....	441, 65
McKinney v. Jewett, 90 N. Y. 267....(310)	241, 37
McKinney v. Stage Co., 4 Iowa, 420....(846)	
McKissick v. St. Louis, 154 Mo. 588.....	187
McKnight v. Brooklyn Heights R. Co., 23 Misc. 527.....	163
McKnight v. Denny, 198 Pa. St. 323.....	216
McKnight v. Ratcliff, 44 Pa. St. 156....(829)	
McKone v. Michigan Central R. Co., 51 Mich. 601.....	384, 212
McKonkey v. Chicago &c. R. Co., 40 Iowa, 205....(776)	
McKormick v. West Bay City, 110 Mich. 265.....	1874, 204
McKune v. Cal. So. R. Co., 66 Cal. 302.....	165
McKune v. Santa Clara Valley M. &c. Co., 110 Cal. 480.....	224
McLain v. Blue Point &c. Co., 51 Cal. 258.....	178
McLain &c. R. Co. v. McVey, 28 Ill. App. 158.....	88
McLamb v. Wilmington &c. R. Co., 122 N. C. 862.....	660, 214
McLane v. Head &c. Co., (N. H.) 52 Atl. Rep. 545.....	163
McLane v. Perkins, 92 Me. 39.....	1100
McLarney v. Long Island R. Co., 11 Misc. 64.....	142
McLaughlin v. Armfield, 58 Hun, 376.....	1453
McLaughlin v. Camden Iron Works, 60 N. J. L. 557.....	1558, 167
McLaughlin v. Eidlitz, 50 App. Div. 518.....	174
McLaughlin v. Louisville &c. Light Co., 100 Ky. 173.....	1062
McLaughlin v. New York Lighterage &c. Co., 7 Misc. 119.....	203
McLaughlin v. New Orleans &c. R. Co., 48 La. Ann. 23.....	2296, 2298, 2298
McLaughlin v. Philadelphia T. Co., 175 Pa. St. 565.....	1953, 2336
McLaury v. McGregor, 54 Iowa, 717....(700)	
McLean v. Blue Point &c. R. Co., 51 Cal. 258.....	1661
McLean v. Burbank, 11 Minn. 277....(441)	
McLean v. Chemical Paper Co., 165 Mass. 5.....	1720
McLean v. Lewiston, (Id.) 69 Pac. Rep. 478.....	849, 1235, 1856
McLean &c. Coal Co. v. Simpson, 97 Ill. App. 21.....	1485, 1679
McLellan v. Assiniboia, 5 Manitoba, L. R. 265.....	1980
McLeod v. Chicago &c. R. Co., 104 Iowa, 139.....	1739
McLeod v. Conn. &c. R. Co., 58 Vt. 727.....	965
McLeod v. Graven, 73 Fed. Rep. 627.....	677, 2314, 2336
McLeod v. Spokane, 26 Wash. 346.....	670, 1867
McLoughlin v. N. Y. Lighterage Co., 7 Misc. 119....(638)	
McLoughlin v. Kemp, 152 Mass. 7.....	995
McMahon v. Dubuque, 107 Iowa, 62.....	889, 1497
McMahon v. Eau Claire Waterworks Co., 95 Wis. 640.....	923
McMahon v. McHale, 174 Mass. 320.....	1468, 1678, 1779
McMahon v. Ida Min. Co., 95 Wis. 308.....	1630
McMahon v. Ida Min. Co., 101 Wis. 102.....	1508
McMahon v. Mayor, 33 N. Y. 642.....	707, 1918
McMahon v. New York, 1 App. Div. 321.....	2022
McMahon v. North Cent. R. Co., 39 Md. 438....(721)	
McMahon v. Philadelphia, (Pa.) 41 W. N. C. 527....(103)	

## TABLE OF CASES.

ccxxiii

	PAGE
McMahon v. Port Henry Iron Co., 24 Hun, 48.....	1559
McMahon v. Second Ave. R. Co., 75 N. Y. 231.....	2337
McManamee v. Missouri P. R. Co., 135 Mo. 440.....	791, 2157
McManigal v. South Side Pass. R. Co., 181 Pa. St. 358.....	2326
McManus v. R. Co., 4 H. & N. 327.... (283)	
McManus v. Staples, 171 Mass. 150.....	1626
McManus v. Wolvertown, 19 N. Y. Supp. 545.....	2352
McManus v. Weston, 164 Mass. 263.....	1983
McMasters v. Penn. R. R. Co., 69 Penn. St. 374.... (288)	
McMillan v. B. & M. R. Co., 46 Iowa, 231.... (720)	
McMillan v. M. S. & C. R. Co., 16 Mich. 80.... (283)	284, 331, 345, 348
McMillan v. Chicago & C. R. Co., 70 Mo. App. 568.....	1035
McMillan v. Cronin, 75 N. Y. 474.... (590)	
McMillan v. Federal Street & C. R. Co., 172 Pa. St. 523.....	593
McMillin v. Deardorff, 18 Ind. App. 428.....	778
McMorrin v. Fitzgerald, 106 Mich. 649.....	2097
McMullan v. Carnegie Bros. & C. 158 Pa. St. 518.....	1416
McMullan v. Edison Elec. I. Co., 13 Misc. 392.... (1058)	
McMullen v. Hoyt, 2 Daly, (N. Y.) 271.....	638
McMurdoch v. Kimberlin, 23 Mo. App. 523.....	2191
McMurray v. Pullman's Palace Car Co., 86 Ill. App. 619.....	599
McMurtry v. Louisville & C. R. Co., 67 Miss. 601.....	482
McNab v. United R. Co., 94 Md. 719.... (736)	769
McNaier v. Manhattan R. Co., 46 Hun, 502.... (1276)	
McNally v. Cohoes, 127 N. Y. 350.....	1894
McNamara v. Beck, 21 Ind. App. 483.....	2354
McNamara v. Clintonville, 62 Wis. 207.... (896)	
McNamara v. Jose, (Wash.) 68 Pac. Rep. 903.....	196
McNamara v. N. Y. & C. R. Co., 136 N. Y. ....	758
McNamara v. Slavens, 76 Mo. 330.... (943)	957
McNamara Tobacco Co. v. Warm, (Ky.) 66 S. W. Rep. 609.....	2029
McNamee v. Hunt, 87 Fed. Rep. 298.....	654
McNaughton v. Elkhart, 85 Ind. 384.....	2261
McNeil v. Boston, 178 Mass. 326.....	1999
McNeil v. Lyons, 20 R. I. 672.....	928
McNeil v. Metropolitan S. R. Co., 20 Misc. 426.....	1199
McNeil v. Durham & C. R. Co., 130 N. C. 256.... (1101)	
McNeven v. Arnott, 4 App. Div. 133.....	2107
McNevin v. Lowe, 40 Ill. 209.....	2185, 2189, 2194
McNevin v. McWha, 40 Ill. 209.....	2185
McNicols v. Nelson, 45 Mo. App. 446.... (13)	
McNish v. Peekskill, 91 Hun, 324.....	1814, 1950
McNulta v. Jenkins, 91 Ill. App. 309.....	873
McNulta v. Lockridge, 137 Ill. 270.....	92
McNulty v. New Orleans City & C. R. Co., 52 La. Ann. 1034.....	2156
McNulty v. Pennsylvania R. Co., 182 Pa. St. 479.....	376
McNutt v. Virginia & C. Ins. Co., (Tenn.) 45 S. W. Rep. 61.....	1314
McPeck v. Central Vt. R. Co., 79 Fed. Rep. 590.....	1523, 1626, 1684
McPeck v. W. U. T. Co., 107 Iowa, 356.....	2393, 2448
McPheeters v. Hannibal & C. R. Co., 45 Mo. 22.... (1001)	
McPherson v. St. Louis & C. R. Co., 97 Mo. 253.....	884
McPherson v. James, 69 Ill. App. 337.....	1000, 1007
McPhillips v. Railroad Co., 12 Daly, 365.....	2313
McPhillips v. Union T. Co., 19 Pa. Super. Ct. 223.....	2332
McQuade v. Metropolitan Street R. Co., 17 Misc. 154.....	2307, 2312
McQueen v. Elkhart, 14 Ind. App. 671.....	1813, 1857, 1886
McQuigan v. D. L. & W. R. Co., 122 N. Y. 618.....	1494, 1545
McQuigan v. D. L. & W. R. Co., 129 N. Y. 50.....	2032, 2038
McQuillan v. Seattle, 13 Wash.....	1872
McQuillan v. Willimantic Electric Light Co., 70 Conn. 715.....	1497
McRae v. McRae, 3 Bradt. 199.... (49)	
McRichard v. Flint, 114 N. Y. 222.....	1067, 1172, 1341, 1363, 1778, 1783, 2116
McRoberts v. Carneal, (Ky.) 46 S. W. Rep. 442.....	51

	PAGE
McSherry v. Canandaigua, 129 N. Y. 612.....	1940
McSloop v. Richmond &c. R. Co., 59 Fed. Rep. 431.....	475
McSwegan v. Pennsylvania R. Co., 7 App. Div. 301.....	313
McTaggart v. Eastman's Co., 28 Misc. 127.....	1623
McTague v. Dowet, 51 App. Div. 206.....	916
McTeer v. Lebow, 85 Tenn. 121.....	87
McVee v. Watertown, 92 Hun, 306.....	1861, 1881
McVeety v. St. Paul &c. R. Co., 45 Minn. 268.....	351
McVeigh v. Gentry, 72 App. Div. 598.....	1378
McVey v. Chesapeake &c. R. Co., 46 W. Va. 111.... (752).....	1111, 2151
McVey v. Illinois C. R. Co., 73 Miss. 487.....	952
McVoy v. Oakes, 91 Wis. 214.....	2146
McWhirter v. Hatten, 42 Iowa, 288.... (849)	
McWilliams v. Mason, 31 N. Y. 294.... (626)	
N. & W. R. Co. v. Ferguson, 79 Va. 241.....	518
N. J. Steam &c. Co. v. Merchants' Bank, 6 How. (U. S. R.) 344.... (341)	
N. J. &c. Co. v. Young, 49 Fed. Rep. 723.....	1607
N. S. Ex. Co. v. Bachman, 28 Oh. St. 144.....	252
N. Y. C. R. Co. v. State, 31 Md. 357.....	1110
N. Y. Lumber Co. v. Brooklyn, 71 N. Y. 580.....	2001
N. Y. &c. R. Co. v. Ball, 53 N. J. L. 283.....	513, 1616
N. Y. &c. R. Co. v. Burns, 22 Vroom, (N. J.) 340.....	376
N. Y. &c. R. Co. v. Atlantic Refining Co., 129 N. Y. 597.....	304
N. Y. &c. R. Co. v. Fraloff, 100 U. S. 24.....	297
N. Y. &c. R. Co. v. Haring, 18 Vroom, (N. J.) 137.....	584
N. Y. &c. R. Co. v. Lyons, 119 Pa. St. 324.....	1547
N. Y. &c. R. Co. v. Mushrush, (Ind. App.) 37 N. E. Rep. 954.....	1189
N. Y. &c. R. Co. v. Skinner, 19 Pa. St. 298.... (1013).....	1026
N. Y. &c. R. Co. v. Winter, 143 U. S. 60.....	561
N. Y. &c. R. Co. v. Dryburg, 35 Pa. 297.... 2389, 2391, 2392, 2412, 1417, 1424, 2426	2426
Nadau v. White, R. L. Co., 76 Wis. 120.....	1448
Nadel v. Fichten, 34 App. Div. 188.....	1321
Nading v. Denison &c. R. Co., 22 Tex. Civ. App. 173.....	890, 928
Nagel v. Alleghany &c. Co., 88 Pa. St. 35.....	722
Nagel v. Buffalo, 34 Hun, 1.....	2011
Nagle v. Missouri P. R. Co., 75 Mo. 653.... (878).....	898, 2133
Nagle v. Wakey, 161 Ill. 387.....	1819
Nall v. Louisville &c. R. Co., 129 Ind. 260.....	1644
Nance v. Lary, 5 Ala. 370.... (172)	
Nance v. St. Louis &c. R. Co., 79 Mo. 196.... (1054)	
Nance v. Stockburger, 111 Ga. 821.....	628
Nanticoke v. Warne, 106 Pa. St. 373.....	695
Nanz v. Oakley, 120 N. Y. 84.... (65)	
Napier v. Brooklyn &c. R. Co., 68 App. Div. 200.....	917
Narramore v. Cleveland &c. R. Co., 96 Fed. Rep. 298.....	1690, 1777
Nash v. Chicago &c. R. Co., 95 Wis. 327.....	1547
Nash v. N. Y. &c. R. Co., 51 Hun, 594.....	814
Nash v. Second Nat. Bank, (N. J. L.) 51 Atl. Rep. 727.....	180
Nash v. Sharpe, 19 Hun, 366.... (836)	
Nashua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339.... (338).....	349, 354
Nashville R. Co. v. Foster, 10 Lea, 351.....	1612
Nashville R. Co. v. Jones, 9 Heisk, (Tenn.) 27.....	1647
Nashville Street Co. v. Griffin, 104 Tenn. 81.....	350, 584, 923
Nashville &c. R. Co. v. Carroll, 6 Heisk, (Tenn.) 347.....	2135
Nashville &c. R. Co. v. Estes, 7 Heisk, 622.... (233).....	235
Nashville &c. R. Co. v. Gann, 101 Tenn. 380.....	1665
Nashville &c. R. Co. v. Johnson, 6 Heisk, 271.....	253
Nashville &c. R. Co. v. Norman, 108 Tenn. 324.....	2271
Nashville &c. R. Co. v. O'Byran, 104 Tenn. 28.....	905, 918
Nashville &c. R. Co. v. Parker, 123 Ala. 683.....	223
Nashville &c. R. Co. v. Peacock, 25 Ala. 229.....	1015
Nashville &c. R. Co. v. Saddler, 91 Tenn. 508.... (1030)	



# TABLE OF CASES.

CCXXV

	PAGE
Nashville &c. R. Co. v. Smith, (Ala.) 31 South. Rep. 481.....	275
Nashville &c. R. Co. v. Smith, 9 Lea, (Tenn.) 470.....	689
Nashville &c. R. Co. v. Smith, 6 Heisk, (Tenn.) 174.... (809)	
Nashville &c. R. Co. v. Spence, 99 Tenn. 218.....	1039
Nashville &c. R. Co. v. Sprayberry, 8 Bax. (Tenn.) 341.... (342)	
Nashville &c. R. Co. v. Thomas, 5 Heisk, 262.....	1022, 1027
Nashville &c. R. Co. v. Wheless, 10 Lea, 741.....	1655
Nason v. West, 31 Misc. 583.....	2344
Nason v. West, 78 Me. 253.....	1115, 1485
Nass v. Schulz, 105 Wis. 146.....	1249
Natchez v. Shields, 74 Miss. 871.....	1946
Natchez Cotton Mill Co. v. Mullins, 67 Miss. 672.... (949)	
Natchez &c. R. Co. v. Cook, 63 Miss. 38.....	952
Natchez &c. R. Co. v. McNeil, 61 Miss. 434.... (1026)	
Nathan v. Charlotte Street R. Co., 118 N. C. 1066.....	684
Nathan v. Sands, 52 Neb. 660.....	1200
National Bank v. American Exchange Bank, 151 Mo. 320.....	40
National Bank v. Baker, 77 Md. 462.....	19
National Bank v. Dearborn, 115 Mass. 219.... (312)	
National Bank v. Johnson, 6 N. D. 180.....	41
National Bank v. National Mechanics' Banking Ass'n &c., 55 N. Y. 211....	1079
National Bank v. Railroad Co., 44 Minn. 224.... (1082)	
National Citizens' Bank v. Citizens' Nat. Bank, 119 N. C. 307.... (41)	
National Exch. Bank v. Berry, 21 Ind. App. 261.....	191
National Exch. Bank v. Veneman, 43 Hun, 241.....	170, 626
National Fire Ins. Co. v. Denver &c. Electric Co., (Colo. App.) 63 Pac. Rep. 949.....	1060
National Fertilizer Co. v. Travis, 102 Tenn. 16.....	1521, 1664, 1667
National Mahaiwe Bank v. Hand, 80 Hun, 584.....	1305
National Malleable Castings Co. v. Luscombe, 9 Oh. C. C. 680.....	1208, 1508
National Malleable Castings Co. v. Luscomb, 19 Oh. C. C. 673....	1411, 1505, 1585
National Park Bank v. Ninth National Bank, 46 N. Y. 77.... (158)	1079
National Telephone Co. v. Baker, 68 L. T. Rep. (N. S.) 283.... (1058)	
National Tube Co. v. Bidell, 96 Pa. St. 175.....	1622
National Union v. Arnhorst, 74 Ill. App. 482.....	1312
National &c. Board Co. v. Lewiston &c. Light Co., 95 Me. 318.....	839
Naugatuck R. Co. v. Waterbury, 24 Conn. 468.... (342)	
Nevasota v. Pearce, 46 Tex. 526.....	1960
Nave v. Flack, 90 Ind. 205.....	657, 2125
Naylor v. C. & N. &c. R. Co., 53 Wis. 661.....	1704
Naylor v. Lower Vein Coal Co., 55 Iowa, 671.....	1543
Nead v. Roscoe Lumber Co., 54 App. Div. 621.....	2343, 2350
Neal v. First Nat. Bank, 26 Ind. App. 503.....	167
Neal v. Gillett, 23 Conn. 437.... (657)	
Neal v. Marion, 126 N. C. 412.....	1879, 2013
Neal v. Marion, 129 N. C. 345.....	1827, 1828, 1876, 1879, 1882
Neal v. Carolina C. R. Co., 126 N. C. 634.....	677, 2149
Nealand v. Boston &c. R. Co., 161 Mass. 67.....	622
Nealand v. Lynn &c. R. Co., 173 Mass. 42.....	1570, 1581
Near v. D. & H. C. Co., 32 Hun, 557.....	1431
Nebonne v. Concord R. R., 68 N. H. 296.....	852, 1240
Nebraska v. Nebraska Telephone Co., 17 Neb. 126.....	2390
Nebraska City v. Campbell, 2 Black, 590.... (836)	
Nebraska Meal Mills v. St. Louis &c. R. Co., 64 Ark. 169.....	315
Nebraska Teleg. Co. v. Jones, 60 Neb. 396.....	689, 1948, 2247
Nebraska Tel. Co. v. York Gas & E. L. Co., 27 Nebraska, 284.... (1058)	
Necker v. Harvey, 49 Mich. 517.....	1399
Neldo v. Ticonderoga, 77 Hun, 524.....	696
Needham v. R. Co., 38 Vt. 294.... (949)	778, 958
Needham v. King, 95 Mich. 303.....	1247
Needham v. San Francisco R. Co., 37 Cal. 409.... (657)	667
Needles v. Howard, 1 E. D. Smith, 54.....	146
Neeley v. O'Conner, 106 Pa. St. 321.....	1459

	PAGE
Neeling v. Chicago &c. R. Co., 98 Iowa, 554.....	1443
Neeson v. City of Troy, 29 Hun, 173.....	940
Neet v. Burlington &c. R. Co., 106 Iowa, 248.... (661).....	661
Neff v. New York &c. Co., 80 Hun, 394.....	1439
Neff v. Wellesley, 148 Mass. 487.....	1997, 2368
Neglia v. Lielouka, 32 Misc. 707.....	1323
Nehr v. State, 35 Neb. 638.....	991
Nehrbas v. Central Pacific R. Co., 62 Cal. 320.....	877
Neidlinger v. Yoost, 99 Fed. Rep. 240.....	1221
Neier v. Missouri Pac. R. Co., 12 Mo. App. 35.... (775).....	846, 1170
Neil v. Barron, 7 Oh. N. P. 84.....	1983
Neilkolozjak v. North American China Co., (Mich.) 88 N. W. Rep. 75.....	1666
Neimeyer v. Weinhaeuser, 95 Iowa, 497.....	1401
Nein v. La Crosse City R. Co., 92 Fed. Rep. 85.....	2326, 2332
Neininger v. Cowan, 101 Fed. Rep. 787.... (755).....	685
Nellie Flagg, 23 Fed. Rep. 671.... (1115)	
Nelling v. Chicago &c. R. Co., 98 Iowa, 554.....	1709
Nellums v. Nashville, 106 Tenn. 222.....	1825, 1826
Nels Wuotilla v. Duluth R. Co., 37 Minn. 153.....	1567
Nelson v. Allen Paper Car-Wheel Co., 29 Fed. Rep. 840.....	1412
Nelson v. Atlantic &c. R. Co., 68 Mo. 593.... (809)	
Nelson v. Breman, 22 R. I. 283.....	2356
Nelson v. C. R. I. Co., 38 Iowa, 564.... (658)	
Nelson v. Canisteo, 100 N. Y. 89.....	1919
Nelson v. Crescent City R. Co., 49 La. Ann. 491.....	2206
Nelson v. First Nat. Bank, 69 Fed. Rep. 798.....	182
Nelson v. Galveston R. Co., 78 Tex. 621.....	953
Nelson v. Harrington, (Wis.) 4 N. W. Rep. 228.....	2197
Nelson v. Hudson River R. Co., 48 N. Y. 498.....	273
Nelson v. Lehigh Valley R. Co., 25 App. Div. 535.....	399
Nelson v. L. I. R. Co., 7 Hun, 140.....	586, 587
Nelson v. Nugent, 106 Wis. 477.....	998
Nelson v. Railroad Co., 26 Vt. 717.....	1474
Nelson v. St. Paul &c. R. Co., 76 Minn. 189.... (755)	
Nelson v. Sanford Mills, 89 Me. 219.....	1721
Nelson v. Shaw, 102 Wis. 274.....	1573, 1700
Nelson v. Southern P. Co., 15 Utah, 325.....	319
Nelson v. Southern P. R. Co., 18 Utah, 244.... (375)	1129
Nelson v. Vermont R. Co., 26 Vt. 717.....	1334
Nelson v. Willey &c. Nav. Co., 26 Wash. 548.....	1631
Nelson v. Woodruff, 1 Black, (U. S.) 156, 160.... (1082)	
Nelson Business College Co. v. Lloyd, 60 Oh. St. 448.....	2
Nelson Man. Co. v. Stoltzzenburg, 59 Ill. App. 628.....	1750, 1751
Nemier v. Riter, 179 Pa. St. 557.....	1621
Nesbitt v. Wilbur, 177 Mass. 200.....	99
Nesbit v. Garner, 75 Iowa, 315.... (730)	
Nesbitt v. Crosby, (Conn.) 51 Atl. Rep. 550.....	666, 1205, 236
Nesbitt v. Northern P. R. Co., 22 Wash. 698.... (954)	
Neslie v. Second &c. R. Co., 113 Pa. St. 300.....	68
Neubauer v. N. Y., L. I. & N. R. Co., 101 N. Y. 607.....	166
Neundoeffer v. Brooklyn &c. R. Co., 9 App. Div. 66.... (756)	
Neumeister v. Eggers, 29 App. Div. 385.....	642, 1089, 226
Neun v. Rochester R. Co., 165 N. Y. 146.....	71
Neven v. Boland, 177 Mass. 11.....	2191
Neversorry v. Duluth &c. R. Co., 115 Mich. 146.....	1004, 1035, 1040, 1041
Neville v. Mitchell, (Tex. Civ. App.) 66 S. W. Rep. 579.....	209
Neville v. St. Louis &c. R. Co., 158 Mo. 293.....	40
Nevins v. Bay State Steamboat Co., 4 Bosw. N. Y. 226.....	29
Nevins v. Peoria, 41 Ill. 502.....	196
Nevins v. Steamship Co., 4 Bosw., 225.... (291)	
Nevitt v. Woodburn, 82 Ill. App. 649.....	5
New Albany v. Lines, 21 Ind. App. 380.....	1961, 196
New Albany v. Slider, 21 Ind. App. 392.....	1988, 2009

## TABLE OF CASES.

cxxxvii

	PAGE
New Albany v. Ray, 3 Ind. App. 321.....	1908
Newark v. Jones, 16 Oh. C. C. 563.....	1934
Newark v. McDowell, 16 Oh. C. C. 556.....	1934
Newark Electric &c. Co. v. Garden, 78 Fed. Rep. 74.....	1066, 2114
Newark Electric &c. Co. v. McGilvery, 62 N. J. L. 451.....	1063
Newark Electric &c. Co. v. Ruddy, 62 N. J. L. 505.....	1064
Newark &c. R. Co. v. McCann, 58 N. J. L. 642.....	414
Newberger Cotton Co. v. Illinois C. R. Co., 75 Miss. 303.....	250, 1112
Newbury v. Getchell &c. Co., 100 Iowa, 441.....	856, 860, 1503, 1639
Newcomb v. Boston Productive Department, 46 Mass. 596.....	1170
Newcomb v. Metropolitan St. R. Co., 36 Misc. 787.....	657, 1165, 2312
Newcomb v. New York &c. R. Co., (Mo.) 69 S. W. Rep. 348.....	428, 1137
Newcomb v. Van Zile, 34 Hun, 275.....	2241, 2362
Newdick v. Hamilton, 18 Oh. C. C. 266.....	2006, 2007, 2008
Newell v. Bartlett, 114 N. Y. 399.....	1130, 1338
Newell v. Newell, 9 Paige, 25.....	2032
Newell v. Rahn, 64 Ill. App. 249.....	1091
Newell v. Ryan, 40 Hun, 286.....	1516
Newell v. Smith, 49 Vt. 260....(91).....	96
Newell v. Woodfolk, 91 Hun, 211.....	2072
New England R. Co. v. Conroy, 175 U. S. 323.....	1647
New England R. Co. v. Hyde, 101 Fed. Rep. 401.....	431
New Haven Trust Co. v. Doherty, 74 Conn. 353.....	71
New Jersey Electric R. Co. v. Miller, 59 N. J. L. 423.....	2317
New Jersey S. Nav. Co. v. Bank, 6 How. (U. S.) 344.....	255, 288, 298
Newman v. Birmingham, 109 Ala. 630.....	2017
Newman v. Pennsylvania R. Co., 33 App. Div. 171.....	222
Newman v. Phillipsburgh &c. R. Co., 50 N. J. L. 446....(706)	
Newman v. Smoker, 25 La. Ann. 303.....	247
Newman v. Vicksburgh &c. R. Co., 64 Miss. 115.....	793, 1022, 1030
Newman v. Western Union Tel. Co., 54 Mo. App. 434....(858)	
Newnom v. Southwestern Teleg. &c. Co., (Tex. Civ. App.) 47 S. W. Rep. 669.	1562
New Orleans v. Kerr, 50 La. Ann. 413.....	1911, 1982, 1983, 1985, 1997
New Orleans &c. R. Co. v. Bourgeois, 66 Miss. 3....(1020)	
New Orleans &c. R. Co. v. Burke, 53 Miss. 200.....	533
New Orleans &c. R. Co. v. Clements, 100 Fed. Rep. 415.....	1487
New Orleans &c. R. Co. v. Field, 46 Miss. 573....(1015).....	1001, 1018, 1026
New Orleans &c. R. Co. v. Harrison, 48 Miss. 112.....	32, 1397
New Orleans &c. R. Co. v. Hughes, 49 Miss. 258.....	1404, 1513, 1601, 1794
New Orleans &c. R. Co. v. Hurts, 36 Miss. 660....(575)	
New Orleans &c. R. Co. v. Jopes, 142 U. S. 18.....	19, 529
New Orleans &c. R. Co. v. McEwen, 49 La. Ann. 1184.....	2103
New Orleans &c. R. Co. v. Statham, 42 Miss. 607.....	577
New Orleans &c. R. Co. v. Thornton, 65 Miss. 256....(1030)	
New Pittsburg Coal &c. Co. v. Peterson, 14 Ind. App. 634.....	1666
Newport News &c. E. Co. v. Bradford, (Va.) 40 S. E. Rep. 900.....	913, 2275
Newport News &c. R. Co. v. Stewart, 99 Ky. 496....(808)	
Newport &c. Co. v. U. S., 61 Fed. Rep. 488.....	256
Newson v. Receivers &c., 78 Fed. Rep. 94.....	1441
Newson v. N. Y. &c. R. Co., 29 N. Y. 83.....	303, 1761
Newson v. Norfolk &c. R. Co., 81 Fed. Rep. 133.....	1033, 1777
Newton v. The Central V. R. Co., 80 Hun, 491.....	407, 463, 703
Newton v. Harris, 6 N. Y. 345....(1797)	
Newton v. Pope, 1 Conn. 109....(105).....	109, 1104
Newton v. Worcester, 169 Mass. 516.....	1896
Newton v. Worcester, 174 Mass. 181.....	1896
New York Biscuit Co. v. Rouss, 74 Fed. Rep. 608.....	1506
New York v. Brown, 27 Misc. 218.....	2260
New York Condensed Milk Co. v. Nassau Electric R. Co., 29 Misc. 127.....	2331
New York Nat. Exch. Bank v. Crowell, 177 Pa. St. 313.....	193
New York Telephone Co. v. Keesey, 5 Pa. Dist. Rep. 366.....	2248
New York &c. R. Co. v. Ansonia Land &c. Co., 72 Conn. 703.....	940
New York &c. R. Co. v. Baker, 98 Fed. Rep. 694.....	536

	PAGE
New York &c. R. Co. v. Blair, 79 Fed. Rep. 896.....	1220
New York &c. R. Co. v. Blumenthal, 160 Ill. 40.....	1101
New York &c. R. Co. v. Cromwell, 98 Va. 227.....	307
New York &c. R. Co. v. Green, 90 Tex. 257.....	1441
New York &c. R. Co. v. Grossman, 17 Ind. App. 652.....	1262
New York &c. R. Co. v. Hamlet, 149 Ind. 344.....	2090
New York &c. R. Co. v. Jones, 94 Md. 24.....	2084
New York &c. R. Co. v. Kelly, 93 Fed. Rep. 745.....	2147
New York &c. R. Co. v. Kistler, 16 Oh. C. C. 316.... (731).....	154, 777, 794
New York &c. R. Co. v. Leander, (Tex. Civ. App.) 46 S. W. Rep. 843.....	936
New York &c. R. Co. v. Leubeck, 157 Ill. 595.... (735)	
New York &c. R. Co. v. Moore, 105 Fed. Rep. 725.... (800).....	762, 1239
New York &c. R. Co. v. Ostman, 146 Ind. 452.....	1436
New York &c. R. Co. v. O'Leary, 93 Fed. Rep. 737.....	1438, 1630
New York &c. R. Co. v. Sayles, 87 Fed. Rep. 444.....	291
New York &c. R. Co. v. Schuler, 3 N. Y. 30.... (7)	
New York &c. R. Co. v. Steinbrenner, 47 N. J. L. 161.... (370)	
New York &c. R. Co. v. Swartout, 3 Oh. Dec. 636.... (799).....	800, 808
New York &c. R. Co. v. Thomas, 92 Va. 606.....	1136
New York &c. R. Co. v. Zumbaugh, 17 Ind. App. 171.....	1034
New York &c. Teleph. Co. v. Bennett, 62 N. J. L. 742.....	895
Niagara &c. Ins. Co. v. Hoeflin, (Ky.) 60 S. W. Rep. 393.....	1314
Nicholas v. Burlington &c. R. Co., 78 Minn. 43.....	963
Nicholas v. N. Y. &c. R. Co., 4 Hun, 329.... (298).....	272
Nicholas v. Peck, 20 R. I. 533.....	1879
Nicholas v. Peck, 21 R. I. 404.....	2248
Nicholas v. Sixth Ave. R. Co., 38 N. Y. 131.... (460)	
Nichols v. Athens, 66 Me. 402.....	1913
Nichols v. Balch, 8 Misc. 452.....	111
Nichols v. Brooklyn City R. Co., 30 Hun, 437.....	1176
Nichols v. Brush &c. Co., 53 Hun, 137.....	1555, 1563
Nichols v. Chicago &c. R. Co., 90 Mich. 203.....	562
Nichols v. Chicago &c. R. Co., (Mich.) 84 N. W. Rep. 470.....	1532
Nichols v. Chicago &c. R. Co., 36 Minn. 452.....	2029
Nichols v. Dubuque &c. R. Co., 68 Iowa, 732.... (848).....	474
Nichols v. Laurens, 96 Iowa, 388.....	1878
Nichols v. Lynn &c. R. Co., 168 Mass. 528.....	473, 530, 1122
Nichols v. Minneapolis, 33 Minn. 430.....	697
Nichols v. R. Co., 106 Mass. 463.....	493
Nichols v. Sixth Ave. R. Co., 38 N. Y. 131.....	467
Nichols v. Smith, 115 Mass. 332.....	91, 93
Nicholson v. Detroit, (Mich.) 88 N. W. Rep. 695.....	1988
Nicholson v. Erie R. Co., 41 N. Y. 525.... (813).....	2104, 2105, 2113
Nicholson v. Lancashire &c. R. Co., 3 Hurlis. & Colt. (Exch.) 534.....	142, 431
Nicholson v. Philadelphia, 194 Pa. St. 460.....	1881
Nicholson v. Whitlock, 57 S. C. 36.....	62
Nicholson v. Willan, 5 East. 507.... (268)	
Nickel v. Columbia Paper Stock Co., (Mo. App.) 68 S. W. Rep. 955.....	1593
Nickerson v. Wheeler, 118 Mass. 295.....	983
Nickolson v. Northern P. R. Co., 80 Minn. 508.....	1032, 1053
Nicodemo v. Southborough, 173 Mass. 455.....	1829
Nicol v. Young, 68 Mo. App. 448.....	628
Nicoud v. Wagner, 106 Wis. 67.....	914
Nieber v. Detroit Elec. R. Co., (Mich.) 87 N. W. Rep. 626.....	516
Niendorff v. Manhattan R. Co., 4 App. Div. 46.....	908, 916, 1234
Nies v. Broadhead, 75 Hun, 255.....	1237
Nies v. Brooklyn &c. R. Co., 68 App. Div. 259.....	495
Nieto v. Clark, 1 Cliff. 145.... (522).....	528
Nihill v. New York &c. R. Co., 167 Mass. 52.....	1707
Nilan v. Richmond &c. Gaslight Co., 1 App. Div. 234.....	2251
Niland v. Geer, 46 App. Div. 194.....	974
Niles v. Minneapolis &c. R. Co., 107 Mich. 238.....	1712
Niles v. New York &c. R. Co., 14 App. Div. 58.....	1527

## TABLE OF CASES.

ccxxix

	PAGE
Nilley v. Hart &c. Co., 51 Conn. 524.....	1145
Nims v. Mt. Hermon, 160 Mass. 177.....	608
Nims v. Mayor &c. of Troy, 59 N. Y. 500.....	1904, 2021
Ninantic &c. Co. v. Leonard, 126 Ill. 216.....	1623
Nines v. St. Louis &c. R. Co., 107 Mo. 475.... (254)	
Nippert v. Warneke, 128 Cal. 501.....	2099
Nisbet v. Atlanta, 97 Ga. 650.....	1984
Nisbet v. Lawson, 1 Ga. 275.....	2177
Nivan v. Rochester, 76 N. Y. 619.....	692
Nixon v. Hannibal &c. R. Co., 141 Mo. 425.....	818, 820
Nixon v. Stillwell, 52 Hun, 353.....	887
Noble v. Aasen, 8 N. D. 77.....	2006
Noble v. Atchison &c. R. Co., 4 Okla. 534.....	568
Noble v. Hanna, 74 Ill. App. 564.....	1868, 1877
Noble v. Jackson, (Ala.) 31 South Rep. 450.....	55
Noble v. Jones, 103 Ga. 584.....	1584
Noble v. Kansas City, (Mo. App.) 68 S. W. Rep. 969.....	1190
Noble v. Milliken, 74 Me. 225.... (142)	
Noble v. Milliken, 77 Me. 359.....	142
Noble v. New York &c. R. Co., 20 App. Div. 40.... (773)	
Noble v. Seattle, 19 Wash. 133.....	954
Nodine v. Doherty, 46 Barb. 59.....	2383
Nofsinger v. Goldman, 122 Oal. 609.....	1564, 1635
Nohrden v. Northeastern R. Co., 59 S. C. 87.... (768)	
Nokomis v. Salter, 61 Ill. App. 150.....	1881
Nolan v. Brooklyn &c. R. Co., 87 N. Y. 63.....	504, 511, 673
Nolan v. Central R. &c. Co., 67 N. J. L. 124.... (755)	
Nolan v. King, 97 N. Y. 565.....	2232
Nolder v. McKeeseport &c. R. Co., 201 Pa. St. 169.....	2297
Nolan v. Metropolitan Street R. Co., 65 App. Div. 184.....	666
Nolan v. Milwaukee &c. R. Co., 91 Wis. 16.....	2170
Nolan v. N. Y. C. &c. R. Co., 53 Conn. 461.....	681, 2053, 2110
Nolan v. New York &c. R. Co., 70 Conn. 159.....	1527, 1528, 1531, 1602
Noll v. Seattle, (Wash.) 69 Pac. Rep. 382.....	1942
Nolton v. Western R. Co., 15 N. Y. 444.....	259, 373, 389, 415, 424, 2185
Noo Dan v. Seattle Electric &c. R. Co., 5 Wash. 466.....	483
Noonan v. Albany, 79 N. Y. 470.....	1902
Noonan v. Consolidated T. R. Co., 64 N. J. L. 579.... (730)	
Noonan v. Obermeyer &c. Brew. Co., 50 App. Div. 377.....	707, 862
Noonan v. Pardee, 200 Pa. St. 474.....	1373
Noonan v. Stillwater, 33 Minn. 198.....	2261
Noran v. St. Paul, 54 Minn. 279.....	2013
Norcross v. Norcross, 53 Me. 163.....	141
Nordheimer v. Alexander, Mont. L. R. 6 Q. B. 402.....	2267
Nordlinger v. Nelson, 46 Fed. Rep. 859.....	256
Norfolk v. Johnakin, 94 Va. 285.....	1921
Norfolk Beet-Sugar Co. v. Hight, 56 Neb. 162.....	1505
Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100.....	1599
Norfolk Beet-Sugar Co. v. Preuner, 55 Neb. 656.....	1752
Norfolk R. &c. Co. v. Corletto, (Va.) 41 S. E. Rep. 740.....	2280, 2285
Norfolk &c. R. Co. v. Ampey, 93 Va. 108.....	
..... 557, 911, 1157, 1466, 1513, 1540, 1633, 1741	
Norfolk &c. R. Co. v. Brown, 91 Va. 668.....	1428, 1674
Norfolk &c. R. Co. v. Carter, 91 Va. 587.....	2090
Norfolk &c. R. Co. v. Cromer, 99 Va. 763.....	1719
Norfolk &c. R. Co. v. De Board, 91 Va. 700.....	2166
Norfolk &c. R. Co. v. Donnelly, 88 Va. 853.....	1609, 1666
Norfolk &c. R. Co. v. Dunnaway, 93 Va. 29.....	2147
Norfolk &c. R. Co. v. Graham, 96 Va. 430.....	1526, 1713
Norfolk &c. R. Co. v. Groseclose's Adm'r, 13 S. E. Rep.... (706)	
Norfolk &c. R. Co. v. Houchins, 95 Va. 398.....	1609, 1655
Norfolk &c. R. Co. v. Irvine, 84 Va. 553.....	618
Norfolk &c. R. Co. v. Johnson, 91 Va. 661.....	1035

	PAGE
Norfolk &c. R. Co. v. Mann, 99 Va. 180.....	1745
Norfolk &c. R. Co. v. Marpole, 97 Va. 594..... (855).....	1893
Norfolk &c. R. Co. v. Phillips, 100 Va. 362.....	875, 1408, 1488, 1673
Norfolk &c. R. Co. v. Poole, 100 Va. 148.....	1117, 1487
Norfolk &c. R. Co. v. Reves, 97 Va. 284..... (240).....	258, 1100, 1223
Norfolk &c. R. Co. v. Stevens, 97 Va. 631.....	850, 857, 875, 1490, 1881
Norfolk &c. R. Co. v. Shott, 92 Va. 34..... (374)	
Norfolk &c. R. Co. v. Suffolk Lumber Co., 92 Va. 413.....	1160
Norfolk &c. R. Co. v. Tanner, (Va.) 41 S. E. Rep. 721..... (401).....	1207
Norfolk &c. R. Co. v. Wood, 99 Va. 156.....	2166
Norfolk &c. R. Co. v. Wyson, 82 Va. 250..... (574)	
Normal v. Webb, 91 Ill. App. 183.....	1851, 1856
Norman v. Chicago &c. R. Co., 110 Iowa, 283.....	1034, 1159
Norman v. Ince, 8 Okla. 412.....	1961
Norris v. Brooklyn City R. Co., 4 Misc. 294.....	507
Norris v. Houston &c. R. Co., (Tex. Civ. App.) 41 S. W. Rep. 708.....	1157
Norris v. Illinois C. R. Co., 88 Ill. App. 614.....	1673, 1734
Norris v. Kohler, 41 N. Y. 42.....	1109, 2288
Norris v. Litchfield, 35 N. H. 271.....	663, 1844
Norris v. Savannah &c. R. Co., 23 Fla. 182.....	233
Norris v. Warner, 59 Ill. App. 300.....	979
Norristown v. Moyer, 67 Pa. St. 355.....	1852, 1914
North v. Stevenson, 71 Mo. App. 429.....	628
North American Provision Co. v. Hart, 66 Ill. App. 659.....	2108
North American R. &c. Co. v. Patry, (Kan. App.) 51 Pac. Rep. 871.....	1445
North American T. &c. Co. v. Morrison, 178 U. S. 262.....	831
North British &c. Co. v. Central V. R. Co., 9 App. Div. 4.....	240, 281, 1308
North Cent. R. Co. v. Husson, 101 Pa. St. 1.....	1411
North Chicago St. R. Co. v. Allen, 82 Ill. App. 128.....	2326, 2333
North Chicago St. R. Co. v. Baur, 179 Ill. 126.....	496
North Chicago St. R. Co. v. Brown, 178 Ill. 187.....	471, 912
North Chicago St. R. Co. v. Broms, 62 Ill. App. 127.....	909
North Chicago St. R. Co. v. Conway, 76 Ill. App. 621.....	1606
North Chicago St. R. Co. v. Dudgeon, 184 Ill. 477.....	910, 1489, 1673, 1688, 2245
North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466.....	863
North Chicago St. R. Co. v. Hoffart, 82 Ill. App. 539.....	2295
North Chicago St. R. Co. v. Irwin, 82 Ill. App. 146.....	2327
North Chicago St. R. Co. v. Kaspers, 85 Ill. App. 316..... (481).....	912, 1121
North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229.....	2320
North Chicago St. R. Co. v. Olds, 40 Ill. App. 421.....	587, 590
North Chicago St. R. Co. v. Smadraff, 189 Ill. 155.....	2273
North Chicago St. R. Co. v. Southwick, 66 Ill. App. 241.....	496
North Chicago St. R. Co. v. Zeigler, 182 Ill. 9.....	837, 2273, 2298
North Chicago St. R. Co. v. Wiswell, 68 Ill. App. 443.....	478, 930
North Chicago &c. R. Co. v. Anderson, 176 Ill. 635.....	1004
North Chicago &c. R. Co. v. Dudgeon, 69 Ill. App. 57.....	1608
North Chicago &c. R. Co. v. Duebner, 85 Ill. App. 602.....	854
North Chicago &c. R. Co. v. Gillow, 166 Ill. 444.....	1142, 1178
North Chicago &c. R. Co. v. Johnson, 114 Ill. 57.....	1497, 1605, 1613
North Chicago &c. R. Co. v. Schwartz, 82 Ill. App. 493.....	1101
North German Lloyd Sa. Co. v. Wood, 18 Pa. Super. Ct. 488..... (855)	
North Jersey Street R. Co. v. Mohart, 62 N. J. L. 236.....	1953
North Kankakee Street R. Co. v. Blatchford, 81 Ill. App. 609.....	707, 1125, 1214, 2304
North Manchester &c. Ass'n v. Wilcox, 4 Ind. App. 141.....	2125
North Pac. R. Co. v. Nickels, 4 U. S. App. 369.....	1532
North Packing &c. Co. v. W. U. T. Co., 70 Ill. App. 275.....	2398, 2414
North Penn. R. Co. v. Rehman, 49 Pa. St. 101..... (1012)	
North Point Consol. &c. Co. v. Utah, 16 Utah, 246.....	2085, 2097
North Point &c. Irr. Co. v. Utah &c. Canal Co., 23 Utah, 199.....	829
North Powder Milling Co. v. Cougnaour, 34 Ora. 9.....	2084
North Transp. Co. v. Chicago, 99 U. S. 635.....	1961
North Vernon v. Voelger, 103 Ind. 314.....	957
Northcote v. Bachelder, 111 Mass. 322.....	1669

## TABLE OF CASES.

ccxxxi

## PAGE

Northern v. Grand Trunk R. Co., 125 Mass. 99. . . . . (605)	
Northern Alabama R. Co. v. Sides, 122 Ala. 594. . . . .	817
Northern C. R. Co. v. State, 31 Md. 357. . . . .	667
Northern C. R. Co. v. State, 54 Md. 115. . . . .	815
Northern C. R. Co. v. Medairy, 86 Md. 168. . . . .	677, 808
Northern C. R. Co. v. O'Connor, 76 Md. 287. . . . .	833
Northern Milling Co. v. Mackay, 99 Ill. App. 57. . . . .	1118, 1200
Northern P. R. Co. v. Craft, 69 Fed. Rep. 124. . . . .	1603
Northern P. R. Co. v. Charles, 162 U. S. 359. . . . .	1613, 1667
Northern P. R. Co. v. Eheland, 163 U. S. 93. . . . .	1713
Northern P. R. Co. v. Freeman, 174 U. S. 379. . . . .	677
Northern P. R. Co. v. Freeman, 83 Fed. Rep. 82. . . . .	684
Northern P. R. Co. v. Hayes, 87 Fed. Rep. 129. . . . .	1208
Northern P. R. Co. v. Heflin, 83 Fed. Rep. 93. . . . .	95
Northern P. R. Co. v. Herbert, 116 U. S. 650. . . . .	1405, 1489, 1616, 1655, 1800
Northern P. R. Co. v. Krohne, 86 Fed. Rep. 230. . . . .	1511
Northern P. R. Co. v. Lewis, 89 Ill. App. 30. . . . .	275
Northern P. R. Co. v. Owens, (Minn.) 90 N. W. Rep. 371. . . . .	85
Northern P. R. Co. v. Pauson, 70 Fed. Rep. 585. . . . .	556
Northern P. R. Co. v. Peterson, 162 U. S. 346. . . . .	1602, 1646
Northern Pac. R. Co. v. United States, 104 Fed. Rep. 691. . . . .	2249
Northern Trust Co. v. Palmer, 171 Ill. 383. . . . .	647, 1321, 1324
Northern &c. R. Co. v. Herchiskel, 74 Fed. Rep. 460. . . . .	2154
Northern &c. R. Co. v. Price, 29 Md. 420. . . . . (809)	
Northridge v. Atlantic Ave. R. Co., 15 Misc. 66. . . . .	2344, 2351, 2358
Northrop v. Syracuse, B. & N. Y. R. Co., 3 Abb. App. Dec. 386. . . . . (308)	
Northrup v. Foot, 14 Wend. 249. . . . .	2373, 2382
Northrup v. N. Y., O. & W. R. Co., 37 Hun. 295. . . . .	790
Northrup v. R. R. Pass. Assurance Co., 43 N. Y. 516. . . . . (261)	
Northwestern Iron Co. v. National Bank, 70 Ill. App. 245. . . . .	178
Northwestern Nat. Bank v. Thompson &c. Man. Co., 71 Fed. Rep. 113. . . . .	119
Norton v. Eastern R. Co., 113 Mass. 366. . . . . (784)	809
Norton v. New Bedford, 166 Mass. 48. . . . .	1999, 2006
Norton v. New York, 16 Misc. 303. . . . .	2015, 2023
Norton v. North Carolina R. Co., 122 N. C. 910. . . . .	776
Norton v. Railroad Co., 40 Mo. App. 642. . . . .	2051
Norton v. Sewell, 106 Mass. 143. . . . .	1376
Norton v. Third Ave. R. Co., 26 App. Div. 60. . . . .	469
Norton v. Volzke, 158 Ill. 402. . . . .	666, 711, 1629
Norton v. Wiswall, 26 Barb. 618. . . . .	1355
Norton Bros. v. Sczpurak, 70 Ill. App. 686. . . . .	1094
Norwalk v. Ireland, 68 Conn. 1. . . . .	1083
Norwalk Gas Co. v. Norwalk, 63 Conn. 495. . . . .	631, 646
Norway Plains Co. v. Boston &c. R. Co., 1 Gray, 263. . . . .	313, 624
Norwich v. Breed, 30 Conn. 535. . . . .	2254, 2261
Nostrand v. Hubbard, 35 App. Div. 201. . . . .	1202
Nourie v. Theobald, 68 N. H. 564. . . . .	1744
Novotny v. Danforth, 9 S. D. 301. . . . .	2101
Nowack v. Metropolitan Street R. Co., 54 App. Div. 302. . . . .	1161
Nowakowski v. Detroit Stove Works, (Mich.) 89 N. W. Rep. 956. . . . .	1495
Nowell v. Wright, 3 Allen, 166. . . . .	85
Noyce v. Colly, 30 N. H. 143. . . . .	1001
Noyes v. Boskawen, 64 N. H. 361. . . . . (730)	
Noyes v. Colby, 30 N. H. 143. . . . .	995, 1006
Noyes v. R. R. Co., 27 Vt. 110. . . . . (349)	
Noyes v. Southern &c. R. Co., 24 Pac. (Cal.) 927. . . . . (689)	
Nudd v. Landsdowne, 7 Del. Co. Rep. (Pa.) 170. . . . .	1828
Nugent v. Atlas S. Co., 51 Hun. 306. . . . .	1636
Nugent v. B. C. & M. R. Co., 80 Me. 62, 77. . . . .	1318, 1716, 1763
Nugent v. Brooklyn &c. R. Co., 64 App. Div. 351. . . . .	1440, 1548
Nugent v. Kauffman Mill Co., 131 Mo. 241. . . . .	1493, 1542
Nugent v. Metropolitan Street R. Co., 17 App. Div. 582. . . . .	2292
Nugent v. Philadelphia T. Co., 181 Pa. St. 160. . . . .	2317



	PAGE
Nugent v. Vanderveer, 38 Hun, 487.....	2117
Nunn v. Georgia R. Co., 71 Ga. 710.....	561
Nurse v. St. Louis &c. R. Co., 61 Mo. App. 67.....	398
Nuss v. Rafsnyder, 178 Pa. St. 397.....	1561
Nussbaum v. Louisville R. Co., (Ky.) 57 S. W. Rep. 249.....	2291
Nutler v. Pearl, (N. H.) 51 Atl. 897.....	2245
Nuttall v. Simis, 22 Misc. 19.....	83
Nutter v. Boston &c. R. Co., 60 N. H. 483..... (776)	1206
Nutting v. Conn. R. Co., 1 Gray, 502..... (345)	
Nutting v. St. Paul, 73 Minn. 371.....	1825, 1956
Nuttir v. Chicago &c. R. Co., (Mo. App.) 5 W. 72.....	1170
Nutzmann v. Germania Life Ins. Co., 78 Minn. 504.....	1216, 1398, 1519
Nyce's Estate, 5 Watts & S. (Pa.) 254.....	47
Nye v. Pennsylvania R. Co., 178 Pa. 134.....	1443
O. C. &c. R. Co. v. Clark, 22 Pa. St. 231..... (569)	
O. & M. R. Co. v. Schiebe, 44 Ill. 460..... (493)	
O. & M. R. Co. v. Stratton, 78 Ind. 88.....	493
O. &c. Co. v. Davis, 23 Ind. 553.....	91
Oakes v. Mase, 165 U. S. 363.....	1609
Oakes v. Northern Pac. R. Co., 20 Ore. 392.....	614, 618
Oakes v. Spaulding, 40 Vt. 347.....	975, 982
Oakland R. Co. v. Fielding, 48 Pa. St. 320..... (819)	
Oakley v. Town of Mamaroneck, 39 Hun, 448.....	1824
Oates v. Metropolitan Street R. Co., 168 Mo. 535.....	667, 2286, 2290
O'Bannon v. Southern Express Co., 51 Ala. 481..... (208)	
O'Barr v. Alexander, 37 Ga. 195.....	2174
Oberman v. Reece, 95 Ill. App. 645.....	118
Oberndorfer v. Pabst, 100 Wis. 505.....	1079
Obert v. Dunn, 140 Mo. 476.....	2101
Obold v. United T. Co., 19 Pa. Super. Ct. 326.....	2290
O'Brien v. Am. &c. Co., 53 N. J. L. 291.....	1667
O'Brien v. Blaut, 17 App. Div. 288.....	1368
O'Brien v. Boston &c. R. Co., 15 Gray, 20.....	586, 588, 1614
O'Brien v. Buffalo Furnace Co., 68 App. Div. 451.....	1537, 1664
O'Brien v. Capwell, 59 Barb. 497.....	1324
O'Brien v. Cunard S. S. Co., 154 Mass. 272..... (607)	
O'Brien v. La Crosse, 99 Wis. 421.....	2039
O'Brien v. Look, 171 Mass. 36.....	1804
O'Brien v. Loomis, 43 Mo. App. 29.....	839
O'Brien v. N. Y. &c. R. Co., 80 N. Y. 236.....	579, 586
O'Brien v. Northwestern Imp. Co., (Minn.) 84 N. W. Rep. 735.....	1156
O'Brien v. Nute-Hallett Co., 177 Mass. 422.....	1740
O'Brien v. Staples Coal Co., 165 Mass. 435.....	1723
O'Brien v. Sullivan, 195 Pa. St. 474.....	1677
O'Brien v. Vaill, 22 Fla. 627.....	143
O'Brien v. Worcester, 172 Mass. 348.....	1908, 1909
O'Bryan v. Amsterdam, 74 Hun, 136.....	1952
O'Callaghan v. Metropolitan Street R. Co., 69 App. Div. 574.....	2306
Oceanic S. Co. v. Campania Trans. Espanola, 134 N. Y. 461.....	1296
Och v. Missouri &c. R. Co., 130 Mo. 27.....	1094, 2208
Ocheltree v. Chicago &c. R. Co., 96 Iowa, 246..... (793)	
Ochsenbein v. Shapley, 85 N. Y. 214..... (673)	6, 2263
Oconee &c. R. Co. v. Ramsay, 110 Ga. 266.....	2139
O'Connell v. Thompson-Starrett Co., 76 N. Y. Supp. 296.....	1513
O'Connell v. Clark, 22 App. Div. 466.....	1423, 1737
O'Connell v. Jarvis, 13 App. Div. 3..... (973)	
O'Connell v. Mooney, 32 Misc. 641.....	974
O'Connell v. Supreme Conclave &c., 102 Ga. 143.....	1311
O'Connell v. St. Louis &c. R. Co., 106 Mo. 482..... (398)	
O'Connell v. Samuel, 81 Hun, 357.....	27
O'Conner v. Adams, 120 Mass. 427.....	1498, 1644, 1600
O'Connor v. Andrews, 81 Tex. 28.....	2073



## TABLE OF CASES.

cexxxiii

	PAGE
O'Connor v. Barker, 25 App. Div. 121.....	1502, 1633
O'Connor v. Boston &c. R. Co., 135 Mass. 352.....	720
O'Connor v. Chicago &c. R. Co., 27 Minn. 166.... (1024)	
O'Connor v. Curtis, (Tex.) 18 S. W. Rep. 953.....	2267
O'Connor v. Fond du Lac, 109 Wis. 253.....	2014
O'Connor v. Golden Gate &c. Co., 135 Cal. 537.....	1537
O'Connor v. Ill. C. R. Co., 44 La. Ann. 339.....	2134
O'Connor v. Illinois C. R. Co., 77 Ill. App. 22.....	2139, 2150
O'Connor v. Missouri Pac. R. Co., 94 Mo. 150.....	798
O'Connor v. Neal, 153 Mass. 281.....	1637
O'Connor v. Pennsylvania R. Co., 48 App. Div. 244.....	1725
O'Connor v. Prendergast, 99 Ill. App. 531.....	2024
O'Connor v. St. Louis &c. R. Co., 56 Iowa, 735.....	2046
O'Connor v. Thompson-Starrett Co., 76 N. Y. Supp. 296.....	1638
O'Connor v. Union R. Co., 67 App. Div. 99.....	934, 2323
O'Connor v. Whittall, 169 Mass. 563.....	1558, 1751
Odair v. Missouri &c. R. Co., 14 Tex. Civ. App. 539.... (739)	
O'Day v. Chicago &c. R. Co., 97 Ill. App. 632.....	2162
O'dell v. N. Y. &c. R. Co., 120 N. Y. 323.....	693, 1494, 1597
O'dell v. Solomon, 99 N. Y. 635.....	1358, 1360
O'dell v. New York &c. R. Co., 18 App. Div. 12.....	363
Oderkirk v. Fargo Express Co., 61 Hun, 418.....	8, 328
Olin Coal Co. v. Denman, 185 Ill. 413.....	1783, 1784
Odum v. Schmidt, 52 La. Ann. 2129.....	2351
Odon v. Dobbs, 25 Ind. App. 522.....	1825, 1941
O'Donnell v. A. V. R. Co., 59 Pa. St. 239.....	376
O'Donnell v. Alleghany &c. R. Co., 9 P. F. Smith, (Pa.) 239.....	513
O'Donnell v. American Sugar Refining Co., 41 App. Div. 307.....	931, 1132
O'Donnell v. East River Gas Co., 91 Hun, 184.....	1628
O'Donnell v. International Nav. Co., 49 App. Div. 408.....	1724
O'Donnell v. Louisville &c. Light Co., (Ky.) 55 S. W. Rep. 202.... (1062)	
O'Donnell v. Louisville &c. R. Co., (Ky.) 42 S. W. Rep. 846.....	410
O'Donnell v. Louisville &c. L. Co., (Ky.) 55 S. W. Rep. 202.....	1155, 1159
O'Donnell v. Mo. &c. R. Co., 7 Mo. App. 190.....	2161
O'Donnell v. Pollock, 170 Mass. 441.....	995
O'Donnell v. Sargent, 69 Conn. 476.....	1415
O'Dowd v. Burnham, 19 Pa. Super. Ct. 464.....	1513, 1598, 1634
O'Driscoll v. Lynn &c. R. Co., 180 Mass. 187.....	1162
O'Dwyer v. O'Brien, 13 App. Div. 570.....	1329
Oedein v. Zautche, 92 Wis. 176.....	1050
Oellerich v. Hayes, 8 Misc. 211.....	1542
O'Fallon Coal Co. v. Laquet, 89 Ill. App. 13.....	925, 1956
O'Futt v. World's Columbian Exposition Co., 175 Ill. 472.....	1702
O'Flaherty v. Nassau &c. R. Co., 34 App. Div. 74.....	866, 1059, 1114
O'Flaherty v. Union R. Co., 45 Mo. 70.... (719)	
O'Fellie v. Hammond, 78 Minn. 275.....	1962, 2083
Ogdensburg &c. R. Co. v. Vermont &c. R. Co., 4 Hun, 268.....	1334
Ogg v. Murdock, 25 W. Va. 139.... (906)	
Ogle v. Cumberland, 90 Md. 59.....	1826
Ogle v. Jones, 16 Wash. 319.....	1629
Oglesby v. Missouri &c. R. Co., 150 Mo. 137.....	1108, 1147
Ogley v. Miles, 139 N. Y. 468.....	1501
O'Gorham v. Teets, 20 Misc. 359.....	1355
O'Grady v. Baltimore &c. R. Co., 28 Pittsb. L. J. (N. S.) 110.....	1171
O'Hanlon v. North R. Co., 6 Best & Smith, 484.... (824)	
O'Hara v. Brooklyn, 57 App. Div. 176.....	1895, 1897
O'Hara v. Buffalo, 39 App. Div. 443.....	1863, 1878
O'Hare v. Coheco Man. Co., 71 N. H. 104.....	1496
O'Hare v. Keeler, 22 App. 191.....	1411, 1494
O'Harra v. Wells, (Neb.) 15 N. W. Rep. 722.....	2189
O'Herron v. Gray, 168 Mass. 573.....	1084
Ohio Valley R. Co. v. Lander, 104 Ky. 431.....	367
Ohio Valley R. Co. v. McKinley, (Ky.) 33 S. W. Rep. 186.....	1452, 1675

	PAGE
Ohio Valley R. Co. v. Young, (Ky.) 39 S. W. Rep. 415.....	792
Ohio &c. Co. v. Fishburn, 61 Oh. St. 608.....	1214
Ohio R. Co. v. Burrows, 32 Ill. App. 161.....	892
Ohio &c. R. Co. v. Allender, 59 Ill. App. 620.....	380, 437, 563
Ohio &c. R. Co. v. Anderson, 10 Bradw. 313.....	92
Ohio &c. R. Co. v. Clutter, 82 Ill. 123.....	1026, 1036
Ohio &c. R. Co. v. Cosby, 107 Ind. 32.....	848
Ohio &c. R. Co. v. Cole, 41 Ind. 331..... (1030)	
Ohio &c. R. Co. v. Collarn, 73 Ind. 261.....	1481, 1531, 1619
Ohio &c. R. Co. v. Crosby, 107 Ind. 32..... (843)	
Ohio &c. R. Co. v. Davis, 23 Ind. 553.....	93
Ohio &c. R. Co. v. Dickerson, 59 Ind. 317..... (869)	
Ohio &c. R. Co. v. Dunbar, 20 Ill. 623..... (1335)	
Ohio &c. R. Co. v. Fishburn, (Oh.) 56 N. E. Rep. 457.....	2029
Ohio &c. R. Co. v. Hammersley, 28 Ind. 374.....	1600, 1614, 1620
Ohio &c. R. Co. v. Heaton, 137 Ind. 136.....	1479
Ohio &c. R. Co. v. Muhling, 30 Ill. 9.....	415
Ohio &c. R. Co. v. Pearcy, 128 Ind. 197.....	1612
Ohio &c. R. Co. v. Porter, 92 Ill. 437..... (1256)	
Ohio &c. R. Co. v. Robb, 36 Ill. App. 627.....	1609
Ohio &c. R. Co. v. Selby, 47 Ind. 471.....	262, 263
Ohio &c. R. Co. v. Simms, 43 Ill. App. 260.....	456
Ohio &c. R. Co. v. Taber, 98 Ky. 503..... (240)	224, 1099
Ohio &c. R. Co. v. Tindell, 13 Ind. 366..... (878)	1614, 1620
Ohio &c. R. Co. v. Walker, 113 Ind. 196.....	741
Ohliger v. Toledo, 20 Oh. C. C. 142..... (959)	1821, 1875, 1876, 1877
Oil Creek &c. Co. v. Clark, 72 Pa. St. 231..... (7)	559
O'Keefe v. Chicago &c. R. Co., 32 Iowa, 467..... (809)	
O'Keefe v. Eighth Ave. R. Co., 33 App. Div. 324.....	1195
O'Keefe v. National &c. Co., 66 Conn. 38.....	1414, 1507, 1898
O'Keefe v. St. Louis & S. R. Co., 81 Mo. App. 386.....	2308
O'Keefe v. Thom. 24 N. W. 379.....	1753
O'Kelly v. Ferguson, 49 La. Ann. 1230.....	118
Oklahoma v. Meyers, 4 Okla. 686.....	1920
Oklahoma City v. Hill, 5 Okla. 114.....	2006
Oklahoma City v. Welsh, 3 Okla. 288.....	1941, 1953
Okowski v. Pennsylvania &c. Coal Co., (Wis.) 90 N. W. Rep. 429.....	1536
Old City Bridge Co. v. Jackson, 114 Pa. St. 321.....	718
Old Colony R. Co. v. Slavens, 148 Mass. 363.....	2261
Old Father v. Zant, 21 Ind. App. 307.....	1200
Old Times Distillery Co. v. Zehnder, (Ky.) 52 S. W. Rep. 1051.....	1402
Oldenburg v. N. Y. &c. R. Co., 124 N. Y. 414.....	802, 803
Oldfield v. N. Y. &c. R. Co., 14 N. Y. 310..... (857)	876, 877, 2040
Olds v. New York &c. R. Co., 172 Mass. 73.....	403
O'Leary v. Brockton Street R. Co., 177 Mass. 187.....	2278
O'Leary v. Brooks Elevator Co., 7 N. Dak. 544.....	722, 2109, 2135
O'Leary v. Erie R. Co., 169 N. Y. 289.....	2164
Oleson v. Chicago &c. R. Co., 38 Minn. 412.....	1733
Oleson v. Lake Shore &c. R. Co., 143 Ind. 405.....	761
Oleson v. Maple Grove Coal &c. Co., (Iowa) 87 N. W. Rep. 736.....	1424
Oley v. Miller, 74 Conn. 304.....	178
Olin P. Ely Co. v. Rhoads, 30 Misc. 111.....	1362
Olive v. Whitney Marble Co., 103 N. Y. 292.....	2, 1108
Oliver v. Denver, 13 Colo. App. 345.....	1957
Oliver v. Denver Tramway Co., 13 Colo. App. 543.....	2318
Oliver v. LaValle, 36 Wis. 592..... (896)	
Oliver v. Louisville &c. R. Co., 43 La. Ann. 804.....	508
Oliver v. Nashville, 106 Tenn. 273.....	1953
Oliver v. North End &c. R. Co., 170 Mass. 222.....	1235
Oliver v. North Eastern &c. R. Co., L. R. (9 Q. B.) 409..... (817)	
Oliver v. Ohio River R. Co., 42 W. Va. 703.....	1404, 1531, 1542
Oliver v. Worcester, 102 Mass. 499.....	1960, 2007
Oliver Ditson Co. v. Bates, (Mass.) 63 N. E. Rep. 908.....	1081

## TABLE OF CASES.

CCXXXV

	PAGE
<i>Omschied v. Nelson-Tenney Lumber Co.</i> , 66 Minn. 61.....	1752
<i>Olmstead v. Dennis</i> , 77 N. Y. 378.... (76).....	79
<i>Olmstead v. Distilling &amp; Co.</i> , 35 Oh. L. J. 133.... (851)	
<i>Olmstead v. Hotaling</i> , 1 Hill, 318.... (308)	
<i>Olmstead v. Nelson-Tenney Lumber Co.</i> , 66 Minn. 61.....	1216
<i>Olmstead v. Pound Ridge</i> , 71 Hun, 25.....	2010
<i>Olmstead v. Raleigh</i> , (N. C.) 41 S. E. Rep. 292.....	1624
<i>Olpe v. Gardner</i> , 48 Hun, 169.....	1176
<i>Olsen v. Andrews</i> , 168 Mass. 261.....	1588, 1624, 1635, 1747
<i>Olsen v. Citizens' R. Co.</i> , 152 Mo. 426.....	398
<i>Olsen v. Fish</i> , 75 Minn. 228.... (1083)	
<i>Olsen v. Nixon</i> , 61 N. J. L. 671.....	1665, 1702
<i>Olsen v. North Pac. Lumber Co.</i> , 100 Fed. Rep. 384.....	1526, 1681
<i>Olsen v. St. Paul &amp; C. R. Co.</i> , 45 Minn. 536.....	374
<i>Olsen v. Starin</i> , 43 App. Div. 422.....	1463, 1625, 1742
<i>Olsen v. Burlington &amp; C. R. Co.</i> , 12 S. D. 326.....	840
<i>Olsen v. Clyde</i> , 32 Hun, 425.....	1625
<i>Olsen v. Crossman</i> , 31 Minn. 222.....	153
<i>Olsen v. Doherty Lumber Co.</i> , 102 Wis. 264.....	1700
<i>Olsen v. Great Northern R. Co.</i> , 68 Minn. 155.....	923
<i>Olsen v. Hanford Produce Co.</i> , 111 Iowa, 347.....	1678
<i>Olsen v. Lamb</i> , 56 Neb. 104.....	2178
<i>Olsen v. Minneapolis &amp; C. R. Co.</i> , 76 Minn. 149.....	1398
<i>Olsen v. Northern P. R. Co.</i> , 84 Minn. 258.....	769
<i>Olsen v. Oregon &amp; C. Nav. Co.</i> , 104 Fed. Rep. 574.....	1625
<i>Olsen v. Oregon Coal &amp; Nav. Co.</i> , 96 Fed. Rep. 109.....	1668
<i>Olsen v. Oregon &amp; C. R. Co.</i> , 24 Utah, 460.....	1218
<i>Olsen v. Pennsylvania &amp; C. Fuel Co.</i> , 77 Minn. 528.....	2165
<i>Olsen v. R. Co.</i> , 38 Minn. 117.....	1666
<i>Olsen v. Schultz</i> , 67 Minn. 494.....	1077
<i>Olsen v. Webb</i> , (Neb.) 59 N. W. 520.....	1359
<i>Omaha v. Bonnian</i> , 52 Neb. 293.....	1118, 1956
<i>Omaha v. Richards</i> , 49 Neb. 244.....	925, 1822, 1857, 1882
<i>Omaha Bottling Co. v. Theiler</i> , 59 Neb. 257.....	1419, 1492, 1506, 1752
<i>Omaha R. Co. v. Brown</i> , 16 Neb. 161.....	1144
<i>Omaha St. R. Co. v. Emminger</i> , 57 Neb. 240.... (863).....	859, 1178, 1240
<i>Omaha St. R. Co. v. Martin</i> , 48 Neb. 65.... (478).....	661, 677
<i>Omaha St. R. Co. v. Leigh</i> , 49 Neb. 782.... (1118)	
<i>Omaha &amp; C. Ins. Co. v. Crighton</i> , 50 Neb. 314.....	1310
<i>Omaha &amp; C. R. Co. v. Crow</i> , 47 Neb. 84.....	374, 404 1396, 2044
<i>Omaha &amp; C. R. Co. v. Granite State &amp; C. Ins. Co.</i> , 53 Neb. 514.... (1308)	
<i>Omaha &amp; C. R. Co. v. Krayenbuhl</i> , 48 Neb. 553.....	776, 784, 1610, 1747
<i>Omaha &amp; C. R. Co. v. Talbot</i> , 48 Neb. 627.... (751).....	776, 785
<i>O'Malley v. Gerth</i> , (N. J. L.) 52 Atl. Rep. 563.....	60, 2255
<i>O'Malley v. Great Northern R. Co.</i> , (Minn.) 90 N. W. Rep. 974.....	250, 299
<i>O'Malley v. McLean</i> , (Ky.) 67 S. W. Rep. 11.....	954
<i>O'Malley v. Metropolitan Street R. Co.</i> , 3 App. Div. 259.....	392
<i>O'Malley v. N. Y. &amp; C. R. Co.</i> , 67 Hun, 130.....	1732
<i>O'Malley v. Parsons</i> , 191 Pa. St. 612.....	1846
<i>O'Malley v. Twenty-five Associates</i> , 170 Mass. 471.....	1322
<i>O'Malley v. St. Paul &amp; C. R. Co.</i> , 43 Minn. 289.... (706).....	2135
<i>O'Mara v. Delaware &amp; C. Co.</i> , 18 Hun, 192.....	1709
<i>O'Mara v. Hudson River R. R. Co.</i> , 38 N. Y. 449.....	709, 779, 869
<i>Eminger v. N. Y. C. &amp; H. R. R. Co.</i> , 4 Hun, 159.....	1715
<i>Omaha Coal &amp; Iron Co. v. Huntley</i> , 2 C. P. Div. 464.... (202)	
<i>Onderdonk v. New York &amp; C. R. Co.</i> , 74 Hun, 42.....	438
<i>Onderdonk v. Smith</i> , 41 Fed. Rep. 599.....	1360
<i>Onderkirk v. Central &amp; C. Bank</i> , 119 N. Y. 263.....	105, 1104
<i>O'Neal v. R. Co.</i> , 132 Ind. 110.....	1543
<i>O'Neal v. Bates</i> , 20 R. I. 793.....	1921, 2258
<i>O'Neil v. Ben Avon</i> , 9 Pa. Dist. 130.....	1961
<i>O'Neil v. Hanscom</i> , 175 Mass. 313.....	1206, 1951
<i>O'Neil v. Keys</i> , 168 Mass. 517.....	1562

	PAGE
O'Neil v. Leary, 164 Mass. 387.....	1508
O'Neil v. Lynn &c. R. Co., (Mass.) 62 N. E. Rep. 983.... (473)	
O'Neil v. Third Ave. R. Co., 3 Misc. 521.....	2340
O'Neil v. Blase, (Mo. App.) 68 S. W. Rep. 764.....	651, 977
O'Neill v. Brooklyn Heights R. Co., 71 Hun, 114.... (908)	
O'Neill v. Great Northern R. Co., (Minn.) 82 N. W. Rep. 1086.....	1596, 1634
O'Neill v. Keokuk &c. R. Co., 45 Iowa, 564.....	1723
O'Neill v. N. Y. &c. R. Co., 115 N. Y. 579.....	1256, 1260, 1266, 1276
Ontario v. Union Bank, 21 Misc. 770.....	1200
Opelousas &c. v. Norman, 51 La. Ann. 736.....	2097
Oppenheimer v. Farmers' &c. Bank, 97 Tenn. 19.....	194
Oppenheim v. West Side Bank, 22 Misc. 722.....	38
Opsahl v. Judd, 30 Minn. 126.... (968).....	2375
Orange Co. Bank v. Brown, 3 Wend. 158.... (198)	
Orange Co. Bank v. Brown, 9 Wend. 85.... (271).....	268, 607, 619
Orange &c. R. Co. v. Ward, 47 N. J. L. 560.....	2270, 2333
Oranmore, 92 Fed. Rep. 396.....	239
Orcutt v. Northern P. R. Co., 45 Minn. 368.....	374
Ord v. Nash, 50 Neb. 335.....	1826, 1837
Oregon T. Co. v. Otis, 100 N. Y. 446.....	2430
O'Reilly v. Bowker Fertilizer Co., 174 Mass. 202.....	1464
O'Reilly v. Long Island R. Co., 4 App. Div. 139.....	2259
O'Reilly v. Long Island R. Co., 15 App. Div. 79.....	2243
O'Reilly v. Monongahela Street R. Co., 17 Pa. Super. Ct. 626.....	964
O'Reilly v. Syracuse, 49 App. Div. 538.....	1867
Orgall v. Chicago &c. R. Co., 46 Neb. 4.....	2048
Oriental Investment Co. v. Sline, 17 Tex. Civ. App. 692.....	1357, 1392
Orlando v. Pragg, 31 Fla. 111.....	2006
Orleans &c. R. Co. v. Clements, 100 Fed. Rep. 415.....	1687
Ormiston v. Olcott, 84 N. Y. 339.....	45, 63
Ormsbee v. Boston &c. R. Co., 14 R. I. 102.... (797).....	702
Ornamental Iron &c. Co. v. Green, (Tenn.) 65 S. W. Rep. 399.....	913, 1806
Orne's Estate, 7 Pa. Dist. 337.....	61
O'Rourke v. Citizens' Street R. Co., 103 Tenn. 124.....	548, 562, 1156
O'Rourke v. Feist, 42 App. Div. 136.....	1321
O'Rourke v. Lindell R. Co., 142 Mo. 342.... (730).....	2275, 2276, 2278
O'Rourke v. New Orleans City &c. R. Co., 51 La. Ann. 755.....	2308, 2315
O'Rourke v. Yonkers R. Co., 32 App. Div. 8.....	2272
Orr v. Southern Bell Tel. &c. Co., 130 N. C. 627.....	1583, 1744
Orr v. Sparkman, 120 Ala. 9.....	171
Ortlip v. Philadelphia &c. Traction Co., 9 Pa. Dist. 291.....	1585, 1679
Orvis v. Elmira &c. R. Co., 17 App. Div. 187.....	2088, 2096
Osage City v. Brown, 27 Kan. 74.....	657, 1865
Osborn v. Detroit &c. R. Co., 115 Mich. 102.....	761
Osborn v. Gillet, L. R., 8 Exch. 88.... (943)	
Osborn v. Jenkinson, 100 Iowa, 432.....	918
Osborn v. Union Ferry Co., 53 Barb. 629.... (432)	
Osborne v. Canadian P. R. Co., 87 Me. 303.....	1052
Osborne v. Chicago &c. R. Co., 111 Mich. 15.... (1092)	
Osborne v. Detroit, 32 Fed. R. 36.... (898)	
Osborne v. Lehigh Valley C. Co., 97 Wis. 27.....	1585, 1592
Osborne v. McMasters, 40 Minn. 103.... (13).....	1170, 1379
Osborne v. Morgan, 130 Mass. 102.....	1544, 1767, 1768
Osborne v. Pulaski Light &c. Co., 95 Va. 16.....	1880
Osgood v. Laytin, 3 Keyes, 521.... (69)	
Osgood v. Lynn, 130 Mass. 492.... (818)	
Oshkosh Water Works Co. v. Oshkosh, 106 Wis. 83.....	2016
O'Shea v. Kohn, 33 Hun, 114.....	2383
Oshterbank v. Gardiner, 49 Supp. Ct. 263.....	1074
Oskamp v. Southern Ex. Co., 61 Oh. St. 341.....	318
Oster v. Schuykill T. Co., 195 Pa. St. 320.....	2297
Osterhoudt v. Southern P. R. Co., 47 App. Div. 146.... (240).....	313, 345
Osterhout v. Bethlehem, 55 App. Div. 198.....	1935, 1945

## TABLE OF CASES.

ccxxxvii

	PAGE
Osterhout v. Roberts, 8 Cow. 43.....	2207
Ostrander v. Brown, 15 John. 39.... (308).....	323
Ostrander v. Lansing, 11 Mich. 693.....	1997
Ostrander v. Lansing, 115 Mich. 224.....	839
Ostrom v. San Antonio, (Tex. Civ. App.) 60 S. W. Rep. 591.....	1987
O'Sullivan v. Flynn, 67 App. Div. 518.....	1574
Otis v. Janesville, 47 Wis. 422.... (732).....	730
Ott v. Great Northern R. Co., 70 Minn. 50.....	1372
Ott v. Lake Shore &c. R. Co., 18 Oh. C. C. 395.....	963, 1607, 1647
Ottawa v. Black, 10 Kan. App. 439.....	1877, 2018, 2020
Ottersbach v. Philadelphia, 161 Pa. St. 111.....	1947
Otto v. St. Louis &c. R. Co., 12 Mo. App. 168.....	2049
Onderkirk v. C. N. Bank, 119 N. Y. 267.... (70).....	128
Onimit v. Henshaw, 35 Vt. 605.....	615, 622
Ouverson v. Grafton, 5 N. D. 281.... (730).....	1137, 1147, 1915, 1916
Overall v. Louisville Light Co., (Ky.) 47 S. W. Rep. 442.....	1062
Overseers of Highways &c. v. Pelton, (Mich.) 87 N. W. Rep. 1029.....	650
Overton v. Freeman, 11 C. B. 73 Eng. C. L. 687.....	633
Overtoom v. Chicago &c. R. Co., 43 Minn. 300.....	410
Oviatt v. Dakota &c. R. Co., 43 Minn. 300.....	410
Owen v. Brockschmidt, 54 Mo. 285.....	875, 878
Owen v. Ft. Dodge, 98 Iowa, 281.....	1870, 1881, 2017
Owen v. H. R. R. Co., 35 N. Y. 516.....	656
Owen v. Illinois C. R. Co., 77 Miss. 142.... (1091).....	
Owen v. L. & N. &c. Co., 10 Ky. L. J. 554.....	247
Owen v. Lancaster, 14 Lanc. L. Rev. 94.....	1967
Owen v. N. Y. C. R. Co., 1 Lansing, 108.....	1550
Owen v. Potter, 115 Mich. 556.....	60
Owens v. Ernst, 1 Misc. 388.....	1502
Owens v. Hannibal &c. R. Co., 58 Mo. 386.... (1024).....	
Owens v. Holland, Ellis, Blackb. & Ell. 102.....	1601
Owens v. Jones, 9 Md. 108.....	1318
Owens v. Kansas City &c. R. Co., 95 Mo. 169.....	2038
Owens v. Wabash R. Co., 84 Mo. App. 143.....	486, 577
Owens v. Wilmington &c. R. Co., 126 N. C. 139.....	527
Owensboro City R. Co. v. Lyddana, (Ky.) 41 S. W. Rep. 578.....	2289
Owensboro R. Co. v. Hill, (Ky.) 56 S. W. Rep. 21.....	682, 2283, 2308
Owings v. Moneyrick Oil Co., 55 S. C. 483.....	1496
Owerson v. Grafton, 5 N. D. 281.....	1829
Oxford v. Leathe, 165 Mass. 254.....	1344
Orsher v. Houston &c. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 550.....	384, 489
Ozburn v. Adams, 70 Ill. 291.... (996).....	
P. C. & S. L. R. Co. v. Krouse, 30 Oh. St. 224.... (522).....	
P. D. & E. R. Co. v. Miller, 11 Ill. App. 377.... (776).....	
P. P. C. Co. v. Smith, 73 Ill. 360.....	596
P. P. &c. R. Co. v. Champ, 75 Ill. 577.... (1040).....	
P. &c. R. Co. v. Camp, 75 Ill. App. 577.... (1016).....	
Pacheco v. Judson Man. Co., 113 Cal. 541.....	1132, 1218
Pacific Coast Sa. Co. v. Bancroft-Whitney Co., 94 Fed. Rep. 180.... 1119, 1195, 1308	
Pacific Ex. Co. v. Critzer, (Tex. Civ. App.) 42 S. W. Rep. 1017.....	320
Pacific Ex. Co. v. Hertzberg, 17 Tex. Civ. App. 100.....	255, 278, 320
Pacific Ex. Co. v. Redman, (Tex. Civ. App.) 60 S. W. Rep. 677.....	215, 826
Pacific Ex. Co. v. Shearer, 160 Ill. 215.....	316
Pacific Pine Lumber Co. v. Western Union Teleg. Co., 123 Cal. 428.....	2427
Pack v. The Mayor &c., 8 N. Y. 222.....	632, 634, 635
Packard v. Getman, 6 Cow. 757.... (609).....	
Packard v. Toledo Traction Co., 22 Oh. C. C. 578.....	475
Packer v. Thompson &c. Co., (Mass.) 56 N. E. Rep. 704.....	1134, 1701
Packet Co. v. Hobbs, 105 Tenn. 29.....	921
Paddock v. Atchison &c. R. Co., 37 Fed. Rep. 841.....	365
Paddock v. Missouri P. R. Co., 155 Mo. 524.....	225
Padgett v. Atchison &c. R. Co., 7 Kan. App. 736.....	1246, 1263
Padgett v. Moll, 159 Mo. 143.... (381).....	420

	PAGE
Paducah v. Memphis R. Co., 12 Bush. (Ky.) 141.... (657).....	711
Page v. Bucksport, 64 Me. 51.... (898)	
Page v. Chicago &c. R. Co., 7 S. D. 297.....	339
Page v. Delaware &c. Canal Co., 34 App. Div. 618.....	859
Pape v. Hartwig, 23 Ind. App. 333.....	191
Page v. Krekey, 137 N. Y. 307.....	168, 626
Page v. Morrell, 3 Keves. 117.... (176)	
Page v. North Carolina &c. R. Co., 71 N. Car. 222.... (1027)	
Page v. Sumpter, 53 Wis. 652.... (898)	
Pagels v. Meyer, 88 Ill. App. 169.....	1739
Pahlan v. Detroit &c. R. Co., 122 Mich. 232.....	1693
Paige v. Freeman, 19 Mo. 421.....	2208
Paige v. Smith, 99 Mass. 395.....	91, 93
Pain v. Packard, 13 Johns. 174.... (177)	
Paine v. Delhi, 116 N. Y. 224.....	1817, 1903
Paine v. Eastern R. Co., 91 Wis. 340.....	1484, 1684, 1710
Paine v. Grand Trunk R. Co., 58 N. H. 611.....	2245
Paine v. Grand Trunk R. Co., 63 N. H. 623.... (761)	
Painton v. Northern Cent. R. Co., 83 N. Y. 7.....	1403, 1414, 1482
Pakalinsky v. N. Y. C. & H. R. R. Co., 82 N. Y. 424.....	790
Palace Car Co. v. Hunter, (Ky.) 54 S. W. Rep. 845.....	599
Paladino v. Supervisors of Westchester County, 47 Hun. 337.....	1910
Palatine Ins. Co. v. Brown, (Tex. Civ. App.) 34 S. W. Rep. 462.....	1314
Paleo v. Bray, 125 Ind. 229.....	832
Paleo v. Connell, 127 Ill. 419.....	832
Palestine v. Hassell, 15 Tex. Civ. App. 519.....	1866, 1872
Palko v. Central R. &c., 9 Kulp, 550.....	1591
Pallett v. Long, 56 N. Y. 200.... (893)	
Palmer v. Bank of Zumbrota, 72 Minn. 266.....	1084
Palmer v. Charlotte &c. R. Co., 3 S. Co. 580.... (569)	
Palmer v. Chicago &c. R. Co., 112 Ind. 250.... (741).....	2140
Palmer v. Conant, 58 Hun. 333.....	1228, 2203
Palmer v. D. & H. C. Co., 120 N. Y. 170.....	406
Palmer v. Dearing, 93 N. Y. 7.....	658, 693, 1319
Palmer v. Dearley, 93 N. Y. 10.... (696)	
Palmer v. Gordon, 173 Mass. 410.....	2108
Palmer v. Lincoln, 5 Neb. 136.... (649)	
Palmer v. Maine C. R. Co., 92 Me. 399.....	592, 833
Palmer v. Missouri P. R. Co., 53 Neb. 611.....	788
Palmer v. Mo. Pacific R. Co., 76 Mo. 217.....	1256, 1261
Palmer v. N. Y. &c. R. Co., 112 N. Y. 234.....	799, 801, 802
Palmer v. Northern Pac. &c. R. Co., 37 Minn. 223.....	1022
Palmer v. Pennsylvania R. Co., 111 N. Y. 488.....	436
Palmer v. Penobscot Lumbering Ass'n, 90 Me. 193.... (824)	
Palmer v. Platt, 27 Hun. 534.....	455
Palmer v. Railroad Co., 93 Mich. 363.....	1656
Palmer v. St. Albans, 56 Vt. 664.....	1110
Palmer v. Winona R. &c. Co., 78 Minn. 138.....	397, 1091
Palmeri v. The Manhattan Railway Co., 133 N. Y. 261.....	523
Palmeter v. Wagner, 11 Alb. L. J. 149.....	150, 596
Palmore v. Morris &c. Co., 182 Pa. St. 82.....	2112
Pantzar v. Tilly Foster Co., 99 N. Y. 368.....	1450, 1481, 1487
Paolo v. Hunter, 3 App. Div. 528.....	2044
Pape v. Lathrop, 18 Ind. App. 633.... (1199)	
Parcells v. Auburn, 77 Hun. 137.....	1880
Pardee v. Drew, 25 Wend. 459.... (268)	
Pardey v. Mechanicsville, 112 Iowa, 68.....	2023
Pardridge v. Gilbride, 98 Ill. App. 134.....	1571
Parent v. Nashua Mfg. Co., 70 N. H. 199.....	1397
Parento v. Taylor &c. Co., 26 App. Div. 518.....	1741
Parents v. Taylor, 26 App. Div. 518.....	1090
Paris &c. R. Co. v. Nesbit, 11 Tex. Civ. App. 608.....	1252, 1264
Parish v. Baird, 160 N. Y. 302.....	1213
Parish v. Crawford, 2 Strange Rep. 1251.... (204)	

## TABLE OF CASES.

ccxxxix

	PAGE
Parish v. Eaton, 62 Wis. 272.....	2353
Parish v. Railroad Co., 28 Fla. 251.....	1612, 1790
Parish v. Western &c. R. Co., 102 Ga. 285....(1113).....	2157
Park v. O'Brien, 23 Conn. 576.....	2361
Park Hotel Co. v. Fourth Nat. Bank, 86 Fed. Rep. 742.....	196
Parker v. Adams, 12 Met. 415.....	2346
Parker v. Atchinson, 58 Kan. 29.....	1369, 2083
Parker v. Barnhard, 135 Mass. 116.....	1076
Parker v. Boston, 175 Mass. 501.....	1946
Parker v. Boston &c. R. Co., 3 Cush. 107....(355).....	
Parker v. Cohoes, 10 Hun, 531.....	1932
Parker v. Day, 155 N. Y. 383.....	55
Parker v. Dubuque &c. R. Co., 43 Iowa, 399....(1027).....	1024
Parker v. Dupree, (Tex. Civ. App.) 67 S. W. Rep. 185.....	955
Parker v. Enslow, 102 Ill. 272.....	2036
Parker v. Ga. R. Co., 83 Ga. 539.....	1732
Parker v. Glover, 42 N. J. Eq. 559....(47).....	
Parker v. Mayor &c. of Macon, 39 Ga. 725.....	1852
Parker v. Metropolitan &c. R. Co., 69 Mo. App. 54.....	398
Parker v. Milwaukee &c. R. Co., 30 Wis. 689....(313).....	
Parker v. New York, 9 App. Div. 518.....	1106
Parker v. Norfolk & C. R. Co., 119 N. C. 677.....	1369, 2090
Parker v. Norfolk &c. R. Co., 123 N. C. 71.....	2084
Parker v. Pine Tree L. Co., 85 Minn. 13.....	1721
Parker v. Portland Pub. Co., 69 Me. 173.....	1137, 2106
Parker v. Railroad Co., Mo. 362.....	1665
Parker v. South Carolina R. Co., 48 S. C. 464....(861).....	
Parker v. Steamboat Co., 17 R. I. 376....(50).....	
Parker v. Stroud, 98 N. Y. 379.....	177
Parker v. Union Co., 42 Conn. 399.....	2366, 2367
Parker v. Union Ice &c. Co., 59 Kan. 626.....	133
Parker v. Wise, 27 Ala. 480....(993).....	
Parkhill v. Brighton, 61 Iowa, 103.....	699
Parkhurst v. Johnson, 50 Mich. 70.....	1470, 1505
Parkinson v. Concord Street R. Co., 71 N. H. 28.....	2325
Parks v. Alta. &c. T. Co., 13 Cal. 422.....	2389, 2441, 2448, 2450
Parks v. Newburyport, 10 Gray, 29.....	1962
Parks v. St. Louis &c. R. Co., (Tex. Civ. App.) 69 S. W. Rep. 125.....	1706
Parks v. Southern R. Co., 124 N. C. 136.....	819, 820
Parks v. State, (Ind.) 64 N. E. 862.....	2198
Parlin &c. Co. v. Finfronck, 65 Ill. App. 174.....	1464
Parmelee v. McNulty, 19 Ill. 556.....	200
Parmenter v. Marion, 113 Iowa, 297.....	1866, 1999
Parody v. Chicago &c. R. Co., 15 Fed. Rep. 205.....	1572
Parrill v. Cleveland &c. R. Co., 23 Ind. App. 638.....	224, 246
Parrott v. Knickerbocker &c. Co., 46 N. Y. 361....(940).....	
Parry v. Gas Co., 15 C. B. N. S. 566.....	1382
Parry v. Squire, 79 Ill. App. 324.....	106
Parley v. Edgemoor Bridge Works, 56 App. Div. 71.....	1423
Parsons v. Brown, 15 Barb. 590.....	590
Parsons v. Hardy, 14 Wend. 215....(210).....	232
Parsons v. Mills, 2 Misc. 80.....	54
Parsons v. N. Y. &c. R. Co., 113 N. Y. 155.....	447, 522
Parsons v. R. Co., 94 Mo. 286....(903).....	
Partenheimer v. Vanorder, 20 Barb. 479.....	633, 996
Partley v. Georgia &c. R. Co., 60 Ga. 182....(1027).....	
Partlow v. Haggarty, 35 Ind. 178.....	982
Partridge v. Scott, 8 M. & W. 220.....	2070, 2101
Parvin v. International &c. R. Co., (Tex. Civ. App.) 54 S. W. Rep. 638.....	400
Passameneck v. Louisville &c. R. Co., 98 Ky. 195.....	2291, 2304
Passenger R. Co. v. Bondron, 92 Pa. St. 475.....	543
Passenger R. Co. v. Young, 21 Oh. St. 518....(504).....	
Passmore v. W. U. T. Co., 78 Pa. St. 238.....	2390, 2399, 2413, 2430

	PAGE
Pasterne v. Adams, 49 Cal. 87.....	2263
Patapasco Guano Co. v. Ballard, 107 Ala. 710.....	50
Patchen v. Walton, 17 App. Div. 158.....	1841, 1850
Patton v. Lancaster, 38 Iowa, 494.....	2181
Patrie v. Oregon Short-Line R. Co., (Id.) 56 Pac. Rep. 82.....	1056
Patry v. Chicago &c. R. Co., 77 Wis. 218.....	566
Patry v. Chicago &c. R. Co., 82 Wis. 408.....	566
Patten v. Chicago &c. R. Co., 32 Wis. 533..... (431)	
Patten v. United Life &c. Ass'n, 133 N. Y. 450.....	1185
Patten v. Wiggin, 51 Me. 594.....	2190, 2194
Patterson v. Austin, 15 Tex. Civ. App. 201.....	1915
Patterson v. Brooklyn, 6 App. Div. 127.....	2020
Patterson v. Hemenway, 148 Mass. 94.....	1076
Patterson v. Hochster, 38 App. Div. 398.....	1119
Patterson v. Houston &c. R. Co., (Tex. Civ. App.) 40 S. W. Rep. 442.....	1800
Patterson v. Inclined Plane R. Co., 12 Oh. C. C. 274.....	475
Patterson v. Pittsburg &c. R. Co., 76 Pa. St. 389.....	
..... 698, 1481, 1572, 1573, 1578, 1581,	1643
Patterson v. Pittston, 8 Kulp. 530.....	2248
Patterson v. Powell, 31 Misc. 250.....	2176
Patterson v. South &c. R. Co., 89 Ala. 318.....	900
Patterson v. Southern P. R. Co., (Tex. Civ. App.) 66 S. W. Rep. 308.....	593
Patterson v. Wallace, 28 L. & E. 48.....	1601
Patterson v. Chesapeake &c. R. Co., 94 Va. 16.....	1106, 1112, 1257
Pattison v. Hammerstein, 17 Misc. 375.....	99
Pattison v. Syracuse National Bank, 80 N. Y. 82.....	124
Patton v. Cooper, 84 Mo. App. 427.....	180
Patton v. Texas &c. R. Co., 179 U. S. 658..... (1108)	1745
Pauk v. St. Louis &c. Co., 166 Mo. 639.....	913
Paul v. Hummel, 43 Miss. 119.....	2024
Paul v. Omaha &c. R. Co., 82 Mo. App. 500.....	839, 909, 2037
Paulding v. Sharkey, 88 N. Y. 432..... (45)	
Paule v. Florence &c. Co., 80 Wis. 350.....	1600
Pauley v. Steam Gauge and Lantern Company, 131 N. Y. 90.....	1458
Paulitsch v. N. Y. C. & H. R. R. Co., 102 N. Y. 280.....	479
Paulmier v. R. Co., 34 N. J. L. 151.....	1510
Pavitt v. Lehigh Valley R. Co., 153 Pa. St. 302.....	301
Pawnee Coal Co. v. Royce, 184 Ill. 402.....	1783, 1784
Pawtucket v. Bray, 20 R. I. 17.....	1079
Payette v. Willis, 23 Wash. 299.....	2179
Payne v. Chicago &c. R. Co., 39 Iowa, 523..... (794)	
Payne v. Chicago &c. R. Co., 44 Iowa, 236..... (794)	
Payne v. Chicago N. W. R. Co., 108 Iowa, 188..... (752)	791
Payne v. Chicago &c. R. Co., 136 Mo. 562.....	770, 779, 1166, 2159
Payne v. Columbus &c. R. Co., 7 Oh. N. P. 327.....	2141, 2157
Payne v. Current River R. Co., 75 Mo. App. 14.....	1004
Payne v. Electric Illum. &c. Co., 64 App. Div. 477.....	1059
Payne v. H. &c. R. Co., 70 Iowa, 584.....	719
Payne v. Irwin, 44 Ill. App. 105.....	1322
Payne v. Nashville &c. R. Co., 106 Tenn. 167.....	493
Payne v. Pavey, 29 La. Ann. 116..... (82)	
Payne v. Reese, 100 Pa. St. 301.....	1718
Payne v. R. Co., 39 La. 523..... (730)	
Payne v. Spokane Street R. Co., 15 Wash. 522.....	402
Payne v. Troy & Boston R. Co., 83 N. Y. 572.....	816
Payne v. Troy & Boston R. Co., 9 Hun, 526.....	1140
Paynter v. Bridgeton &c. Co., (N. J. L.) 52 Atl. Rep. 367.....	399, 1104
Peabody v. O. R. &c. R. Co., 21 Ore. 121.....	350
Peach v. Utica, 10 Hun, 477.....	702, 1824
Peacock v. Dallas, 89 Tex. 438.....	1942
Peak v. Louisville &c. R. Co., (Ky.) 66 S. W. Rep. 995.....	492
Peake v. Superior, 106 Wis. 403.....	1819, 1820
Pearce v. The Thomas Newton, 41 Fed. Rep. 100.....	237



## TABLE OF CASES.

ccxli

	PAGE
Peard v. Mt. Vernon, 83 Hun, 250.....	2338
Pearl v. Benton, 123 Mich. 411.....	1834
Pearl v. Omaha &c. R. Co., 115 Iowa, 535.....	873, 1200, 1527, 1777
Pearl v. West End Street R. Co., 176 Mass. 177.....	650
Pearley v. Eastern R. Co., 98 Mass. 414.....	1269
Pearson v. W. U. T. Co., 124 N. Y. 256.....	2390, 2391, 2394, 2414, 2429, 2450
Pearson v. Gillenwaters, 99 Tenn. 446.....	62
Pearson v. Milwaukee &c. R. Co., 45 Iowa, 497.....	1014
Pearson v. Seattle, 14 Wash. 438.....	2015
Peary v. Georgia R. Co., 81 Ga. 485.... (552)	
Peary v. Louisville &c. R. Co., 40 La. Ann. 32.....	381
Pease v. Chicago &c. R. Co., 61 Wis. 163.....	1614
Pease v. Delaware, Lackawanna & Western R. Co., 101 N. Y. 367.....	585
Pease v. Parsonfield, 92 Me. 345.....	1941
Pease v. Smith, 61 N. Y. 477.....	1080
Peaslee v. Fitchburg R. Co., 152 Mass. 155.....	1520
Peasley v. Chatham, 69 Hun, 389.....	1850
Peaty v. New York, 33 Misc. 231.....	1987
Peay v. Western &c. Teleg. Co., 64 Ark. 538.... (854)	
Pecheaky v. Metropolitan Street R. Co., 30 Misc. 432.....	2331
Peck v. Cooper, 112 Ill. 192.....	367
Peck v. Hutchinson, 88 Iowa, 320.....	2191
Peck v. Michigan City, 149 Ind. 670.....	1961, 1964
Peck v. New York &c. R. Co., 50 Conn. 379.... (751)	
Peck v. N. Y. C. &c. R. Co., 70 N. Y. 587.....	520, 596
Peck v. New York &c. R. Co., 165 N. Y. 347.....	1106, 1221
Peck v. N. Y. &c. R. Co., 8 Hun, 286.....	909
Peck v. Oregon &c. R. Co., (Utah) 69 Pac. Rep. 153.... (762)	
Peck v. Weeks, 34 Conn. 145.....	244, 304
Peckett v. Bergen Bench Co., 44 App. Div. 559.....	2121
Pedigo v. Louisville &c. R. Co., (Ky.) 68 S. W. Rep. 462.... (777)	
Peerless Stone Co. v. Wray, 152 Ind. 27.....	1594, 1701, 2044
Peet v. Chicago & N. W. R. Co., 19 Wis. 131.....	338, 345
Pegram v. W. U. T. Co., 97 N. C. 57.....	2399, 2415, 2445
Pegram v. W. U. T. Co., 100 N. C. 28.....	2424
Pell v. Reinhart, 127 N. Y. 381.....	1317, 1319, 1341
Peirce v. Bane, 80 Fed. Rep. 988.....	1430, 1587
Peirce v. Oliver, 18 Ind. App. 87.....	1602, 1627, 1666, 1802
Peirce v. Rabberman, 77 Ill. App. 619.....	1037
Peirce v. Van Dusen, 78 Fed. Rep. 693.....	95, 1803
Pelkey v. Saranac, 67 App. Div. 337.....	1824
Pell v. Reinhart, 127 N. Y. 381.....	1319
Pelletreau v. Metropolitan Street R. Co., 77 N. Y. Supp. 386.....	2282, 2318
Peltier v. Bradley &c. Co., 67 Conn. 42.....	2344, 2347, 2348
Pelton v. Nichols, 180 Mass. 245.....	115
Pence v. Chicago &c. R. Co., 63 Iowa, 746.... (753)	
Pence v. Louisville &c. R. Co., (Ky.) 64 S. W. Rep. 905.....	576
Pence v. St. Paul &c. R. Co., 28 Minn. 488.....	1336
Pence v. Wabash R. Co., (Iowa) 90 N. W. Rep. 59.....	851, 920
Pender v. Brooklyn Heights R. Co., 65 App. Div. 521.....	2303
Pender v. Raggs, 178 Pa. St. 337.....	652
Pendergast v. Clinton, 147 Mass. 402.....	2017
Pendergast v. Union R. Co., 10 App. Div. 207.....	262, 506, 1618
Penfield v. Cleveland R. Co., 26 App. Div. 413.....	3, 591
Peniston v. Chicago &c. R. Co., 34 La. Ann. 777.....	431
Penley v. Maine C. R. Co., 92 Me. 59.....	2090
Penman v. McKeesport &c. Street R. Co., 201 Pa. St. 247.....	2336
Penn v. Folger, 77 Ill. App. 365.....	46
Penn. Mt. &c. Co. v. Mechanics' &c. T. Co., 72 Fed. Rep. 413.... (1311)	
Penn. v. Buffalo &c. R. Co., 3 Lansing, 443.....	303
Pennington v. Illinois C. R. Co., 69 Ill. App. 628.....	563
Pennington v. Wilmington &c. R. Co., 62 Md. 95.... (572)	
Pennsylvania Co. v. Chicago, 81 Fed. Rep. 317.....	1910

	PAGE
Pennsylvania Co. v. Cohen, 66 Ill. App. 319.... (1099)	
Pennsylvania Co. v. Conlan, 101 Ill. 93.....	1206, 1613
Pennsylvania Co. v. Ebaugh, 144 Ind. 687.....	1429
Pennsylvania Co. v. Ebaugh, 152 Ind. 531.....	1682
Pennsylvania Co. v. Files, 65 Oh. St. 403.....	895
Pennsylvania Co. v. Finney, 145 Ind. 551.....	1691
Pennsylvania Co. v. Hensill, 70 Ind. 569.....	1168
Pennsylvania Co. v. Hickley, 20 Oh. C. C. 668.....	1655
Pennsylvania Co. v. Hunsley, 23 Ind. App. 37.... (889)	
Pennsylvania Co. v. Kennard Glass &c. Co., 59 Neb. 435.....	251
Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645.....	305
Pennsylvania Co. v. Liveright, 14 Ind. App. 518, 521.....	620
Pennsylvania Co. v. McCaffrey, 173 Ill. 169, 635.....	386, 452, 486, 1159
Pennsylvania Co. v. McCurdy, 66 Oh. St. 118.....	1541
Pennsylvania Co. v. Mahoney, 22 Oh. C. C. 469.....	1696
Pennsylvania Co. v. Marion, 123 Ind. 415.....	1189
Pennsylvania Co. v. Neumeyer, 129 Ind. 409.....	2036
Pennsylvania Co. v. Roy, 102 U. S. 451.... (522).....	596, 602, 1181
Pennsylvania Co. v. Reidy, 72 Ill. App. 343.... (751)	
Pennsylvania Co. v. Walker, (Ind. App.) 64 N. E. Rep. 473.....	209
Pennsylvania Co. v. Whitcomb, 111 Ind. 212.....	1661
Pennsylvania Co. v. Witte, 15 Ind. App. 583.....	1416, 1465, 1541, 1682, 2046
Pennsylvania Canal Co. v. Bentley, 66 Pa. St. 30.... (658).....	657
Pennsylvania Coal Co. v. Nee, 12 Cent. (Penn.) 524.....	1729
Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126.....	2086
Pennsylvania Ins. &c. Co. v. Franklin Fire Ins. Co., 5 Pa. Dist. 323.....	74
Pennsylvania R. Co. v. Barnett, 59 Penn. St. 259.....	740, 785, 793, 809
Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495.....	875, 877
Pennsylvania R. Co. v. Beale, 73 Pa. St. 504.... (794).....	758
Pennsylvania R. Co. v. Bell, 122 Pa. St. 58.....	453
Pennsylvania R. Co. v. Berry, 68 Penn. St. 272.....	338, 343
Pennsylvania R. Co. v. Bray, 125 Ind. 229.....	560
Pennsylvania R. Co. v. Butler, 57 Penn. St. 335.... (857).....	265, 874, 884
Pennsylvania R. Co. v. Coon, 111 Pa. St. 430.... (751).....	793
Pennsylvania R. Co. v. Cornell, 18 Am. & Eng. R. Cas. 339.... (342)	
Pennsylvania R. Co. v. Dunlap, 112 Ind. 93.... (1041)	
Pennsylvania R. Co. v. Gallentine, 77 Ind. 322.....	1265
Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.... (846).....	847, 883
Pennsylvania R. Co. v. Gresco, 79 Ill. App. 127.....	262
Pennsylvania R. Co. v. Hankey, 93 Ill. 580.....	1430
Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.....	265, 885
Pennsylvania R. Co. v. Hine, 41 Oh. St. 276.... (572)	
Pennsylvania R. Co. v. Hoagland, 78 Ind. 203.....	486, 560, 766
Pennsylvania R. Co. v. Keller, 17 P. F. Smith, 300.....	885
Pennsylvania R. Co. v. Kelley, 31 Pa. St. 372.... (711)	
Pennsylvania R. Co. v. Kerr, 62 Pa. St. 353.... (1273)	
Pennsylvania R. Co. v. Kilgore, 32 Penn. 292.... (484).....	674
Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.....	2167
Pennsylvania R. Co. v. Knight, 58 N. J. L. 287.....	612, 623
Pennsylvania R. Co. v. Krick, 47 Ind. 368.... (784)	
Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21.....	513, 1731, 1735
Pennsylvania R. Co. v. La Rue, 81 Fed. Rep. 148.....	1430, 1630
Pennsylvania R. Co. v. Lilly, 73 Ind. 252.... (878).....	778, 876
Pennsylvania R. Co. v. Lynch, 90 Ill. 333.....	1542, 1546
Pennsylvania R. Co. v. Lyons, 129 Pa. St. 113.... (474)	
Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526.... (559).....	7, 252, 486
Pennsylvania R. Co. v. McCormack, 131 Ind. 250.....	1432
Pennsylvania R. Co. v. Mahoney, 22 Oh. C. C. 469.....	1092, 1511, 1710
Pennsylvania R. Co. v. Malia, (Ky.) 49 S. W. Rep. 809.....	951
Pennsylvania R. Co. v. Marion, 104 Ind. 239.....	959
Pennsylvania R. Co. v. Marshall, 119 Ill. 399.... (761).....	808
Pennsylvania R. Co. v. Meyers, 12 Oh. C. C. 263.....	1403
Pennsylvania R. Co. v. Miller, 99 Fed. Rep. 529.....	753, 762, 796

## TABLE OF CASES.

ccxliii

	PAGE
Pennsylvania R. Co. v. Mitchell, 124 Ind. 473....(1054)	
Pennsylvania R. Co. v. Newmeyer, 129 Ind. 401.....	403
Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60....(671).....	684, 784, 1570
Pennsylvania R. Co. v. Olney, 89 Ind. 453.....	691
Pennsylvania R. Co. v. Price, 96 Pa. St. 256....(373)	
Pennsylvania R. Co. v. Price, 23 Alb. L. J. 69....(424)	
Pennsylvania R. Co. v. Reidy, 99 Ill. App. 477.....	913
Pennsylvania R. Co. v. Righter, 42 N. J. L. 180....(794)	
Pennsylvania B. Co. v. Rossman, 13 Oh. C. C. 111.....	1137, 1261
Pennsylvania R. Co. v. Schwartzberger, 45 Penn. St. 208....(342)....	351, 352
Pennsylvania R. Co. v. Sloan, 125 Ill. 72.....	808
Pennsylvania B. Co. v. Snyder, 55 Oh. St. 342.....	689, 2165
Pennsylvania R. Co. v. Stoeke, 104 Ill. 201.....	1121
Pennsylvania R. Co. v. Stranahan, 79 Pa. St. 405.....	1258, 1259
Pennsylvania B. Co. v. Wachter, 60 Md. 395.....	1513, 1613, 1614, 1620
Pennsylvania R. Co. v. Weber, 76 Pa. St. 157....(657).....	758
Pennsylvania R. Co. v. Werner, 89 Pa. St. 59....(689)	
Pennsylvania R. Co. v. White, 88 Pa. St. 327....(441)	
Pennsylvania R. Co. v. Woodworth, 26 Oh. St. 585....(372)	
Pennsylvania R. Co. v. Atha, 22 Fed. Rep. 920.....	2131
Pennsylvania R. Co. v. Conlan, 101 Ill. 93.....	1219
Pennsylvania & C. R. Co. v. McClurg, 56 Penn. St. 294.....	537
Pennsylvania &c. R. Co. v. Dian, 92 Md. 459.....	2043
Pennsylvania &c. R. Co. v. Forsyth, 61 Penn. 81....(358)	
Pennsylvania &c. R. Co. v. Hendrickson, 80 Penn. St. 182....(1250)	
Pennsylvania &c. R. Co. v. Hughes, 119 Pa. St. 301.....	1411
Pennsylvania &c. B. Co. v. James, 81 Pa. St. 194.....	718
Pennsylvania &c. R. Co. v. Lacey, 89 Pa. St. 458....(1269)	
Pennsylvania &c. R. Co. v. Langendorff, 48 Oh. St. 316.....	691
Pennsylvania &c. R. Co. v. Long, 94 Ind. 250.....	1146, 1545
Pennsylvania &c. R. Co. v. Mason, 109 Pa. St. 296.....	1412, 1616
Pennsylvania &c. R. Co. v. Morel, 40 Oh. St. 338....(792)	
Pennsylvania &c. R. Co. v. Pfuelb, 60 N. J. L. 278....(804)	
Pennsylvania &c. R. Co. v. Rooney, 89 Ind. 453.....	1713
Pennsylvania &c. R. Co. v. Shultz, 93 Penn. 341.....	1250
Pennsylvania &c. R. Co. v. Smith, 98 Ind. 42.....	2044
Pennsylvania &c. R. Co. v. Sullivan, 25 Ga. 228....(348)	
Pennsylvania &c. R. Co. v. Whitlock, 99 Ind. 16.....	1245
Penny v. Missouri &c. R. Co., 71 Mo. App. 577....(787)	
Penny v. New York Central &c. R. Co., 34 App. Div. 10.....	17
Penny v. Rochester R. Co., 7 App. Div. 595.....	711, 2276
Penrose v. Fehr, 113 Mich. 517.....	1881
Pensacola Tel. Co. v. W. U. T. Co., 96 U. S. 9.....	2390
Penso v. McCormick, 125 Ind. 116.....	2114
Penwell v. Harvey, 78 Ill. App. 278.....	1742
People v. A. &c. R. Co., 77 N. Y. 232.....	1334
People v. Augsburg, 97 N. Y. 501.....	1233
People v. Barber, 115 N. Y. 475.....	1213
People v. Beach, 87 N. Y. 508.....	1938
People v. Board of Auditors, 75 N. Y. 316.....	1988
People v. Bodine, 1 Denio, 281.....	1201
People v. Brooklyn, 65 N. Y. 349.....	1832, 1920
People v. Buddensieck, 103 N. Y. 487....(1237)	
People v. Champlain, 33 App. Div. 277.....	2015
People v. Colt, 1 Park. Crim. R. 611....(1220)	
People v. Common Council &c. 78 N. Y. 33.....	80
People v. Conroy, 97 N. Y. 80....(673)	
People v. Corporation of Albany, 11 Wend. 539.....	1852
People v. Cunningham, 1 Denio, 524.....	2237, 2239
People v. Davis, 56 N. Y. 95.....	1149, 1938
People v. Dover &c. Comrs., 158 Ill. 197.....	1830, 1832
People v. Dyle, 21 N. Y. 578.....	1201, 1202
People v. Erwin, 4 Den. 129.....	2232

	PAGE
People v. Esopus, 74 N. Y. 310.....	1295
People v. Family Fund Soc., 31 App. Div. 166.....	92
People v. Faulkner, 107 N. Y. 477....(57)	
People v. Fish, 125 N. Y. 136.....	1220, 1237
People v. Fogelson, 116 Mich. 556.....	1178
People v. Fort St. R. Co., 41 Mich. 413.....	2337
People v. Fournier, (Cal.) 47 Pac. Rep. 1014.....	1133
People v. Gardinier, 6 N. Y. 155....(1220)	
People v. Gonzales, 35 N. Y. 49....(1240)	
People v. Gordon, 96 Ill. App. 456.....	2199
People v. Horton, 64 N. Y. 610.....	2238, 2239
People v. Jillson, 3 Park. Cr. 234.....	586
People v. Jones, 54 Barb. 311.....	149
People v. Kelly, 76 N. Y. 475, 489....(81)	
People v. Kennedy, 39 N. Y. 245....(1220)	
People v. Kerr, 27 N. Y. 188.....	2226
People v. Lake, 12 N. Y. 358.....	1231
People v. Lindsay, 63 N. Y. 143....(1220)	
People v. Little Valley, 75 N. Y. 316.....	2220
People v. L. I. R. Co., 134 N. Y. 506.....	811
People v. L. I. R. Co., 58 Hun, 412.....	811
People v. McElvaine, 121 N. Y. 250.....	1234
People v. McWhorter, 4 Barb. S. C. 438.....	1201
People v. Merchant's Bank, 78 N. Y. 269....(36)	
People v. Murphy, 101 N. Y. 126.....	1184
People v. N. Y. &c. R. Co., 74 N. Y. 302....(816)	1197
People v. N. Y. &c. R. Co., 28 Hun, 543.....	218
People v. N. Y. C. R. R. Co., 25 Barb. 199....(780)	785, 793
People v. Pelton, 36 App. Div. 450.....	2096
People v. Pennock, 60 N. Y. 421.....	2220
People v. President N. Y. Gas Light Co., 6 Lansing, 467.....	2095
People v. Randall, 73 N. Y. 416....(92)	
People v. Roosa, 43 App. Div. 611.....	2035
People v. Safford, 5 Denio, 112....(1197)	1199
People v. Schuyler, 106 N. Y. 289; 43 Hun, 88.....	1182, 1186, 1191
People v. Sullivan, 70 Ill. App. 634.....	1235
People v. Supervisors, 28 N. Y. 112.....	69, 78
People v. Third Avenue Savings Bank, 98 N. Y. 661.....	161
People v. Troy & B. R. Co., 37 Hun, 427.....	1832, 1920
People v. Truckee Lumber Co., 116 Cal. 397.....	2096
People v. Westchester County, 57 App. Div. 135.....	1980
People v. Wilson, 109 N. Y. 345.....	1220
People's Bank v. Citizens' Bank, 119 N. C. 310....(41)	
People's Bank v. Morgotofski, 75 Md. 432.....	1076
People's Nat. Bank v. Freeman's Nat. Bank, 169 Mass. 129.....	40
People's Savings Co. v. Pickrell, (Ky.) 56 S. W. Rep. 500.....	827
Peoples &c. R. Co. v. Green, 58 Md. 84.....	473
Peoria v. Adams, 72 Ill. App. 662.....	1091, 1853, 1917, 2045, 2090
Peoria v. Eisler, 62 Ill. App. 26.....	1907
Peoria v. Gerber, 168 Ill. 318.....	1920
Peoria v. Gerber, 68 Ill. App. 255.....	1823, 1924, 1949
Peoria v. Simpson, 110 Ill. 294.....	1934, 2125, 2261
Peoria R. Co. v. Champ, 75 Ill. 577.....	1028
Peoria &c. Co. v. U. S. Rolling Stock Co., 136 Ill. 643.....	330
Peoria &c. Ins. Co. v. Frost, 37 Ill. 333....(943)	
Peoria &c. R. Co. v. Berry, 15 Ill. App. 155....(796)	
Peoria &c. R. Co. v. Clayberg, 107 Ill. 644.....	1125
Peoria &c. R. Co. v. Johns, 43 Ill. App. 83.....	959, 1613
Peoria &c. R. Co. v. Lane, 83 Ill. 448.....	1335
Peoria &c. R. Co. v. Lyons, 9 Ill. App. 350....(818)	
Peoria &c. R. Co. v. Rice, 144 Ill. 227.....	1612
Peoria &c. R. Co. v. Siltman, 67 Ill. 72....(796)	

	PAGE
Pepke v. Grace Hospital, (Mich.) 90 N. W. Rep. 278.....	2195
Peplinski v. Pennsylvania R. Co., (Pa.) 52 Atl. Rep. 32.....	1796
Pepper v. W. U. T. Co., 87 Tenn. 554.....	2424, 2444, 2449, 2453
Peppett v. Michigan C. R., 119 Mich. 640.....	1686
Percival v. Hickey, 18 Fed. Rep. 284.... (520)	
Perez v. Texas &c. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 137.....	1800
Perham v. Portland &c. Electric Co., 33 Or. 451.....	1064
Perigo v. Chicago &c. R. Co., 52 Iowa, 276.....	1690, 1691, 1711
Perigo v. Chicago &c. R. Co., 55 Iowa, 326.....	1143
Perigo v. Indianapolis Brewing Co., 21 Ind. App. 338.....	1424, 1624, 1636
Perkins v. Delaware, 113 Mich. 377.....	1836
Perkins v. East R. Co., 29 Me. 307.... (1040).....	1912
Perkins v. New York, 113 N. Y. 660.....	2221
Perkins v. N. Y. C. &c. R. Co., 24 N. Y. 196.... (944).....	260, 415
Perkins v. Portland, 47 Maine, 573.... (338).....	339, 345
Perkins v. Washington Ins. Co., 4 Cow. 645.....	1305
Perkins Man. Co. v. Williams, 98 Ga. 388.....	1357
Perley v. East. R. Co., 98 Mass. 414.....	1246
Perley v. Georgetown, 7 Gray, 464.....	1990
Perlick v. Detroit Wooden-Ware Co., 119 Mich. 331.....	1720
Perlstein v. American Exp. Co., 177 Mass. 530.....	2349
Perras v. Booth &c. Co., (Minn.) 84 N. W. Rep. 739.....	1596
Perrin v. Devendorf, 22 Ill. App. 284.....	2370
Perry v. Dubuque &c. R. Co., 36 Iowa, 102.....	1048
Perry v. Lansing, 17 Hun, 34.... (726).....	1758
Perry v. Macon Consolidated Street R. Co., 101 Ga. 400.....	2295
Perry v. Marsh, 25 Ala. 659.....	1510
Perry v. Metropolitan Street R. Co., 68 App. Div. 351.....	917, 2035
Perry v. Old Colony R. Co., 164 Mass. 296.....	1494, 1495, 1803
Perry v. Ricketts, 55 Ill. 234.....	1481
Perry v. Rodgers, 91 Hun, 243.....	1484, 1677
Perry v. St. Joseph R. Co., 29 Kan. 420.... (965)	
Perry v. Thompson, 98 Mass. 249.... (283)	
Perzhke v. Hencken, 44 N. Y. Supp. 265.....	1570
Person v. Montgomery, 120 N. C. 111.....	61
Persons v. Van Tassel, (S. D.) 89 N. W. Rep. 861.....	1085
Perth Amboy Gas Light Co. v. Middlesex County Bank, 60 N. J. Eq. 84.....	100
Peryea v. Thompson, 5 Hum. (Tenn.) 397.... (19)	
Peschel v. Chicago &c. R. Co., 62 Wis. 338.....	1579, 1697
Petaja v. Aurora Iron Min. Co., 106 Mich. 463.....	1629
Peter v. Chicago &c. R. Co., 121 Mich. 324.....	1252, 1263
Peterman v. Northern P. R. Co., 105 Fed. Rep. 335.....	950
Peters v. Bowman, 115 Cal. 545.....	2134, 2137
Peters v. Johnson, 50 W. Va. 644.....	895, 1380, 2113
Peters v. Lewis, 28 Wash. 366.....	2084
Peters v. Lindsborg, 40 Kan. 654.....	1986
Peters v. McKay &c. Co., (Cal.) 68 Pac. Rep. 478.....	1432
Petersburgh &c. R. Co. v. Hite, 81 Va. 767.... (793)	
Peterson v. Hubbell, 12 App. Div. 372.....	8
Peterson v. Chicago &c. R. Co., 80 Iowa, 92.... (342).....	356
Peterson v. Delaware &c. R. Co., 9 Kulp, 552.... (443)	
Peterson v. Georgia R. &c. Co., 97 Ga. 798.....	1369
Peterson v. Johnson-Wentworth Co., 70 Minn. 538.....	1216, 1779
Peterson v. New Pittsburg Coal &c. Co., 149 Ind. 280.....	1585
Peterson v. St. Louis &c. R. Co., 156 Mo. 552.... (779)	
Peterson v. Santa Rosa, 119 Cal. 387.....	2096
Peterson v. Seattle Co., 26 Wash. 615.....	842, 1207, 1773, 2326
Peterson v. Southern &c. R. Co., 89 Ala. 318.....	2259
Peterson v. Stege, 67 Ill. App. 147.....	190
Peterson v. Western &c. Teleg. Co., 72 Minn. 41.....	902
Peterson v. Wilmington, 130 N. C. 76.....	1813
Petrie v. Columbia R. Co., 29 S. C. 303.....	876, 953
Petrie v. N. Y. &c. R. Co., 66 Hun, 282.....	759, 782

	PAGE
Petrie v. New York &c. R. Co., 63 App. Div. 473.....	736
Petrie v. Third Ave. R. Co., 30 Misc. 254.....	2312
Pettengell v. Chelsea, 161 Mass. 368.....	1987
Pettengill v. Yonkers, 116 N. Y. 558.....	1919, 1991
Pettigrew v. Evansville, 25 Wis. 223.....	1966
Pettit v. Camden, 87 Fed. Rep. 768.....	1837
Pettit v. Camden, 91 Fed. Rep. 998.....	1836
Pettit v. Great Northern R. Co., 62 Minn. 530.....	428, 2155
Pettit v. New York &c. Co., 80 Hun, 86.....	2095
Petty v. Brunswick &c. R. Co., 109 Ga. 666.....	1772
Petty v. Hannibal &c. R. Co., 88 Mo. 306..... (756)	761
Peverly v. Boston, 136 Mass. 366.....	605
Peyton v. Chicago &c. R. Co., 70 Iowa, 522.... (1054)	
Peyton v. Texas &c. R. Co., 41 La. Ann. 861.....	691
Pfaelzer v. Car Co., 4 Weekly Notes, 240.....	150
Pfeiffer v. Stein, 26 App. Div. 535.....	1161, 1397
Pfeiffer v. Chicago City R. Co., 96 Ill. App. 10.....	1208, 2296
Pfeiffer v. Dialogue, (N. J. L.) 46 Atl. Rep. 772.....	1624
Pfister v. R. Co., 70 Cal. 169.... (610)	
Phaffinger v. Gilman, (Ky.) 38 S. W. Rep. 1088.....	1012
Phalen v. Rochester R. Co., 31 App. Div. 448.....	924
Pharr v. Southern R. Co., 119 N. C. 751.....	2148
Phelan v. Moss, 67 Pa. St. 59.... (183)	
Phelon v. Stiles, 43 Conn. 426.... (10)	
Phelps v. Bostwick, 22 Barb. 314.... (106)	
Phelps v. Chicago &c. R. Co., 122 Mich. 171.....	1679, 1692
Phelps v. Mancato, 23 Minn. 276.....	1820
Phelps v. N. W. R. Co., 19 C. B. (N. S.) 321.....	619
Phelps v. New England R. Co., 172 Mass. 98.... (791)	
Phelps v. R. R., 19 C. B. N. S. 321.....	619
Phelps v. Wait, 30 N. Y. 78.....	1764, 1767, 2026
Phelps &c. Co. v. Skinner, 63 Kan. 384.....	84
Philadelphia v. Long, 75 Pa. St. 257.... (719)	
Philadelphia v. River &c. R. Co., 173 Pa. St. 334.....	2002
Philadelphia R. Co. v. Stinger, 78 Pa. St. 219.... (740)	767, 784
Philadelphia &c. R. Co. v. Anderson, 94 Pa. St. 351.....	411, 1102, 1336
Philadelphia &c. R. Co. v. Boyer, 97 Pa. St. 91.....	536, 766, 1103
Philadelphia &c. R. Co. v. Burkhardt, 83 Md. 516.... (739)	
Philadelphia &c. R. Co. v. Carr, 99 Pa. St. 505.... (762)	768
Philadelphia &c. R. Co. v. Davis, 111 Pa. St. 597.....	1620
Philadelphia &c. R. Co. v. Derby, 14 How. (U. S.) 482.... (8) .. 6, 15, 266, 389, 417	
Philadelphia &c. R. Co. v. Ervin, 89 Pa. St. 71.....	2129
Philadelphia &c. R. Co. v. Fronk, 67 Md. 339.....	815
Philadelphia &c. R. Co. v. Hagan, 47 Pa. St. 244.... (784)	
Philadelphia &c. R. Co. v. Havre de Grace &c. Boat Co., 23 How. (U. S.) 209.....	2376
Philadelphia &c. R. Co. v. Henderson, 80 Pa. St. 182.....	1264
Philadelphia &c. R. Co. v. Hendrickson, 80 Pa. St. 182.....	1256, 1264
Philadelphia &c. R. Co. v. Henrice, 92 Pa. St. 431.....	1241, 2230, 2344
Philadelphia &c. R. Co. v. Hoeflich, 62 Md. 300.....	581
Philadelphia &c. R. Co. v. Hogeland, 66 Md. 149.....	786
Philadelphia &c. R. Co. v. Huber, 128 Pa. St. 63.....	1686
Philadelphia &c. R. Co. v. Hughes, 119 Pa. St. 301.....	1612
Philadelphia &c. R. Co. v. Hummell, 44 Pa. 375.... (814)	718, 815
Philadelphia &c. R. Co. v. Keenan, 103 Pa. St. 124.....	1412
Philadelphia &c. R. Co. v. Killips, 88 Pa. St. 405.... (784)	793
Philadelphia &c. R. Co. v. Laver, 112 Pa. St. 414.... (808)	
Philadelphia &c. R. Co. v. McCormick, 124 Pa. St. 427.... (444)	
Philadelphia &c. R. Co. v. Orbann, 119 Pa. St. 37.....	904
Philadelphia &c. R. Co. v. Pottsville Water Co., 182 Pa. St. 418.....	2084
Philadelphia &c. R. Co. v. Spearen, 47 Pa. St. 30.... (711)	
Philadelphia &c. R. Co. v. Schultz, 93 Pa. St. 341.....	1261
Philadelphia &c. R. Co. v. State, 61 N. J. L. 71.... (796)	

## TABLE OF CASES.

ccxlvi

	PAGE
Philadelphia &c. R. Co. v. Stebbing, 62 Md. 504.....	1170, 1241
Philadelphia &c. R. Co. v. Wilt, 4 Whart. 143..... (520)	
Philadelphia &c. R. Co. v. Yerger, 73 Pa. St. 121.....	1251, 1256
Philadelphia &c. R. Co. v. Young 90 Fed. Rep. 709.....	413, 1124
Phillips v. Edsall, 127 Ill. 535.....	2180
Phillips v. N. R. Co., 62 Hun, 233.....	438, 1335
Phillips v. St. Charles Street R. Co., 106 La. 592.....	515
Phillip v. Detroit &c. R. Co., 111 Mich. 274.... (752)	
Phillips v. Chicago &c. R. Co., 64 Wis. 475.....	1610
Phillips v. Corell, 79 Hun, 210.... (1007).....	1001
Phillips v. Dewald, 79 Ga. 732.....	2362, 2363
Phillips v. Duquesne T. Co., 8 Pa. Super. Ct. 210.... (706).....	708, 718, 1094
Phillips v. Earl, 8 Rich. 182.... (271)	
Phillips v. Ehrman, 8 Misc. (N. Y.) 39.....	1317, 1343
Phillip v. Hughes, (Tex. Civ. App.) 33 S. W. Rep. 157.....	113
Phillips v. Library &c., 55 N. J. L. 307.....	1317, 1322
Phillips v. N. Y. &c. R. Co., 80 Hun, 404.....	765
Phillips v. N. Y. C. &c. R. Co., 84 Hun, 412.... (740)	
Phillips v. People's Pass. R. Co., 190 Pa. St. 222.....	2290
Phillips v. Rensselaer &c. R. Co., 49 N. Y. 177.....	477, 479, 481
Phillips v. Romona &c. Stone Co., 19 Ind. App. 341.....	1397, 1447
Phillips v. Southern R. Co., 114 Ga. 284.....	366, 552
Phillips v. Southern R. Co., 124 N. C. 123.....	371, 554
Phillips v. Southwestern Ry. Co., L. R. 4 Q. B. Div. 406.... (836)	
Philpott v. Philadelphia T. Co., 175 Pa. St. 570.....	762, 937
Phoenix Assur. Co. v. Coffman, 10 Tex. Civ. App. 631.....	1313
Phoenix Pot Works v. Pittsburg &c. R. Co., 130 Pa. St. 284.....	306
Phoenix &c. Co. v. Erie &c. Transp. Co., 117 U. S. 312.....	256
Phyfe v. Manhattan R. Co., 30 Hun, 377.....	836
Picard v. Ridge Ave. &c. R. Co., 147 Pa. St. 195.....	497
Pick v. Ellinger, 66 Ill. App. 570.....	190
Pickard v. Smith, 10 C. B. N. S. 480.... (653).....	655, 1321, 2128
Pickering v. Orange, 1 Scan. 338.... (673)	
Pickett v. West Monroe, 47 App. Div. 629.... (908)	
Pickett v. Wilmington &c. R. Co., 117 N. C. 616.....	661, 2148
Pickins v. Coal River Boom &c. Co., 51 W. Va. 445.....	2098
Piehl v. Albany R. Co., 19 App. Div. 471.....	1090
Piehl v. Albany R. Co., 30 App. Div. 166.....	1109, 2067
Pier v. Chicago &c. R. Co., 94 Wis. 357.....	1125, 1442
Pier v. Finch, 24 Barb. 516.... (569)	
Pierce v. Andrews, 13 Oh. C. C. 513.....	1005
Pierce v. Camden &c. R. Co., 58 N. J. L. 400.....	1693
Pierce v. Clavin, 82 Fed. Rep. 550.....	1545
Pierce v. Dart, 7 Cow. 609.....	77
Pierce v. Davis, 80 Fed. Rep. 865.....	1098
Pierce v. Gray, 63 Ill. App. 158.....	441
Pierce v. Jones, 22 Ind. App. 163.... (804).....	810, 1178
Pierce v. Madison &c. R. Co., 21 How. (U. S.) 441.... (338)	
Pierce v. North Carolina R. Co., 124 N. C. 83.....	29
Pierce v. Railroad Co., 124 N. C. 83.....	1336
Pierce v. Rabberman, 77 Ill. App. 619.... (1014)	
Pierce v. Southern P. Co., 120 Cal. 156.....	230, 244, 2043
Pierce v. Van Dusen, 78 Fed. Rep. 693.....	1157
Pierce v. Walters, 164 Ill. 560.....	2142, 2144, 2145, 2146
Pierce v. Walton, 20 Ind. App. 66.....	827
Pierce v. Wilmington, 2 Marv. (Del.) 306.....	1821, 1935, 1948, 1951
Pierce v. Worcester &c. R. Co., 105 Mass. 199.....	1255
Pierce v. Wright, 73 Ill. App. 512.... (1014)	
Piercy v. Metropolitan Street R. Co., 30 Misc. 612.....	1896, 2307
Pierpont v. Loveless, 72 N. Y. 211.....	634
Pierret v. Moller, 3 E. D. Emith, 574.... (986)	
Pierson v. Atlantic Nat. Bank, 77 N. Y. 304.....	1147
Pierson v. Lebanon, 69 Mo. App. 321.....	1949

	PAGE
Pierson v. New York &c. R. Co., 53 App. Div. 363.....	1477, 1675, 1677
Pierson v. People, 79 N. Y. 424.....	1183, 1184, 1186
Pieschel v. Miner, 30 Misc. 301.....	1108, 1113
Pike v. Grand Trunk R. Co., 39 Fed. Rep. 255.....	691
Pike v. Housinger, 155 N. Y. 201.....	2186
Pikesville &c. R. Co. v. State, 88 Md. 563.....	1692, 1751
Pilkinton v. R. Co., 70 Tex. 226.....	1733
Pilling v. Narragansett Mach. Co., 19 R. I. 686.....	1704
Pilucki v. Detroit &c. Works, 117 Mich. 111.....	1459
Pinckney v. Tel. Co., 19 S. C. 71.....	2391, 2398, 2408, 2430
Pinco v. N. Y. &c. R. Co., 34 Hun, 80.....	448
Pine Bluff Water &c. Co. v. Schneider, 62 rk. 109.....	10, 681, 1382
Pine Bluff &c. L. Co. v. McCain, 62 Ark. 118.....	1382
Pingree v. Comstock, 18 Pick. 46.... (91)	
Pingree v. Gas Co., 107 Mich. 156.....	628
Pinckerton v. Woodward, 33 Cal. 557.... (135).....	140, 146
Pinney v. Hall, 156 Mass. 225.....	1356
Pinney v. Missouri &c. R. Co., 71 Mo. App. 577.... (792).....	798
Pinnix v. Durham, 130 N. C. 360.....	1925, 1952
Pintorelli v. Hortons, 22 R. I. 374.....	1570
Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9.... 1133, 1479, 1484, 1675, 2204	
Pioneer Fireproof Const. Co. v. Howell, 189 Ill. 123.....	1455, 1465, 1541, 1595
Pioneer Fireproof Constr. Co. v. Sunderland, 87 Ill. App. 213.....	28
Pioneer Min. &c. Co. v. Thomas, 133 Ala. 279.....	1746
Pioneer &c. Constr. Co. v. Nansen, 176 Ill. 100.....	646, 1136, 1401
Piper v. Many, 21 Wend. 282.... (137).....	146
Piper v. New York &c. R. Co., 156 N. Y. 224.....	500, 598, 1409
Piper v. Spokane, 22 Wash. 147.....	1158, 1872, 1873, 1874, 1887, 2018
Piper v. Union T. Co., 202 Pa. St. 100.....	2317
Pippin v. Sherman &c. R. Co., (Tex. Civ. App.) 58 S. W. Rep. 961.....	1415
Piqua v. Geist, 59 Oh. St. 163.....	1831
Piquegno v. Chicago &c. R. Co., 52 Mich. 40.....	1433
Piskorowski v. Detroit &c. R. Co., 121 Mich. 498.....	743
Pitcher v. Lennon, 12 App. Div. 356.....	2077
Pitcher v. People's St. R. Co., 154 Pa. St. 560.....	475
Pitcher v. People's &c. R. Co., 174 Pa. St. 402.....	465
Pittman v. El Reno, 4 Okla. 638.....	1879
Pittman v. Harris, (Tex. Civ. App.) 59 S. W. Rep. 1121.....	134
Pittman v. Pacific Exp. Co., 24 Tex. Civ. App. 595.....	255
Pitts v. Florida &c. R. Co., 98 Ga. 655.....	1565
Pitts v. N. Y. &c. R. Co., 79 Hun, 546.....	754
Pittsburg v. Broderson, 10 Kan. App. 430.....	1870
Pittsburg v. Grier, 10 Harris, 54.....	2129
Pittsburg v. McClurg, 6 P. F. Smith, (Pa.) 209.....	541, 700
Pittsburg Bank v. Neal, 22 How. (U. S.) 96.... (182)	
Pittsburg Bridge Co. v. Walker, 170 Ill. 550.....	1682
Pittsburg Electric R. Co. v. Kelly, 57 Kan. 514.....	2283
Pittsburg &c. R. Co. v. Ackworth, 10 Oh. C. C. 583.....	1111, 1755
Pittsburg &c. R. Co. v. Adams, 105 Ind. 151.....	1492, 1599, 1600
Pittsburg &c. R. Co. v. Aldridge, 27 Ind. App. 498.....	454, 458
Pittsburg &c. R. Co. v. Allen, 40 Oh. St. 206.... (1045)	
Pittsburg &c. R. Co. v. Andrews, 39 Md. 329.... (557).....	541
Pittsburg &c. R. Co. v. Bedford &c. R. Co., 81 1-2 Pa. St. 104.... (1334)	
Pittsburg &c. R. Co. v. Bingham, 29 Oh. St. 364.....	2138
Pittsburg &c. R. Co. v. Blair, 11 Oh. C. C. 579.....	928
Pittsburg &c. R. Co. v. Blakemore, 1 Oh. D. 26.... (289)	
Pittsburg &c. R. Co. v. Burroughs, 6 Oh. N. P. 37.....	1679
Pittsburg &c. R. Co. v. Burroughs, 9 Oh. St. C. P. Dec. 324.....	1679
Pittsburg &c. R. Co. v. Burton, 139 Ind. 380.... (761)	
Pittsburg &c. R. Co. v. Callaghan, 157 Ill. 406.....	2170
Pittsburg &c. R. Co. v. Carlson, 24 Ind. App. 559.....	851
Pittsburg &c. R. Co. v. Columbus &c. R. Co., 8 Bliss. (U. S.) 456.....	1336
Pittsburg &c. R. Co. v. Daniels, 90 Ill. App. 154.....	552



## TABLE OF CASES.

ccclix

	PAGE
Pittsburg &c. R. Co. v. De Vinney, 17 Oh. St. 197.....	1660
Pittsburg &c. R. Co. v. Donahue, 70 Pa. St. 119.....	32
Pittsburg &c. R. Co. v. Eby, 55 Ind. 567.... (1035)	
Pittsburg &c. R. Co. v. Elwood, 25 Ind. App. 671.....	1678
Pittsburg &c. R. Co. v. Ensign, 6 Oh. C. D. 616.... (904)	
Pittsburg &c. R. Co. v. Evans, 53 Pa. St. 250.....	684
Pittsburg &c. R. Co. v. Frazee, 150 Ind. 576.... (751)	1091
Pittsburg &c. R. Co. v. Goss, 13 Ill. App. 619.....	1714
Pittsburg &c. R. Co. v. Gray, (Ind. App.) 64 N. E. Rep. 39.....	386, 441, 496
Pittsburg &c. R. Co. v. Hart, 10 Oh. C. C. 411.....	1094
Pittsburg &c. R. Co. v. Hennigh, 39 Ind. 509.... (569)	
Pittsburg &c. R. Co. v. Hinds, 53 Penn. St. 512.... (532)	533
Pittsburg &c. R. Co. v. Hood, 94 Fed. Rep. 618.....	741
Pittsburg &c. R. Co. v. Hosea, 152 Ind. 412.....	2205
Pittsburg &c. R. Co. v. Howard, 40 Oh. St. 6.... (1043)	
Pittsburg &c. R. Co. v. Iddings, 28 Ind. App. 504.....	1267
Pittsburg &c. R. Co. v. Indiana Horseshoe Co., 154 Ind. 322.....	1255, 1262
Pittsburg &c. R. Co. v. Kelly, 12 Oh. C. C. 341.....	890, 2145, 2146
Pittsburg &c. R. Co. v. Kirke, 1 N. E. R. 849.....	1645
Pittsburg &c. R. Co. v. Lewis, (Ky.) 38 S. W. Rep. 482.... (741)	792
Pittsburg &c. R. Co. v. Lyon, 123 Pa. St. 140.....	904
Pittsburg &c. R. Co. v. McGrath, 115 Ill. 172.....	1173
Pittsburg &c. R. Co. v. McMillan, 37 Oh. St. 554.... (1026)	
Pittsburg &c. R. Co. v. Mahoney, 148 Ind. 196.....	266, 1755, 2207
Pittsburg &c. R. Co. v. Martin, 82 Ind. 476.... (784)	
Pittsburg &c. R. Co. v. Martin, 157 Ind. 216.....	2046
Pittsburg &c. R. Co. v. Martin, 3 Oh. Dec. 493.....	386, 443
Pittsburg &c. R. Co. v. Maurer, 21 Oh. St. 421.... (1024)	8
Pittsburg &c. R. Co. v. Montgomery, 152 Ind. 1.... (855)	
Pittsburg &c. R. Co. v. Moore, 152 Ind. 345.....	1590
Pittsburg &c. R. Co. v. Methven, 21 Oh. St. 586.... (1013)	
Pittsburg &c. R. Co. v. Nelson, 51 Ind. 150.....	1256, 1264
Pittsburg &c. R. Co. v. Noel, 77 Ind. 110.... (657)	1257, 1265
Pittsburg &c. R. Co. v. Nuzum, 50 Ind. 141.....	565
Pittsburg &c. R. Co. v. Parish, 28 Ind. App. 189.....	838, 1118, 1439, 1589, 1683
Pittsburg &c. R. Co. v. Pillow, 26 Smith, (Pa.) 510.... (363)	
Pittsburg &c. R. Co. v. Reynolds, 55 Oh. St. 370.....	565, 833
Pittsburg &c. R. Co. v. Ruby, 38 Ind. 294.....	1481
Pittsburg &c. R. Co. v. Sackworth, 10 Oh. C. C. 583.....	1544
Pittsburg &c. R. Co. v. Sentmeyer, 92 Pa. St. 276.....	1408, 1438, 1553, 1712
Pittsburg &c. R. Co. v. Shaw, 15 Ind. App. 173.... (784)	786, 1014, 1328
Pittsburg &c. R. Co. v. Sheppard, 56 Oh. St. 68.....	252
Pittsburg &c. R. Co. v. Smith, 26 Oh. St. 124.... (1046)	
Pittsburg &c. R. Co. v. Smith, 38 Oh. St. 410.... (1037)	1041, 1046
Pittsburg &c. R. Co. v. Spencer, 98 Ind. 186.... (726)	
Pittsburg &c. R. Co. v. Sponier, 85 Ind. 165.....	2245
Pittsburg &c. R. Co. v. Street, 26 Ind. App. 224.....	562, 564, 592
Pittsburg &c. R. Co. v. Stuart, 71 Ind. 500.... (1000)	1012, 1023
Pittsburg &c. R. Co. v. Taylor, 104 Pa. St. 306.... (767)	
Pittsburg &c. R. Co. v. Thomas Bumstead, 48 Ill. 221.....	11
Pittsburg &c. R. Co. v. Thompson, 21 Ind. App. 355.....	1032
Pittsburg &c. R. Co. v. Vandeyne, 57 Ind. 576.....	364
Pittsburg &c. R. Co. v. Viers, (Ky.) 68 S. W. Rep. 469.....	247
Pittsburg &c. R. Co. v. Vining's Adm'r, 27 Ind. 513.... (706)	
Pittsburg &c. R. Co. v. Williams, 74 Ind. 462.... (1101)	
Pittsburg &c. R. Co. v. Wright, 80 Ind. 236.... (756)	
Pittsburg &c. R. Co. v. Yundt, 78 Ind. 37.....	784
Pitzner v. Shinnick, 39 Wis. 129.... (1040)	
Pixley v. Clark, 35 N. Y. 520.....	1105, 2060, 2073, 2220
Pizzi v. Reed, 36 Misc. 123.....	2045
Pizzi v. Reid, 72 App. Div. 162.....	872
Place v. Yonkers, 43 App. Div. 380.....	2019, 2020
Plainview v. Mendelson, (Neb.) 90 N. W. Rep. 956.....	1865

	PAGE
Plank v. N. Y. C. &c. R. Co., 60 N. Y. 607.....	1429, 1430, 1493, 1494, 1688
Plant Invest. Co. v. Cook, 85 Fed. Rep. 611.....	430
Planters' Oil Co. v. Mansell, (Tex. Civ. App.) 43 S. W. Rep. 913.....	855
Planters' Oil Mill v. Monroe Waterworks &c. Co., 52 La. Ann. 1243.....	1814
Planters' Warehouse &c. Co. v. Taylor, 64 Ark. 307.....	1244
Plass v. Plass, 122 Cal. 3.....	1200
Plaster v. Illinois Central R. Co., 35 Iowa, 449.... (1026)	
Platt v. Railroad Co., 84 Iowa, 694.....	1747
Platt v. Waterbury, 72 Conn. 531.....	1990
Platt &c. Co. v. Dowell, 30 Pac. (Col.) 68.....	719
Plattsmouth v. Mitchell, 20 Neb. 228.....	657
Platz v. Cohoes, 89 N. Y. 219.....	2376
Platz v. McKean, 178 Pa. St. 601.....	1941
Plaut v. Railway &c. Co., (Minn.) 91 N. W. Rep. 19.....	769
Play v. Western Union Teleg. Co., 64 Ark. 538.....	2458
Player v. Burlington &c. R. Co., 62 Iowa, 723.... (482)	
Playford v. Tel. Co., L. R., 4 Q. B. 706.....	2426
Pleasanton v. Rhine, 8 Kan. App. 452.....	1869
Pleasants v. R. Co., 95 N. C. 195.....	674, 1547
Pleasants v. Raleigh &c. R. Co., 121 N. C. 492.....	1435, 1608
Plefka v. Knapp &c. Co., 145 Mo. 316.... (1092)	1739
Plemmer v. Ricker, 71 Vt. 114.....	1179
Pletcher v. Scranton T. Co., 185 Pa. St. 147.....	2336
Ploedterll v. Mayor &c., 55 N. Y. 666.....	1943
Ploen v. Staff, 9 Mo. App. 309.....	1332
Ploof v. Burlington T. Co., 70 Vt. 509.... (717)	
Plopper v. N. Y. C. & H. R. Co., 13 Hun, 625.....	463
Plumber v. Ossipee, 59 N. H. 55.... (730)	
Plummer v. Dill, 156 Mass. 426.....	2112
Plummer v. Eastern R. Co., 73 Me. 591.....	764
Plummer v. Milan, 79 Mo. App. 439.....	863, 1868, 1882
Plunkett v. Central of Ga. R. Co., 105 Ga. 203.....	1492, 1590
Plymouth County Bank v. Gilman, 9 S. D. 278.....	118
Podmore v. South Brooklyn Sav. Inst., 48 App. Div. 218.....	162
Poeppers v. Mo. &c. R. Co., 77 Mo. 715.....	1268
Pohler v. N. Y. &c. R. Co., 16 N. Y. 476.... (1045)	
Poindexter v. Benedict Paper Co., 84 Mo. App. 352.....	1525, 1724
Poindexter v. May, 98 Va. 143.....	1002, 1007
Pointon v. St. Louis &c. R. Co., 90 Ill. App. 623.....	1552
Poirier v. Carroll, 35 La. Ann. 699.....	1571
Poland v. Earhart, 70 Iowa, 285.....	1379, 2024
Polenske v. Lit Bros., 18 Pa. Super. Ct. 474.....	2131
Poler v. N. Y. Cent. R. Co., 16 N. Y. 476.....	1041
Polk v. Cosgrove, 4 Biss 437.... (82)	
Polk County v. Cedartown, 110 Ga. 824.....	1831
Pollard v. Maine C. R. Co., 87 Me. 51.....	1444, 2169
Pollard v. Rowland, 2 Blackf. (Ind.) 22.....	39, 2180
Pollard v. Vinton, 105 U. S. 7.... (280)	
Pollett v. Long, 56 N. Y. 200.....	1265, 1277
Pollock v. Landis, 36 Iowa, 651.... (135)	145
Polykranas v. Krausz, 77 N. Y. Supp. 46.....	1199
Polzen v. Morse, 91 Mich. 208.....	1246
Pomaski v. Grant, 119 Mich. 675.....	509
Pomeroy v. Boston &c. R. Co., 172 Mass. 92.....	465
Pomfrey v. Village of Saratoga Springs, 104 N. Y. 459.....	693, 696, 1131, 1167, 1888, 1893
Pomitt v. R. Co., 62 Mo. 527.... (279)	
Pomponio v. New York &c. R. Co., 66 Conn. 528.....	2111, 2165
Pond v. United States, 111 Fed. Rep. 980.....	88
Ponda v. St. Paul C. R. Co., 71 Minn. 438.....	1196
Pond-Decker Lumber Co. v. Spencer, 86 Fed. Rep. 846.....	277
Ponsano v. St. Charles Street R. Co., 52 La. Ann. 245.....	2298
Pontiac v. Talbot Pav. Co., 94 Fed. Rep. 65.....	1815

# TABLE OF CASES.

ccli

	PAGE
Pool v. Devers, 30 Ala. 672.....	1165
Pool v. Southern Pac., 20 Utah, 210.....	678, 1442, 1625, 1616, 1674
Poole v. D., L. & W. R. Co., 35 Hun, 29.... (342).....	343, 356
Poole v. Longueville, 2 Saund. 285.... (1008)	
Poole v. Northern Pac. R. Co., 16 Ore. 261.....	551
Poor v. Sears, 154 Mass. 539.....	1330
Pope v. Farmers' Union & Milling Co., 130 Cal. 139.....	133
Pope v. Hoopes, 90 Fed. Rep. 451.....	629
Pope v. Matthews, 18 S. C. 444.... (47)	
Pope v. United Traction Co., 30 Pittsb. L. J. (N. S.) 62.....	421
Pope v. W. U. T. Co., 14 Ill. App. 531.....	2418, 2448
Popham v. Banard, 77 Mo. App. 619.... (240).....	251, 350
Popp v. Cincinnati & C. R. Co., 96 Fed. Rep. 465.....	966
Popplewell v. Pierce, 10 Cush. 509.... (982)	
Porcella v. Mutual & C. Asso., 50 App. Div. 158.....	2252
Port Blakeley Mill Co. v. Garret, 97 Fed. Rep. 537.....	1630
Port Blakely Mill Co. v. Sharkey, 102 Fed. Rep. 259.....	826
Port Royal & C. R. Co. v. Davis, 95 Ga. 292.....	1733
Portance v. Lehigh Valley Coal Co., 101 Wis. 574.....	1634
Porter v. Anheuser & C. Assn., 24 Mo. App. 1.....	2133
Porter v. Andrus, 10 N. D. 558.....	193
Porter v. Armstrong, 129 N. C. 101.....	2084
Porter v. Chicago & C. R. Co., 41 Iowa, 358.... (31)	
Porter v. Gilky, 57 Mo. 235.... (135).....	153
Porter v. Hardy, 10 N. D. 551.....	177
Porter v. Hildebrand, 14 Pa. St. 129.....	614
Porter v. Railroad Co., 41 Iowa, 358.... (19)	
Porter Man. Co. v. Edwards, 29 Hun, 509.... (273)	
Portland v. Richardson, 54 Me. 46.....	2261
Portland Gold Min. Co. v. Flaherty, 111 Fed. Rep. 312.....	1453
Portsmouth Gas Light Co. v. Shanahan, 65 N. H. 233.....	1908
Posch v. Southern & C. R. Co., 76 Mo. App. 601.... (398).....	478
Posey v. Denver Nat. Bank, 24 Colo. App. 199.....	188
Posey v. Texas & C. R. Co., 102 Fed. Rep. 236.....	1744
Post v. Abbyville & C. R. Co., 99 Ga. 232.....	189
Post v. Hartford & C. R. Co., 72 Conn. 362.....	471
Post v. Olmstead, 47 Neb. 893.....	925, 2357
Post v. Southern P. R. Co., 103 Tenn. 184.....	340
Post v. Stockwell, 44 Hun, 28.....	3
Postal Teleg. & C. Co. v. Barwise, 11 Colo. App. 328.....	2460
Postal Teleg. & C. Co. v. Brantley, 107 Ala. 683.....	10
Postal Teleg. & C. Co. v. Coote, (Tex. Civ. App.) 57 S. W. Rep. 912.... (919)	
.....	1519, 1635
Postal Teleg. & C. Co. v. Hulsey, 115 Ala. 193.....	1669, 1746, 1805
Postal Teleg. & C. Co. v. Hulsey, 132 Ala. 444.....	895, 1509, 1802, 2044
Postal Teleg. & C. Co. v. Ford, 117 Ala. 672.....	2427
Postal Teleg. & C. Co. v. Lathrop, 33 Ill. App. 400.....	2445
Posten v. Denver & C. T. Co., 11 Colo. App. 187.....	409, 495
Pothast v. Chicago & C. R. Co., 110 Iowa, 458.....	1038
Potter v. Chicago & C. R. Co., 12 Wis. 372.....	875
Potter v. Detroit & C. R. Co., 122 Mich. 179.....	1692
Potter v. Faulkner, 31 L. J. Q. B. 30.....	1397
Potter v. Knox Lumber Co., 146 Ind. 14.....	2048
Potter v. Moran, 61 Mich. 60.....	2230, 2350
Potter v. Natural Gas Co., 183 Pa. St. 575.....	1135
Potter v. N. Y. & C. R. Co., 136 N. Y. 77.....	1534
Potter v. N. Y. & C. R. Co., 60 Hun, 313.... (1046).....	1052
Potter v. Railroad Co., 136 N. Y. 77.....	1612
Potter v. Railroad Co., 46 Iowa, 399.....	1642
Potter v. Scranton T. Co., 176 Pa. St. 271.....	2275, 2318
Potter v. Sharp, 24 Hun, 179.....	272
Potter v. Sjorgren, 91 Ill. App. 530.... (657)	
Potter v. Warner, 91 Pa. St. 362.....	898

	PAGE
Potter Co. v. New York &c. R. Co., 22 Misc. 10.....	1023
Potts v. Plunkett, (2 B. Ireland) 7 Am. L. R. (O. S.) 562.....	1547
Potts v. W. U. T. Co., 82 Tex. 545.....	2429, 2446
Pottstown Gas Co. v. Murphy, 39 Pa. St. 257.....	1382
Poucher v. N. Y. C. R. Co., 49 N. Y. 263.....	261
Poulin v. Broadway &c. R. Co., 61 N. Y. 621.....	467
Poulin v. Canadian Pac. R. Co., 6 U. S. App. 298.....	566
Poulsen v. Nassau Electric R. Co., 18 App. Div. 221.....	1103, 1114
Poulsen v. Nassau Electric Co., 30 App. Div. 246.....	680, 1202
Poulton v. London &c. R. Co., 2 L. R. 2 Q. B. 534.... (518)	
Powell v. Ashland Iron &c. Co., 98 Wis. 35.....	678, 1545
Powell v. Construction Co., 88 Tenn. 692.....	4
Powell v. Deveny, 3 Cush. 300.....	12, 2362
Powell v. Hurt, 31 Mo. App. 632.... (51)	
Powell v. Mills, 37 Miss. 691.... (230).....	199
Powell v. Missouri Pac. R. Co., 76 Mo. 80.....	751, 776
Powell v. Myers, 26 Wend. 591.....	200, 307, 607, 608
Powell v. N. Y. C. &c. R. Co., 109 N. Y. 613.... (750).....	748
Powell v. Penn. R. Co., 32 Pa. St. 414.....	240, 306, 513
Powell v. R. Co., 57 N. H. 132.....	1255
Powell v. Salisbury, 2 Younge & Jervis, 391.... (1105)	
Powell v. Wytheville, 95 Va. 73.....	1961
Powers v. Boston &c. R. Co., 175 Mass. 466.....	1143, 1744
Powers v. Calcasieu Sugar Co., 48 La. Ann. 483.....	1398, 1452
Powers v. Chicago, 20 Ill. App. 178.....	1935
Powers v. Clarke, 127 N. Y. 417.... (626)	
Powers v. Creem, 22 App. Div. 480.....	711, 1878
Powers v. Erie, 98 N. Y. 274.....	1598
Powers v. Fall River, 168 Mass. 60.....	1594
Powers v. Harlow, 53 Mich. 607.....	1317, 1323, 2128
Powers v. Kindt, 13 Kan. 61.....	997
Powers v. Mitchell, 3 Hill, 540.....	132
Powers v. N. Y. &c. R. Co., 98 N. Y. 274.....	693, 1494, 1545, 1584
Powers v. N. Y. C. R. Co., 60 Hun, 19.....	1420, 1476
Powers v. O'Neill, 89 Hun, 129.....	2119
Powers v. Philadelphia, 18 Pa. Super. Ct. 621.....	1857
Powers v. St. Louis &c. R. Co., 71 Mo. App. 540.....	2090
Powers v. Standard Oil Co., 53 S. C. 358.....	1562
Powhatan Steamboat Co. v. Appomattox R. R. Co., 24 How. (U. S. S. C.) 247.....	2375
Poznonski v. Szezech, 71 Ill. App. 670.....	1702
Prahl v. Waupaca, 109 Wis. 299.....	1846
Prater v. Marble Co., (Tenn.) 105 S. W. Rep. 496.... (958)	
Prather v. Richmond &c. R. Co., 86 Ga. 435-6.....	1730
Pratt v. Atlantic &c. R. Co., 42 Me. 579.....	1255
Pratt v. Chicago &c. R. Co., 98 Iowa, 563.....	772, 775
Pratt v. Chicago &c. R. Co., 107 Iowa, 287.... (737).....	793
Pratt v. Cohasset, 177 Mass. 488.....	1949
Pratt v. L. S. &c. R. Co., 63 Hun, 616.....	1755
Pratt v. Ogdensburg &c. R. Co., 102 Mass. 557.....	240, 305, 355
Pratt v. Prouty, 153 Mass. 333.....	1565
Pray v. Jersey City, 32 N. J. L. 394.....	1960
Preece v. Rio Grande &c. R. Co., (Utah) 68 Pac. Rep. 413.... (1258)	
Prendergast v. N. Y. C. & H. R. R. Co., 58 N. Y. 652.....	707, 715, 876
Prentiss v. Kent. &c. R. Co., 63 Mich. 478.....	1544
Prescott &c. R. Co. v. Smith, (Ark.) 67 S. W. Rep. 865.....	501
Pressman v. Dickson City, 13 Pa. Super. Ct. 236.....	1813
Prest. &c. v. State, 71 Ind. 573.....	884
Preston v. Hannibal &c. R. Co., 132 Mo. 111.....	1123
Preston v. Ocean S. S. Co., 33 App. Div. 193.....	1596
Prewitt v. Missouri &c. R. Co., 134 Mo. 615.... (771).....	2162
Price v. Atchison Water Co., 58 Kan. 551.....	720, 2134
Price v. Barker, 1 Jurist., (N. S.) 775.....	2203

## TABLE OF CASES.

celiii

	PAGE
Price v. Barnard, 70 Mo. App. 175.....	1033
Price v. Chesapeake &c. R. Co., 46 W. Va. 538.....	550
Price v. Charles Warner Co., 1 Penn. (Del.) 462..1125, 2272, 2277, 2282, 2298,	2340
Price v. Ga Nun et al., 11 Misc. 74.....	2187
Price v. H. &c. R. Co., 77 Mo., 508.....	1718
Price v. Haeberie, 25 Mo. App. 201.....	2182
Price v. Neale, 3 Burrow, 1354.... (166).....	1079
Price v. N. J. &c. R. Co., 2 Vroom. 229.... (1012).....	1026
Price v. Oswego &c. R. Co., 50 N. Y. 213.....	2419
Price v. Philadelphia &c. R. Co., 84 Md. 506.....	1094
Price v. Powell, 3 Comst. 322.... (272).....	312
Price v. Richmond R. Co., 33 S. C. 556.... (944).....	
Price v. St. Louis &c. R. Co., 72 Mo. 414.....	2045
Price v. Simon, 62 N. J. L. 153.....	13
Prichard v. Consolidated Gas Co., 2 Pa. Super. Ct. 179.....	1383
Prichard v. Moore, 75 Ill. App. 553.....	1240
Prideau v. Mineral Point, 43 Wis. 513.... (732).....	659, 730
Prideaux v. Criddell, 4 L. R. Q. B. 461.....	36
Priest v. Nichols, 116 Mass. 401.....	520, 1317, 1322, 2090
Priestly v. Fowler, 3 M. & W. 1.....	1547, 1601, 1749
Prime v. Twenty-third St. R. Co., 1 Abb. N. C. 63.....	2338
Primrose v. W. U. T. Co., 154 U. S. 1..2389, 2390, 2397, 2400, 2409, 2414, 2431, 2441	
Prince v. Lynn, 149 Mass. 193.....	1989
Prince George's Co. v. Burgess, 61 Md. 29.....	657
Pringle v. Long Island R. Co., 157 N. Y. 100.....	1367
Prior v. Davis, 109 Ala. 117.....	55
Pritchard v. LaCrosse &c. R. Co., 7 Wis. 232.... (1014).....	
Probert v. Phipps, 149 Mass. 258.....	1504
Probat v. Delemater, 100 N. Y. 266.... (678).....	1403, 1412, 1415, 1457, 1467
Proctor v. R. Co., 72 N. C. 579.... (1024).....	
Proctor v. Southern &c. R. Co., 130 Cal. 20.....	830
Proctor v. White Mountain Freezer Co., 70 N. H. 3.....	1134
Proffett v. Missouri &c. R. Co., (Tex.) 68 S. W. Rep. 979.....	1460
Pronk v. Brooklyn &c. R. Co., 68 App. Div. 390.....	1202
Prophet v. Kemper, (Mo. App.) 68 S. W. Rep. 956.....	1549
Proprietors of Locks &c. v. Lowell, 7 Gray, 223.....	1966
Prosser v. Montana C. R. Co., 17 Mont. 372.....	1123, 1429, 1686, 1712
Proud v. Philadelphia &c. R. Co., 64 N. J. L. 702.....	399
Provident Life &c. Co. v. Fidelity Ins. &c. Co., (Pa.) 52 Atl. Rep. 34.....	94
Provident Loan R. Co. v. Wolcott, 5 Kan. App. 473.....	1371
Provost v. Yazoo &c. R. Co., 52 La. Ann. 1894.....	2155
Pruitt v. Hannibal &c. R. Co., 62 Mo. 527.....	233
Prussak v. Hattron, 30 App. Div. 66.....	2067
Prybilski v. Northwestern Coal R. Co., 98 Wis. 413.....	1419
Pryor v. Davis, 109 Ala. 117.....	50
Pryor v. Louisville &c. R. Co., 90 Ala. 32.....	1727
Pueblo &c. R. Co. v. Shearman, 25 Colo. 114.....	380, 711
Puechner v. Braun, 10 Pa. Super. Ct. 595.....	1011
Puechell v. Kansas City Wire &c. Works, 79 Mo. App. 459.....	2238
Puechell v. Sutherland, 79 Mo. App. 459.....	2054
Puff v. Lehigh Valley R. Co., 71 Hun, 577.....	750, 760, 1164
Puffer v. Chicago &c. R. Co., 65 Minn. 350.....	1587
Pugh v. Illinois C. R. Co., (Miss.) 23 South Rep. 356.... (779).....	
Pulliam v. Illinois C. R. Co., 75 Miss. 627.....	798
Pullman Co. v. Pollock, 69 Tex. 120.....	601
Pullman Palace Car Co. v. Adams, 120 Ala. 581.....	599
Pullman Palace Car Co. v. Arents, (Tex. Civ. App.) 66 S. W. Rep. 329.....	601
Pullman Palace Car Co. v. Barker, 4 Col. 344.... (896).....	
Pullman Palace Car Co. v. Bluhm, 109 Ill. 20.... (898).....	
Pullman Palace Car Co. v. Cain, 15 Tex. Civ. App. 503.....	367, 601
Pullman Palace Car Co. v. Connell, 74 Ill. App. 447.....	1592
Pullman Palace Car Co. v. Gaylor, 6 Ky. L. 279.... (596).....	
Pullman Palace Car Co. v. Lawrence, 74 Miss. 782.....	849

	PAGE
Pullman Palace Car Co. v. Lee, 48 Ill. App. 75.....	367
Pullman Palace Car Co. v. Lowe, 28 Neb. 239.....	150, 601
Pullman Palace Car Co. v. Nelson, 22 Tex. Civ. App. 223.....	601
Pullman Palace Car Co. v. Reed, 75 Ill. 125.....	551
Pullman &c. Co. v. Matthews, 74 Tex. 654.....	601
Pullman &c. Co. v. Smith, 73 Ill. 360.....	150
Pullman &c. R. Co. v. Gardiner, 3 Penny. (Pa.) 78..... (602)	
Pullman's Palace Car Co. v. Fielding, 62 Ill. App. 577.....	599
Pullman's Palace Car Co. v. Hall, 106 Ga. 765.....	599
Pullman's Palace Car Co. v. King, 99 Fed. 380.....	603
Pullman's Palace Car Co. v. Martin, 95 Ga. 314.....	599
Pulp v. Roanoke &c. Co., 120 N. C. 525.....	1094
Pulsifer v. Berry, 87 Me. 405.....	1126
Purcell v. Chicago &c. R. Co., 109 Iowa, 628.....	2144
Purcell v. English, 86 Ind. 34.....	1317
Purcell v. Jaycox, 59 N. Y. 288.....	5
Purcell v. Lauer, 14 App. Div. 33.....	924, 1092
Purcell v. Richmond R. Co., 108 N. C. 414.....	903, 906, 907
Purcell v. St. Paul &c. R. Co., 48 Minn. 134.....	896
Purcell v. Southern R. Co., 119 N. C. 728.....	1498, 1647
Purcell Mill & E. Co. v. Kirkland, (I. T.) 47 S. W. Rep. 311.....	1415, 1581
Purdy v. Purdy, (Ky.) 42 S. W. Rep. 89.....	50
Purdy v. R., W. &c. R. Co., 52 Hun, 267.....	1772
Purdy v. Westinghouse &c. Man. Co., 197 Pa. St. 257.....	1479
Purl v. St. Louis &c. R. Co., 72 Mo. 168..... (702)	751
Purnell v. Minor, 49 Neb. 555.....	113
Purnell v. Raleigh &c. R. Co., 122 N. C. 832..... (657)	787, 796, 1094
Purple v. Union P. R. Co., 114 Fed. Rep. 123.....	383
Pursley v. Edgemoor &c. Works, 56 App. Div. 71.....	1214, 1487, 1566, 1784
Purvass v. Landell, 12 Clark & F. 91.....	2174
Purvis v. Coleman, 21 N. Y. 111..... (135)	137, 150
Puryea v. Thompson, 5 Hun, (Tenn.) 397.....	32
Pusey v. Webb, 2 Penn. (Del.) 490..... (109)	106, 112, 363, 532
Putman v. N. Y. C. & H. R. R. R. Co., 47 Hun, 439.....	799, 2362
Putnam v. Payne, 13 Johns. 312..... (991)	
Putnam v. Sullivan, 3 Mass. 45.....	177
Putnam v. Timothy Dry Goods &c. Co., 79 Fed. Rep. 454.....	95
Putnam v. Wigg, 3 N. Y. S. R. 304.....	976
Putnam v. Wood, 3 Mass. 481-485..... (202)	
Pye v. Mankato, 36 Minn. 373.....	1960, 1962, 1966
Pyle v. Clark, 75 Fed. Rep. 644.....	677, 731, 753, 755
Pym v. Great Northern R. Co., 2 Best & Smith, (Q. B.) 759.....	863
Pyper v. Salt Lake Amusement Aaso., 20 Utah, 9.....	1086
Pzepka v. American Glucose Co., 11 Misc. 131.....	1287
Quaife v. Chicago &c. R. Co., 48 Wis. 513.....	431, 1179
Quarman v. Barnett, 6 M. & W. 499.....	2288
Quebec &c. Co. v. Merchant, 133 U. S. 375.....	1673
Queen v. Dayton Coal & I. Co., 95 Tenn. 458.....	712, 1521
Quigley v. Clough, 173 Mass. 429.....	2108
Quigley v. Jones Man. Co., 26 App. Div. 434.....	1214
Quigley v. H. W. Johns Man. Co., 26 App. Div. 434.....	1321, 1323, 1361
Quigley v. Plant Co., 165 Mass. 368.....	1537
Quill v. Empire State Teleg. &c. Co., 159 N. Y. 1.....	1058
Quill v. Houston &c. R. Co., 93 Tex. 616.....	1441, 1549
Quill v. New York, 36 App. Div. 476.....	1997
Quilty v. Battie, 48 N. Y. S. R. 413.....	992, 993
Quimby v. Boston &c. R. Co., 150 Mass. 365.....	416
Quimby v. Boston &c. R. Co., 69 N. H. 334.....	1699
Quimby v. Boston &c. R. Co., 71 Vt. 301..... (1040)	
Quimby v. Uhl, (Mich.) 89 N. W. Rep. 722.....	93
Quimby v. Vanderbilt, 17 N. Y. 306.....	259, 296, 337, 340, 342
Quin v. Moore, 15 N. Y. 432.....	876, 944, 946

# TABLE OF CASES.

cclv

	PAGE
Quincy v. Barker, 81 Ill. App. 30.... (699)	
Quincy v. Jones, 76 Ill. 231.....	1961
Quincy Coal Co. v. Hood, 77 Ill. 68.....	1481
Quincy &c. Co. v. Kitts, 42 Mich. 34.....	1470, 1473, 1644, 1670
Quinlan v. Sixth Ave. R. Co., 4 Daly, 487.....	2363, 2364
Quinlan v. Utica, 11 Hun, 217.....	1131
Quinlivan v. Buffalo &c. R. Co., 52 App. Div. 1.....	1408
Quinn v. L. I. R. Co., 34 Hun, 332.... (854)	
Quinn v. Brooklyn City R. Co., 40 App. Div. 608.....	2329
Quinn v. Chicago &c. R. Co., 107 Iowa, 710.....	1690
Quinn v. Crowe, 88 Ill. App. 191.....	1325
Quinn v. Fish, 6 Misc. (N. Y.) 105.....	1497
Quinn v. Illinois Central R. Co., 51 Ill. 495.... (508)	
Quinn v. Louisville &c. R. Co., 98 Ky. 231.....	532
Quinn v. New York &c. R. Co., 175 Mass. 150.....	1692, 1772, 1776
Quinn v. O'Keefe, 9 App. Div. 68.....	1221, 1228, 1229, 2347
Quinn v. Perham, 151 Mass. 162.....	1356
Quinn v. Power, 87 N. Y. 535.....	1, 6
Quinn v. Sempronius, 33 App. Div. 70.....	2018
Quinn v. Shamokin &c. Electric R. Co., 7 Pa. Super. Ct. 19.....	454, 542
Quinn v. So. Car. R. Co., 29 S. C. 381.....	904
Quintona v. Consolidated &c. R. Co., 14 Tex. Civ. App. 347.....	1449
Quirk v. Rapid R. Co., (Mich.) 90 N. W. Rep. 673.....	2336
Quirk v. Siegel-Cooper Co., 43 App. Div. 464.....	2121
Quirk v. Siegel-Cooper Co., 26 Misc. 244.....	923
Quirouet v. Alabama &c. R. Co., 111 Ga. 315.....	1742, 1746
Rabberman v. Callaway, 63 Ill. App. 154.....	1254
Rabberman v. Hunt, 88 Ill. App. 625.... (1040)	
Rabbermann v. Pierce, 77 Ill. App. 405.....	1046
Rabe v. Consol. Ice Co., 113 Fed. Rep. 905.....	1779
Raben v. Central Iowa R. Co., 74 Iowa, 732.... (426)	
Rabidon v. Chicago &c. R. Co., 115 Mich. 390.....	1054
Race v. Railroad Co., 62 N. J. L. 526.....	2047
Race v. Union Ferry Co., 138 N. Y. 644.....	604, 1128
Racine v. Erie R. Co., 69 App. Div. 437.....	924
Racine v. N. Y. C., 70 Hun, 453.....	1415
Rack v. Chicago City R. Co., 173 Ill. 289.....	2295
Rack v. Chicago City R. Co., 69 Ill. App. 656.....	2282
Rackford v. N. Y. C. & H. R. R. Co., 53 N. Y. 654.....	790
Radeliff's Executors v. Mayor, 4 Comst. 203.....	1960, 2058, 2061, 2098
Radjaviller v. Third Ave. R. Co., 58 App. Div. 11.....	863
Radley v. London &c. R. Co., L. R. 1 App. Cases, 754, 759.....	664
Radman v. Haberstro, 17 N. Y. St. Rep. 497.... (893)	
Radway v. Briggs, 37 N. Y. 256.....	1358
Raffert v. Pittsburg, 15 Pa. Super. Ct. 77.....	2022
Rafferty v. Central Park &c. R. Co., 14 Misc. 560.....	1459
Ragland v. St. Louis &c. R. Co., 49 La. Ann. 1166.....	1442, 1718
Rahentramp v. United States T. Co., 14 Pa. Super. Ct. 635.....	2030
Rahilly v. St. Paul &c. R. Co., 66 Minn. 153.....	556
Raiford v. Mississippi R. Co., 43 Miss. 233.... (1013)	
Railey v. Garbutt, 112 Ga. 288.... (1108)	
Railroad Co. v. Aller, 56 Oh. St. 754.....	429
Railroad Co. v. Aspell, 23 Pa. St. 147.....	443, 493, 766
Railroad Co. v. Barrett, 36 Oh. St. 448.... (208)	
Railroad Co. v. Barron, 5 Wall. 90.....	285, 289
Railroad Co. v. Baugh, 149 U. S. 368.....	1474
Railroad Co. v. Belcher, 89 Ky. 198.... (1032)	
Railroad Co. v. Block, 88 Ill. 112.....	1473
Railroad Co. v. Bondron, 92 Pa. St. 475.... (764)	
Railroad Co. v. Boyce, 72 Ill. 510.... (622)	
Railroad Co. v. Brown, 17 Wall. 445.....	368, 1335
Railroad Co. v. Brumfield, 64 Miss. 637.... (1028)	

	PAGE
Railroad Co. v. Case, 9 Bush, (Ky.) 728.....	730
Railroad Co. v. Butler, 1 West. (Ind.) 110.... (736)	
Railroad Co. v. Callbreath, 66 Tex. 526.....	1510
Railroad Co. v. Campbell, 36 Oh. St. 658.... (296).....	349
Railroad Co. v. Cooper, 85 Va. 930.... (536)	
Railroad Co. v. Crum, 30 Neb. 70.... (888)	
Railroad Co. v. Dies, 91 Tenn. 177.....	353
Railroad Co. v. Fairclough, 52 Ill. 106.... (622)	
Railroad Co. v. Finlay, 37 Ark. 569.... (1013)	
Railroad Co. v. Finney, 10 Wis. 388.... (527)	
Railroad Co. v. Fitzpatrick, 42 Oh. St. 318.....	1466
Railroad Co. v. Fort, 84 U. S. (17 Wall.) 553.....1506, 1544, 1599, 1600, 1676	
Railroad Co. v. Geiger, 79 Tex. 13.... (95)	
Railroad Co. v. Gerber, 82 Ill. 632.....	1336
Railroad Co. v. Gilbert, 88 Tenn. 430.....	253
Railroad Co. v. Gladmon, 15 Wall. (U. S.) 401.... (711).....	2228
Railroad Co. v. Gorman, 26 Mo. 44.... (1013)	
Railroad Co. v. Gower, 85 Tenn. 465.....	1473
Railroad Co. v. Guttridge, 9 C. & P. 472.... (1148)	
Railroad Co. v. Halloren, 53 Tex. 46.....	411
Railroad Co. v. Hardway, 17 Ill. App. 321.... (622)	
Railroad Co. v. Harris, 67 Tex. 166.... (254)	
Railroad Co. v. Henderson, 37 Oh. St. 549.....1643, 1657, 1673, 1731	
Railroad Co. v. Henly, 48 Oh. St. 608.....	1429
Railroad Co. v. Hirsch, 69 Miss. 126.....	816
Railroad Co. v. Hogeland, 66 Md. 149.... (730)	
Railroad Co. v. Holt, 29 Kan. 152.....	1632
Railroad Co. v. Houston, 95 U. S. 697.... (794).....	753
Railroad Co. v. Hunter, 38 Ind. 557.... (1013)	
Railroad Co. v. Husson, 101 Penn. 1.....	1473
Railroad Co. v. Irish, 72 Ill. 404.... (1013)	
Railroad Co. v. Johnson, 97 Tenn. 667.... (953)	
Railroad Co. v. Jones, 30 Kan. 601.....	1470
Railroad Co. v. Jones, 95 U. S. 439.... (509)	
Railroad Co. v. Kanouse, 39 Ill. 272.... (1336)	
Railroad Co. v. Kassen, 49 Oh. St. 230.....	668
Railroad Co. v. Kelly, 182 Ill. 267.... (452)	
Railroad Co. v. Kinney, 8 Ind. 402.... (1055)	
Railroad Co. v. Kutac, 72 Tex. 643.... (536)	
Railroad Co. v. Jones, 5 Otto, 439.... (513)	
Railroad Co. v. Lane, 83 Ill. 448.....	513
Railroad Co. v. Larned, 103 Ill. 293.... (1082)	
Railroad Co. v. Lavelley, 36 Oh. St. 221.....	1632
Railroad Co. v. Lebus, 14 Bush. 518.... (1013)	
Railroad Co. v. Le Gierse, 51 Tex. 203.... (905)	
Railroad Co. v. Lockwood, 17 Wall. 357.....266, 268, 375	
Railroad Co. v. Long, (Pa.) 25 P. F. Smith, 257.... (718)	
Railroad Co. v. Lull, 28 Mich. 510.... (1055)	
Railroad Co. v. McMannewitz, 70 Tex. 73.....	689
Railroad Co. v. Macer, 40 Cal. 522.... (1013)	
Railroad Co. v. Mahan, 8 Bush, (Ky.) 184.... (622)	
Railroad Co. v. Manufacturing Co., 16 Wall. 318, 329.....288, 290	
Railroad Co. v. Mayes, 58 Ark. 399.....	498
Railroad Co. v. Meacham, 91 Tenn. 428.....	382
Railroad Co. v. Miller, 51 Tex. 275.....	871
Railroad Co. v. Miller, 25 Mich. 290.... (810)	
Railroad Co. v. Moore, 29 Kan. 633.....	1632
Railroad Co. v. Morey, 47 Oh. St. 207.... (648)	
Railroad Co. v. Morgan, 31 Kan. 77.....	784
Railroad Co. v. Patton, 31 Miss. 188.... (1013)	
Railroad Co. v. Pearson, 22 P. F. Smith, (Pa.) 169.... (718)	
Railroad Co. v. Phillipi, 20 Kan. 12.... (784)	
Railroad Co. v. Reagan, 96 Tenn. 128.....	1474



## TABLE OF CASES.

celvii

	PAGE
Railroad Co. v. Reed, 80 Tex. 362.... (906)	
Railroad Co. v. Reeves, 10 Wall. (U. S.) 176.....	237
Railroad Co. v. Rice, 10 Kan. 426.... (784)	
Railroad Co. v. Rowland, 50 Ind. 353.... (1055)	
Railroad Co. v. Salmon, 14 Kan. 524.....	1632
Railroad Co. v. Savage, 110 Ind. 157.....	2052
Railroad Co. v. Schriener, 6 Ind. 141.... (1005)	
Railroad Co. v. Simcock, (Tex.) 17 S. W. Rep. 47.....	2051
Railroad Co. v. Skillman, 39 Oh. St. 444.....	582
Railroad Co. v. Smith, 22 Oh. St. 227.... (1013)	
Railroad Co. v. Spangler, 44 Oh. St. 471.....	1772
Railroad Co. v. State, 38 Md. 364.... (663)	
Railroad Co. v. Stacker, 86 Tenn. 344.....	487
Railroad Co. v. Stinger, 28 P. F. Smith, (Pa.) 219.... (793)	
Railroad Co. v. Stout, 17 Wall. (U. S.) 657.... (720).....	1345, 2133
Railroad Co. v. Swarts, 58 Kan. 235.....	1479
Railroad Co. v. Tankersley, 54 Ark. 25.....	498
Railroad Co. v. Thornton, 65 Miss. 256.... (1028)	
Railroad Co. v. Thomas, 47 Leg. Intel. (Pa.) 223.....	691
Railroad Co. v. Tower, 2 R. I. 404.... (1013)	
Railroad Co. v. Velleley, 32 Oh. St. 345.... (364).....	681
Railroad Co. v. Vandiver, 42 Pa. St. 365.... (527)	
Railroad Co. v. Watts, 64 Tex. 568.....	1510
Railroad Co. v. Williams, 65 Ala. 74.... (1013)	
Railroad Co. v. Wilson, 28 Kan. 639.... (784)	
Railroad Co. v. White, 80 Tex. 202.... (847)	
Railroad Co. v. Wright, 100 Tenn. 56.....	1521
Railroad Co. v. Wynn, 88 Tenn. 320.....	226
Railton v. Taylor, 20 R. I. 279.....	1323, 1327
Railway Co. v. Anderson, 82 Tex. 516.... (21)	
Railway Co. v. Beall, 91 Tex. 310.... (879)	
Railway Co. v. Finley, 79 Tex. 80.... (387)	
Railway Co. v. Fort, (Tex.) 2 Am. & Eng. R. Cas. 392.... (343)	
Railway Co. v. Humes, 115 U. S. 512.... (1032)	
Railway Co. v. Kelley, 91 Tenn. 699.... (336)	
Railway Co. v. Lawton, 55 Ark. 428.....	383
Railway Co. v. Manchester Mills, id. 653.... (253)	
Railway Co. v. Morrison, (Tex.) 56 S. W. Rep. 735.... (885)	
Railway Co. v. Murray, 55 Ark. 248.....	687
Railway Co. v. Neff, 87 Tex. 303.....	487
Railway Co. v. Norton, 24 Pa. St. 465.....	2230, 2271
Railway Co. v. Roach, 35 Kan. 740.... (343)	
Railway Co. v. Ross, 112 U. S. 377.....	1614
Railway Co. v. Russell, 8 Tex. Civ. App. 578.... (387)	
Railway Co. v. Sowell, 90 Tenn. 17.....	254
Railway Co. v. Watkins, 88 Tex. 20.... (487)	
Rainboldt v. Eddy, 34 Iowa, 440.... (173)	
Rainey v. N. Y. C. & H. R. R. Co., 68 Hun, 495.....	1168
Rains v. St. Louis &c. R. Co., 71 Mo. 164.....	878
Raleigh &c. R. Co. v. Lowe, 101 Ga. 320.....	315
Raleigh v. Empire Ins. Co., 36 N. Y. 350.....	1310
Ralph v. R. R., 32 Wis. 177.....	1165
Ramaley v. Leland, 43 N. Y. 539.....	135, 151
Ramer v. American Cent. Ins. Co., 70 Mo. App. 47.....	1312
Raming v. Metropolitan &c. R. Co., 157 Mo. 477.....	381, 516
Ramsay v. People, 97 Ill. App. 283.....	84
Ramsey v. National Contracting Co., 49 App. Div. 11.....	912, 2238
Ramsdell v. Jordan, 168 Mass. 505.....	1077
Ramsdell v. N. Y. R. Co., 151 Mass. 245.....	957
Ramsden v. B. &c. R. Co., 104 Mass. 117.... (520)	
Ranchau v. Rutland R. Co., 71 Vt. 142.....	268
Randall v. Baltimore &c. R. Co., 109 U. S. 487.....	1694
Randall v. Chicago &c. R. Co., 113 Mich. 115.... (420)	

	PAGE
Randall v. Connecticut &c. R. Co., 132 Mass. 269.... (805)	
Randall v. Eastern R. Co., 106 Mass. 276.....	1957
Randall v. Northern Tel. Co., 54 Wis. 140.... (657)	
Randall v. R. Co., 109 U. S. 478.....	1492, 1611
Randles v. Waukesha County, 96 Wis. 629.....	1983
Randleson v. Murray, 8 Ad. & E. 109.... (655)	
Randolph v. Feist, 23 Misc. 650.....	1322
Randolph v. O'Riordan, 155 Mass. 331.....	2346, 2348
Rangleley v. Southern R. Co., 95 Va. 715.... (792)	738, 804, 2143
Rankert v. Junius, 25 App. Div. 470.....	1933
Rankin v. Smith, 63 Ill. App. 522.....	1825
Ranney v. Chicago &c. R. Co., 59 Ill. App. 130.....	1047
Ranning v. Metropolitan Street R. Co., 157 Mo. 477.....	2045
Ransberry v. North American &c. Co., 22 Wash. 476.....	832
Ransom v. Belvidere, 87 Ill. App. 187.....	1819
Ransom v. Halcott, 18 Barb. 36.... (83)	
Ransom v. Kitner, 31 Ill. App. 241.... (989)	
Ransom v. N. Y. & E. R. Co., 15 N. Y. 415.....	853
Ranson v. Chicago &c. R. Co., 62 Wis. 178.....	785
Raper v. Wilmington &c. R. Co., 126 N. C. 563.....	2141
Rapho v. Moore, 68 Pa. St. 404.....	1470
Rapson v. Cubitt, 9 M. & W. 710.....	633
Rarick v. Smith, 5 Pa. Dist. Rep. 530.....	2097
Rathbone v. N. Y. C. &c. R. Co., 140 N. Y. 48.....	270
Rathbone v. Union R. Co., 13 R. I. 709.... (473)	
Rathbone v. Oregon R. Co., (Ore.) 66 Pac. Rep. 909.....	382
Rathgebe v. Pennsylvania R. Co., 179 Pa. St. 31.....	436
Rattagliata v. Hubbell, 7 Misc. 103.....	2353
Ratteree v. Chapman, 79 Ga. 574.... (905)	
Ratzer v. Burlington &c. R. Co., 64 Minn. 245.....	317
Rauch v. Lloyd, 31 Pa. St. 358.... (711)	
Raughley v. West Jersey &c. R. Co., 202 Pa. St. 43.....	485
Rauh v. Deutcher Verein, 29 App. Div. 483.....	1193
Raulston v. Traction Co., 13 Pa. Super. Ct. 412.... (658)	
Rauscher v. Philadelphia T. Co., 176 Pa. St. 349.....	2317
Rawitzky v. Louisville &c. R. Co., 4 La. Ann. 47.... (556)	
Rawley v. Collian, 90 Mich. 31.....	744
Rawls v. American Mutual Life Ins. Co., 27 N. Y. 282.....	1224
Rawson v. Holland, 59 N. Y. 611.... (351)	352
Rawson v. The Pennsylvania R. Co., 48 N. Y. 212.....	279, 291, 293, 296
Ray v. Boston & Worcester R. Corp., 10 Cush. 112.....	1601
Ray v. Camp, 110 Ga. 818.....	1202
Ray v. Cortland &c. T. Co., 19 App. Div. 530.....	560, 564, 591, 854
Ray v. Diamond State Steel Co., 2 Penn. (Del.) 525.....	1397, 1572, 1579, 1581
Ray v. Keene, 19 App. Div. 147.....	27
Ray v. Poplar Bluff, 70 Mo. App. 252.....	651, 1879
Ray v. Stuckey, 113 Wis. 77.....	701
Rayl v. Kreilich, 74 Mo. App. 246.... (106)	116, 1104
Raymond v. Haverhill, 168 Mass. 382.....	896, 1883
Raymond v. Keesberg, 91 Wis. 191.....	864, 2249
Raymond v. Lowell, 6 Cush. 524, 530.....	1875, 2343
Raynor v. Trolan, 22 App. Div. 107.....	1509
Raynor v. Wilmington &c. R. Co., 129 N. C. 195.....	1147
Re Armstrong Estate, 125 Cal. 603.....	58
Re Bartol's Estate, 182 Pa. St. 407.....	47
Re Corcoran's Estate, 27 Pittsb. L. J. (N. S.) 112.....	54
Re Demarest, 86 Fed. Rep. 803.....	2111
Re Ehles Will, 73 Wis. 345.....	956
Re Estate of Horner, 66 Mo. App. 531.....	60
Re Evans' Estate, 1 Pa. Super. Ct. 37.....	51
Re Fisher's Estate, 189 Pa. St. 179.....	2204
Re Griffith's Estate, 1 Lack. L. News, 311.....	54
Re Hall's Estate, 70 Vt. 458.....	52

## TABLE OF CASES.

celix

	PAGE
Re Horne's Estate, 28 Pittsb. L. J. (N. S.) 443.....	48
Re Johnson's Estate, 4 Oh. N. P. 156.....	56
Re Kalbfell's Estate, 27 Pitts. L. J. (N. S.) 280.....	61
Re Kohler's Estate, 15 Wash. 613.....	62
Re Lightner's Estate, 187 Pa. St. 237.....	47
Re McQueen's Estate, 13 N. Y. St. Rep. 602.....	1193
Re Old's Estate, 176 Pa. St. 158.....	47
Re Ramsay, 95 Fed. Rep. 299.....	1148
Re Seaman's Estate, 2 Lack. L. News, 271.....	62
Re Staggers Estate, 8 Pa. Super. Ct. 260.....	2376
Re Thomas's Estate, 26 Col. 110.....	46
Re Watson, 51 La. Ann. 1641.....	56
Re Watson's Estate, 189 Pa. St. 150.....	47
Read v. Amidon, 41 Vt. 15.....	154
Read v. Brooklyn &c. R. Co., 32 App. Div. 503.....	2311
Read v. City &c. R. Co., 115 Ga. 366.....	729, 1061
Read v. East Providence Fire Dist., 20 R. I. 574.....	653
Read v. Edwards, 17 Ld. Raymond, N. S. 245.... (1006).....	977
Read v. Great Eastern R. Co., L. R. 3 Q. B. 555.... (956).....	
Read v. New York &c. R. Co., 20 R. I. 209.....	1469
Read v. Nichols, 118 N. Y. 224.....	1266, 1277
Read v. Spaulding, 30 N. Y. 630.... (235).....	
Readdy v. Shamokin, 137 Pa. St. 98.....	847
Readhead v. R. R., L. R. 2 Q. B. 412.....	1376
Reading v. Pa. R. Co., 32 N. J. L. 264.....	849
Reading v. Telfer, 57 Kan. 798.....	730, 1822
Reading Twp. v. Telfer, 57 Kan. 798.....	2058
Reading &c. R. Co. v. Eckert, 2 Cent. (Pa.) 791.... (896).....	
Reading &c. R. Co. v. Latshaw, 93 Pa. St. 449.....	1261
Reading &c. R. Co. v. Ritchie, 102 Pa. St. 425.....	758, 776
Reagan v. Boston &c. Light Co., 167 Mass. 406.... (1062).....	
Reagan v. Casey, 160 Mass. 374.....	1399
Reagan v. Southward, (Mass.) 63 N. E. Rep. 895.....	1638
Reber v. Herring, 115 Pa. St. 599.....	2192, 2196
Reber v. Pittsburg &c. Traction Co., 179 Pa. St. 339.....	399, 511
Reberk v. Horne &c. Co., 85 Minn. 326.....	1563
Reeka v. Ocean Steamship Co., 3 Misc. 526.....	1563
Record v. Chicasaw Cooperage Co., (Tenn.) 69 S. W. Rep. 334.... 1200, 1239, 1585	1585
Record v. Saratoga, 46 Hun, 448.....	1182, 1192
Rector v. Syracuse Rapid-Transit R. Co., 66 App. Div. 395.....	2366
Reddington v. Chicago &c. R. Co., 108 Iowa, 96.....	1797
Reddington v. Woods, 45 Cal. 406.....	173
Redfield v. Oakland &c. R. Co., 110 Cal. 277.....	393
Redfield v. Oakland &c. Street R. Co., 112 Cal. 220.....	845, 1125
Redford v. Clarke, (Va.) 40 S. E. Rep. 630.....	16, 76
Redford v. Spokane Street R. Co., 15 Wash. 419.....	2325
Redford v. Woburn, 176 Mass. 520.....	1867
Redford &c. R. Co. v. Rainbolt, 99 Ind. 551.....	1102
Redigan v. Boston &c. R. Co., 155 Mass. 44.....	2112
Redlick v. Doll, 54 N. Y. 235.....	520
Redmond v. Industrial Benefit Association, 78 Hun, 104.....	1187
Redmond v. Liverpool & Philadelphia S. S. Co., 46 N. Y. 578.....	309, 312
Redmund v. Butler, 168 Mass. 367.....	1698
Redpath v. Vaughan, 48 N. Y. 655.....	239
Redpeth v. W. U. T. Co., 112 Mass. 71.....	2397, 2399, 2413, 2415
Red River Line v. Smith, 99 Fed. Rep. 520.....	1463, 1464, 1586
Redson v. Michigan &c. R. Co., 120 Mich. 671.....	736
Reed v. Alleghany City, 29 P. F. Smith, (Pa.) 300.... (650).....	
Reed v. Axtell, 84 Va. 231.....	431
Reed v. Brooklyn Heights R. Co., 32 App. Div. 503.....	2272
Reed v. Burlington R. Co., 72 Iowa, 166.....	1730
Reed v. C. R. I. &c. R. Co., 57 Iowa, 23.....	860
Reed v. Detroit, 108 Mich. 224.....	937, 1111

	PAGE
Reed v. Great Northern R. Co., 76 Minn. 163.....	553
Reed v. Louisville &c. R. Co., 104 Ky. 603.....	396, 1093, 2044
Reed v. McCord, 18 App. Div. 381.....	1105
Reed v. Madison, 83 Wis. 171.....	1857
Reed v. Mayor, 97 N. Y. 620.....	2019
Reed v. Mayor, 31 Hun, 313.....	1945
Reed v. Metropolitan Street R. Co., 58 App. Div. 87.....	729, 2330
Reed v. Minneapolis Street R. Co., 34 Minn. 557.....	2110
Reed v. Missouri &c. R. Co., (Mo. App.) 68 S. W. Rep. 364.....	1634, 1746
Reed v. New York Cent. R. Co., 45 N. Y. 574.....	1174
Reed v. Northfield, 13 Pick. 94.... (697).....	657
Reed v. P. W. & O. R. Co., 48 Hun, 231.....	1222
Reed v. R. Co., 60 Mo. 199.... (351).....	
Reed v. Railway Co., 72 Iowa, 166.....	1736
Reed v. Richardson, 98 Wis. 216.... (313).....	
Reed v. State of New York, 108 N. Y. 407.....	2220
Reed v. Stockmeyer, 74 Fed. Rep. 186.....	1543
Reed v. Texas &c. R. Co., (Tex. Civ. App.) 50 S. W. Rep. 432.....	557
Reed v. Third Ave. R. Co., 14 Misc. 458.... (657).....	
Reed v. Western Union Teleg. Co., 135 Mo. 661.....	2398, 2452
Reed v. Wilmington &c. Co., 1 Marv. (Del.) 193.....	223
Reddie v. The London & Northwestern Railway Co., 4 Exch. 244.....	634
Reedy v. Metropolitan Street R. Co., 27 Misc. 527.....	1165
Reedy v. Stockmeyer, 74 Fed. Rep. 186.....	1668
Reegan v. Western R. Co., 8 N. Y. 175.....	1112
Reem v. St. Paul City R. Co., 77 Minn. 503.....	397, 1159, 1163
Reens v. The Mail &c. Co., 10 Misc. 122.....	2370
Reese v. Hershey, 12 Lanc. L. Rev. 353.....	1449
Reese v. Morgan Silver Min. Co., 15 Utah, 453.....	1723
Reese v. Morgan &c. Min. Co., 17 Utah, 489.....	1145, 1724
Reese v. Penn. R. Co., 131 Pa. St. 422.....	552
Reese v. Wheeling &c. R. Co., 42 W. Va. 333.....	1545, 1586, 1713
Reese v. W. U. Tel. Co., 123 Ind. 294.... (858).....	2454
Reeves v. Poindexter, 8 Jones. (L.) N. C. 308.....	1166
Reeves v. Texas &c. R. Co., 32 Tex. Civ. App. 920.... (824).....	
Regan v. Adams Exp. Co., 49 Ia. Ann. 1579.....	225, 1091
Regan v. Chicago &c. R. Co., 51 Wis. 599.....	2043
Regan v. Palo, 62 N. J. L. 30.....	1542, 1682
Regan v. Reed, 96 Ill. App. 460.....	28, 910
Regner v. Glens Falls, Sandy Hill &c. R. Co., 74 Hun, 202.....	363, 1221
Rahberg v. Mayor, 91 N. Y. 137.....	1940, 1948, 1968, 1960
Reich v. The Union Railway Company of New York City, 78 Hun, 417.....	
	1205, 2231, 2291
Reichel v. N. Y. C. & H. R. R. Co., 130 N. Y. 682.....	1431
Reichenbacher v. Pahmeyer, 8 Brandw. (Ill.) 217.....	1328
Reichert v. Buffalo Spring &c. Co., 15 Misc. 222.....	1724
Reid v. Chicago, 83 Ill. App. 554.....	1869
Reid v. Pennsylvania R. Co., 44 N. J. L. 280.....	1248
Reid v. U. S. Express Co., 48 N. Y. 462.....	351
Reid &c. Co. v. Bradley, 105 Iowa, 220.....	628
Reidel v. Philadelphia &c. R. Co., 87 Md. 153.... (779).....	
Reigler v. Tribune Association, 40 App. Div. 324.....	9
Reilly v. Parker, 11 Misc. 68.....	1638
Reilly v. Albany, 40 Hun, 405.....	2008
Reilly v. Atlas Iron Construction Co., 83 Hun, 196.....	1763
Reilly v. Brooklyn Heights R. Co., 65 App. Div. 453.....	924, 2313
Reilly v. Campbell, 59 Fed. Rep. 990.....	1416
Reilly v. Erie R. Co., 72 App. Div. 476.....	2076
Reilly v. Phila. T. Co., 176 Pa. St. 335.....	2297
Reilly v. Metropolitan Street R. Co., 30 Misc. 110.....	2312
Reilly v. Shannon, 180 Pa. St. 513.....	1359
Reilly v. Sicilian Asphalt Pa. Co., 16 Misc. 65.....	2238
Reilly v. Third Ave. R. Co., 16 Misc. 11.....	2282, 2319

## TABLE OF CASES.

ccclxi

	PAGE
Rally v. Troy City R. Co., 32 App. Div. 131	2325
Reims v. St. Louis &c. R. Co., 71 Mo. 164	1718
Reinder v. B. & P. Coal Co., 12 Ky. L. R. 30	1485
Reiner v. Jones, 38 App. Div. 441	1329
Reinhart v. Sutton, 58 Kan. 726	2085
Reinig v. B. R. Co. of Brooklyn, 49 Hun, 269	1633
Reining v. City of Buffalo, 102 N. Y. 308	1797
Reiper v. Nichols, 31 Hun, 491	1267, 1286
Reis v. Stratton, 23 Ill. App. 314	989
Reis v. Struck, (Ky.) 64 S. W. Rep. 729	1698
Reiser v. Detroit Steel &c. Works, 109 Mich. 244	1401
Reiser v. New York &c. R. Co., 24 App. Div. 23	1710
Reiser v. Penn. Co., 152 Pa. St. 38	1482
Reisert v. Williams, 51 Mo. App. 13	1503
Reisery v. City of New York, 69 App. Div. 302	2086
Reiss v. Metropolitan Street R. Co., 28 Misc. 198	2312
Reiss v. N. Y. S. Co., 103 N. Y. 107	1106
Reiss v. N. Y. Steam Co., 128 N. Y. 103	1377
Reiss v. Pelham, 65 N. Y. Supp. 1033	1833
Reiss v. Texas &c. R. Co., 98 Fed. Rep. 533	321
Reissman v. Jacobowitz, 22 Misc. 551	1327
Reiter v. Winona & C. R. Co., 72 Minn. 225	1591
Relyea v. Kansas &c. R. Co., 112 Mo. 86	1608
Rembe v. N. Y., O. & W. R. R. Co., 102 N. Y. 721	816
Remer v. L. I. R. Co., 36 Hun, 253	2106
Remington v. Walker, 99 N. Y. 626	65
Remping v. Wharton, 56 Neb. 536	2178
Remsen v. Beekman, 25 N. Y. 552	(177)
Remihan v. Bennin, 103 N. Y. 573	1186
Renne v. United States Leather Co., 107 Wis. 305	931, 1694
Renninger v. New York &c. R. Co., 11 App. Div. 565	1682, 1707
Renwick v. N. Y. C. R. R. Co., 36 N. Y. 132	780, 789
Requa v. Rochester, 45 N. Y. 129	1943
Resseque v. Byers, 52 Wis. 650	1080
Reaser v. Corwin, 72 Ill. App. 625	628
Reiter v. Dawson, (Minn.) 52 N. W. Rep. 955	2114
Rettig v. Fifth Ave. Trans. Co., 6 Misc. 328	1640
Reuben v. Swigart, 15 Oh. C. C. 565	652
Reusch v. Greetingier, 192 Pa. St. 74	1596
Reusch v. Grotzinger, 16 Lanc. L. Rev. 13	1638
Revenswood Bank v. Reneker, 18 Pa. Super. Ct. 192	193
Rex v. Carlile, 6 Car. & P. 636	2244
Rex v. Kerrison, 3 M. & S. 526	(817)
Rex v. Pullman's Palace Car Co., 2 Marv. (Del.) 337	1527, 1634
Rex v. Timmins, 7 C. & P. 499	2363
Rex v. White, 1 Burr. 337	2091
Rexford v. State, 105 N. Y. 229	2217, 2218, 2219
Rexter v. Starin, 73 N. Y. 601	690
Rey v. Toney, 24 Mo. 600	(203)
Reynolds v. Alfred Van Beuren, 10 Misc. 703	2266
Reynolds v. Barnard, 168 Mass. 226	1785, 1804
Reynolds v. Boston &c. R. Co., 64 Vt. 66	1473
Reynolds v. Great Northern R. Co., 69 Fed. Rep. 808	752, 786, 787, 815
Reynolds v. Hanrahan, 100 Mass. 313	12
Reynolds v. Kneeland, 63 Hun, 283	1536
Reynolds v. Leveester, 15 Gray, 78	1201
Reynolds v. Merchants' Woolen Co., 168 Mass. 501	1420
Reynolds v. Niagara Falls, 81 Hun, 353	1229
Reynolds v. N. Y. C. & H. R. R. R. Co., 58 N. Y. 252	710, 715, 769
Reynolds v. Northern R. Co., 22 Wash. 165	(821)
Reynolds v. Railway Co., 8 Misc. 313	2231
Reynolds v. Richmond &c. R. Co., 92 Va. 400	401
Reynolds v. Robinson, 64 N. Y. 589	843, 1226, 1232

	PAGE
Reynolds v. Starin, 50 App. Div. 535.....	2121
Reynolds v. Sweetser, 16 Gray, 78.... (1202)	
Reynolds v. Third Ave. R. Co., 8 Misc. 313.....	2313
Reynolds v. Union Free School &c., 33 App. Div. 88.....	2043
Reynolds v. Van Beuren, 155 N. Y. 120.....	1358, 2263
Reynolds v. Van Beuren, 10 Misc. 703.....	912, 1205
Reynolds v. W. U. T. Co., 81 Mo. App. 223.....	2421, 2428, 2430, 2460
Rhea County v. Sneed, 105 Tenn. 581.....	1980
Rhind v. Stake, 28 Misc. 177.....	107, 112
Rhinehart v. People's Bank, 89 Mo. App. 511.....	41
Rhinclander, 28 App. Div. 246.....	1323
Rhines v. Evans, 66 Pa. St. 192.....	2182
Rhines v. Evans, 16 P. F. Smith, 192.... (12).....	2180
Rhing v. Broadway & Seventh Ave. R. Co., 53 Hun, 321.....	2276
Rhoades v. Varney, 91 Me. 222.....	913, 1585, 1660, 1681
Rhobidas v. Concord, 70 N. H. 90.....	1990, 1996
Rhodes v. Nevada, 47 Mo. App. 499.....	2051
Rhodes v. New York Central & Hudson River R. Co., 8 Misc. 366.....	1442
Rhodes v. U. I. & E. R. Co., 5 Hun, 344.....	1043
Rhodius v. Johnson, 24 Ind. App. 401.....	1365, 2126
Rhyner v. Menasha, 107 Wis. 201.....	704, 862, 1825, 1864, 1871, 1882
Rice v. Buffalo Steel-House Co., 17 App. Div. 462.....	2354
Rice v. Crescent City R. Co., 51 La. Ann. 108.....	667, 708, 934, 2297
Rice v. Des Moines, 40 Iowa, 638.... (697).....	898
Rice v. Dwight Mfg. Co., 2 Cush. 80, 87.....	283
Rice v. Eureka Paper Co., 70 App. Div. 336.....	1571
Rice v. Farmer's &c. Bank, (Tex. Civ. App.) 42 S. W. Rep. 1023.....	181
Rice v. Hart, 118 Mass. 201.... (313)	
Rice v. Illinois Central R. Co., 22 Ill. App. 643.....	608
Rice v. King Philip Mills, 144 Mass. 229.....	1446
Rice v. Peninsula Club, 52 Mich. 87.....	2394
Rice v. St. Louis, 165 Mo. 636.....	1163
Rice v. New York &c. R. Co., 55 App. Div. 339.....	1549
Rice v. Norfolk &c. R. Co., (N. C.) 41 S. E. Rep. 1031.....	2089
Rice v. Wood, 61 Ark. 442.....	2028
Riceman v. Havemeyer, 84 N. Y. 647.....	1478, 1493
Rich v. Rockland, 87 Me. 188.....	1895
Rich v. Sacramento R. Co., 18 Cal. 351.....	1016
Richard v. Detroit &c. R. Co., (Minn.) 89 N. W. Rep. 52.....	356, 2029
Richards v. Hayes, 17 App. Div. 422.....	1679, 1737
Richards v. Louisville &c. R. Co., (Ky.) 49 S. W. Rep. 419.....	1443
Richards v. Rough, 53 Mich. 212.....	1406
Richards v. Willard, 176 Pa. St. 181.....	895
Richards v. Westcott, 2 Bows. 589.... (268)	
Richardson v. N. Y. C. R. Co., 98 Mass. 85.... (958)	
Richardson v. Anglo-American Provision Co., 72 Ill. App. 77.....	1424
Richardson v. Carbon Hill Coal Co., 18 Wash. 368.....	1373
Richardson v. Chicago &c. R. Co., 149 Mo. 311.....	240, 287
Richardson v. Chicago &c. R. Co., 56 Wis. 347.....	1050
Richardson v. Chouteau, 37 Fed. Rep. 532.....	355
Richardson v. Danvers, 176 Mass. 413.....	1922
Richardson v. Florida &c. R. Co., 55 S. C. 334.....	1030
Richardson v. Goddard, 23 How. (U. S. R.) 28.... (309)	
Richardson v. Marceline, 73 Mo. App. 360.....	1144, 1869
Richardson v. Milburn, 11 Md. 340.....	1001
Richardson v. Railroad Co., 55 S. C. 334.....	992
Richardson v. Van Ness, 53 Hun, 267.....	16
Richardson v. Webster City, 111 Iowa, 427.....	1961
Richberger v. American Exp. Co., 73 Miss. 161.....	527
Richfield v. Michigan C. R. Co., 110 Mich. 406.....	688
Richmond v. Leaker, 99 Va. 1.....	1092, 1104, 1866, 1867, 1877
Richmond v. New York &c. R. Co., 8 App. Div. 382.....	1436
Richmond v. Sacramento Valley R. Co., 18 Cal. 351.... (657)....	1013, 1014, 1022

	PAGE
Richmond v. Southern P. R. Co., (Or.) 67 Pac. Rep. 947.....	264
Richmond v. Test, 18 Ind. App. 482.....	1967
Richmond Gas Co. v. Baker, 146 Ind. 600.....	863, 1383, 1384
Richmond Granite Co. v. Bailey, 92 Va. 554.....	1635
Richmond R. Co. v. Elliott, 149 U. S. 266.....	1470
Richmond R. Co. v. Medley, 75 Va. 499.....	1259
Richmond R. &c. Co. v. Garthright, 92 Va. 627.....	2284
Richmond &c. Co. v. Garthright, 92 Va. 627.....	915, 2280
Richmond &c. Co. v. Williams, 86 Va. 165.....	1666
Richmond &c. E. Co. v. Bowles, 92 Va. 738.....	1132
Richmond &c. R. Co. v. Anderson, 31 Grattan, (Va.) 812..... (785)	2142
Richmond &c. R. Co. v. Bedell, 88 Ga. 591.....	300
Richmond &c. R. Co. v. Benson, 86 Ga. 203.....	236
Richmond &c. R. Co. v. Burnsed, 70 Miss. 437.....	374
Richmond &c. R. Co. v. Childress, 82 Ga. 719.....	2036
Richmond &c. R. Co. v. Ford, 94 Va. 627.....	1646
Richmond &c. R. Co. v. Jefferson, 89 Ga. 554.....	366
Richmond &c. R. Co. v. Jones, 92 Ala. 218.....	1409
Richmond &c. R. Co. v. Moore, 94 Va. 493.....	654, 2109
Richmond &c. R. Co. v. Morris, 31 Grattan, (Va.) 200.....	445
Richmond &c. R. Co. v. Norment, 84 Va. 167.....	1620
Richmond &c. R. Co. v. Picklesimer, 17 Va. L. J. 12.....	483
Richmond &c. R. Co. v. Richardson, (Ky.) 43 S. W. Rep. 465..... (345)	
Richmond &c. R. Co. v. Richardson, (Ky.) 66 S. W. Rep. 1035.....	283
Richmond &c. R. Co. v. Rudd, 16 Va. L. J. 96.....	1736
Richmond &c. R. Co. v. Scott, 16 Va. L. J. 362.....	541
Richmond &c. R. Co. v. Tribble, 97 Va. 495.....	670, 701, 1713
Richmond &c. R. Co. v. White, 88 Ga. 805.....	321
Richmond &c. Works, v. Ford, 94 Va. 627.....	1506, 1508, 1637, 1540, 2046
Richter v. Cicero &c. Street R. Co., 70 Ill. App. 196.....	2289
Richter v. Harper, 95 Mich. 221.....	1247
Richtmeyer v. Remsen, 38 N. Y. 206.....	81
Ricketts v. Baltimore & Ohio R. Co., 59 N. Y. 637..... (298)	
Ricketts v. Birmingham St. R. Co., 85 Ala. 600..... (497)	
Ricketts v. Chesapeake &c. R. Co., 33 W. Va. 433.....	906, 907
Ricketts v. Railway Co., 12 Eng. L. & E. R. 520..... (1043)	
Ricks v. Flynn, 196 Pa. St. 263.....	1667
Riddle v. Hoffman's Ex'r, 3 Penn. R. 224.....	12, 2180
Ridell v. N. Y. C. & H. R. R. Co., 73 N. Y. 618.....	2026
Ridenhour v. Kansas City Cable R. Co., 102 Mo. 270.....	851
Ridenor v. Wabash &c. R. Co., 81 Mo. 227.....	1037
Rider v. Amsterdam, 31 Misc. 375.....	1990
Rider v. New York, 18 N. Y. Sup. Ct. (J. & S.) 221.....	719
Rider v. Syracuse Street R. Co., 171 N. Y. Supp. 139.....	2309
Rider v. White, 65 N. Y. 54.....	976, 979, 980, 983, 986
Ridge Avenue &c. R. Co. v. Philadelphia, 181 Pa. St. 592.....	1813
Ridges v. Chicago, 72 Ill. App. 142.....	1571
Ridgeway v. Downing Co., 109 Ga. 591.....	646
Riest v. Goshen, 42 Ind. 339..... (699)	
Riester v. New York &c. R. Co., 16 App. Div. 216.....	425, 451
Rifley v. Minneapolis &c. R. Co., 72 Minn. 469.....	1122, 1433, 1712
Rigdon v. Alleghany Lumber Co., 13 N. Y. Supp. 871.....	1697
Rigdon v. Temple Waterworks Co., 11 Tex. Civ. App. 542.....	955, 2109
Rigg v. Manchester &c. R. Co., 12 Jur. (N. S.) 525..... (605)	432
Riggs v. Boylan, Biss. 445..... (82)	
Riggs v. Covenant &c. Ass'n, (Ky.) 49 S. W. Rep. 190.....	179
Rigney v. Chicago, 102 Ill. 64.....	1963
Riker v. New York &c. R. Co., 64 App. Div. 357.....	1461
Riland v. Hirahler, 7 Pa. Super. Ct. 384.....	1079
Riley v. N. Y. &c. R. R. Co., 34 Hun, 97.....	275, 298
Riley v. Chicago &c. R. Co., 104 Iowa, 235.....	1038
Riley v. Chicago &c. R. Co., 71 Minn. 425.....	1253
Riley v. Eastchester, 18 App. Div. 94.....	1920, 1980

	PAGE
Riley v. Farnum, 62 N. H. 42.....	2357
Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247.....	1646, 1799
Riley v. Grand Island Receivers, 72 Mo. App. 280.....	963
Riley v. Harris, 177 Mass. 163.....	986
Riley v. Horne, 5 Bing. 217.... (268)	
Riley v. Lidtke, 49 Neb. 139.....	847
Riley v. Metropolitan Street R. Co., 36 Misc. 789.....	2053
Riley v. Missouri &c. R. Co., 68 Mo. App. 652.....	712, 2143, 2144
Riley v. New York &c. R. Co., 90 Md. 53.... (739)	
Riley v. O'Brien, 53 Hun, 147.....	1569
Riley v. Railroad Co., 27 W. Va. 145.....	1616
Riley v. Reifert, (Tex. Civ. App.) 32 S. W. Rep. 185.....	173
Riley v. St. Louis &c. R. Co., 39 Mo. App. 375.....	1005
Riley v. W. U. T. Co., 6 Misc. 221.....	2409
Riley v. W. U. Tel. Co., 8 Misc. 217.....	2397
Rima v. Rossie Iron Works, 120 N. Y. 433.....	1481
Rinake v. Victor Man. Co., 58 S. C. 360.....	1460
Ring v. Chicago &c. R. Co., (Iowa) 75 N. W. Rep. 492.... (751)	
Ring v. Cohoes, 77 N. Y. 83.....	1089, 1818, 1922
Rio Grande &c. R. Co. v. Lynch, (Tex. Civ. App.) 66 S. W. Rep. 712.....	1689
Riollet v. Summers, 106 Pa. St. 95.....	2366
Riordan v. Ocean S. S. Co., 124 N. Y. 655.....	656, 1111, 1068
Riou v. Rockport Granite Co., 171 Mass. 162.....	1802, 1805
Ripley v. Leverenz, 83 Ill. App. 603.....	838
Ripley v. New Jersey &c. R. Co., 2 Vroom, (N. J.) 388.....	549
Rippe v. Metropolitan Street R. Co., 35 App. Div. 321.....	916
Ripple's Estate, 9 Kulp, 66.....	67
Risinger v. Southern R. Co., 59 S. C. 429.....	814, 815
Ristine v. Blocker, 15 Colo. App. 224.....	901
Ritchey v. West, 23 Ill. 329.....	2189, 2194
Ritchie v. Waller, 63 Conn. 155.....	10
Ritger v. Milwaukee, 99 Wis. 190.....	1924
Ritjer v. Milwaukee, 99 Wis. 190.....	732
Ritt v. True Tag Paint Co., (Tenn.) 69 S. W. Rep. 324.....	910, 1571
Rittenhouse v. Independent Line of Telegraph, 44 N. Y. 263.....	2448, 2450
Rittenhouse v. Wilmington Street R. Co., 120 N. C. 544.....	1730, 1799
Ritz v. Penn. R. Co., 3 Phila. 82.....	233, 306
Ritz v. Wheeling, 45 W. Va. 262.....	2110
Rivara v. Ghio, 2 E. D. Smith, (N. Y.) 264.....	105
Riverside Cotton Mills v. Green, 98 Va. 58.....	1449
Rixford v. Smith, 52 N. H. 355.....	230, 306
Roach v. Jones, 18 Tex. Civ. App. 231.....	2457
Roach v. Ogdensburg, 80 Hun, 467.....	1811
Roanoke v. Shull, 97 Va. 419.....	708, 714, 919, 1857, 1869
Roark v. Greene, 61 Kan. 299.....	1235
Robards v. Wabash R. Co., 84 Ill. App. 477.....	736, 2139
Robb v. La Grange, 158 Ill. 21.....	1964
Robb v. Pittsburg &c. R. Co., 14 Pa. Super. Ct. 282.....	547, 593
Robbins v. Atkins, 168 Mass. 45.... (1321)	
Robbins v. Brownsville Paper Co., 53 App. Div. 641.....	1697
Robbins v. Chicago, 4 Wall, 657.....	654, 1296, 2261
Robbins v. Diggins, 78 Iowa, 521.....	2358
Robbins v. Jones, 15 Com. B. (N. S.) 221.....	1318, 1324
Robbins v. Springfield Street R. Co., 165 Mass. 30.....	2274, 2320
Robbins v. Wilmar, 71 Minn. 403.....	1965
Roberts v. Mobile &c. R. Co., 74 Miss. 334.....	1018
Roberson v. Blevins, 57 Kan. 50.... (176)	
Roberson v. Morgan, 118 N. C. 991.....	1248
Robert v. Powell, 24 Misc. 241.....	2244
Robert v. Smith, 2 Hen. & Man. 213.....	1601
Robertson v. Mayor &c. and New York Central &c. R. Co., 7 Misc. 645.....	1846
Roberts v. C. & N. W. R. Co., 35 Wis. 679.... (784)	
Roberts v. N. Y. E. R. Co., 128 N. Y. 455.... (1213)	1208



## TABLE OF CASES.

ccxv

	PAGE
Roberts v. Chicago &c. R. Co., 78 Ill. App. 526....(1101)	
Roberts v. Chicago &c. R. Co., 35 Wis. 679....(820)	755
Roberts v. Cleburne County, 116 Ala. 378.....	2013
Roberts v. Delaware &c. Canal Co., 177 Pa. St. 183....(804)	
Roberts v. Graham, 5 Wall. 578....(1179)	
Roberts v. Great Western Ry. Co., 4 C. B. (N. S.) 504....(1051)	
Roberts v. Indianapolis Street R. Co., 158 Ind. 634.....	1552
Roberts v. Johnson, 58 N. Y. 613.....	461, 1100
Roberts v. Koehler, 30 Fed. Rep. 94.....	564
Roberts v. Leak, 108 Ga. 806.....	1370
Roberts v. Mason, 10 Oh. St. 277.....	904
Roberts v. Missouri &c. Teleg. Co., 166 Mo. 370.....	1424, 1725
Roberts v. New York &c. R. Co., 175 Mass. 296.....	566
Roberts v. Ogdensburg &c. R. Co., 29 Hun, 154.....	2032
Roberts v. Porter Man. Co., 110 Ga. 474.....	1750
Roberts v. Quincy &c. R. Co., 43 Mo. App. 287....(1054)	
Roberts v. Railroad Co., 33 Minn. 218.....	1608
Roberts v. Riley, 15 La. Ann. 103....(114)	
Roberts v. St. James, 76 Minn. 456.....	2022
Roberts v. Smith, (Ariz.) 52 Pac. Rep. 1120.....	379
Roberts v. Spokane Street R. Co., 23 Wash. 325.....	2274, 2280, 2301, 2335
Roberts v. State, 160 N. Y. 217.....	2223
Roberts v. Stuyvesant Safe Deposit Company, 123 N. Y. 57.....	129
Robert's Estate, 8 Pa. Dist. 303.....	48
Roberts &c. Co. v. Sun &c. Ins. Co., 19 Tex. Civ. App. 338.....	1314
Robertson v. Chicago &c. R. Co., 146 Ind. 486.....	1627, 1738
Robertson v. Erie R. Co., 22 Barb. 91....(513)	
Robertson v. Flemming, 41 Macq. H. L. Cas. 177.....	2185
Robertson v. Kennedy, 2 Dana, (Ky.) 430.....	200
Robertson v. N. S. Co., 139 N. Y. 416.....	242, 272, 300
Robertson v. National S. S. Co., 1 App. Div. 61.....	242
Robertson v. New York &c. R. Co., 22 Barb. 91....(500)	
Robertson v. Old Colony R. Co., 156 Mass. 525.....	266, 370
Robertson v. Pennsylvania R. Co., 180 Pa. St. 43.....	758
Robertson v. Wabash R. Co., 152 Mo. 382.....	428, 860
Robinette v. Alabama &c. R. Co., (Ala.) 31 South. Rep. 18....(761)	
Robins v. St. Louis &c. R. Co., 21 Mo. App. 141....(1015)	
Robin's Estate, 180 Pa. St. 630.....	54
Robinska v. Mills, 174 Mass. 432.....	1495
Robinson v. W. P. R. Co., 48 Cal. 409....(657)	
Robinson v. W. U. T. Co., (Tex. Civ. App.) 43 S. W. Rep. 1053.....	2395
Robinson v. Blake Man. Co., 143 Mass. 528.....	1743
Robinson v. Cedar Rapids, 100 Iowa, 662.....	1875
Robinson v. Chamberlain, 34 N. Y. 389.....	76, 77, 80, 638
Robinson v. Chittenden, 69 N. Y. 525.....	204
Robinson v. Chittenden, 7 Hun, 133.....	312
Robinson v. Cone, 22 Vt. 213....(711)	
Robinson v. Cornish, 34 N. Y. St. R. 695.....	200
Robinson v. Detroit &c. R. Co., 73 Fed. Rep. 883.....	953
Robinson v. Dininny, 96 Va. 41.....	1594
Robinson v. Gary, 28 Oh. St. 241.....	2197
Robinson v. Grand Trunk R. Co., 32 Mich. 322....(1036)	
Robinson v. Hodgkin, 99 Wis. 327.....	52
Robinson v. Louisville &c. R. Co., 112 Fed. Rep. 484.....	1207, 2273
Robinson v. McNeil, 18 Wash. 163.....	22
Robinson v. Manhattan R. Co., 5 Misc. 209.....	481, 687, 696
Robinson v. Marino, 3 Wash. 434.....	975, 979, 983
Robinson v. Mills, 25 Mont. 391.....	93
Robinson v. N. Y. C. & H. R. R. Co., 66 N. Y. 11.....	724
Robinson v. N. Y. C. & H. R. R. Co., 20 Blatchf. C. C. 338.....	1114
Robinson v. New York &c. Steamship Co., 63 App. Div. 211.....	359
Robinson v. Northampton St. R. Co., 157 Mass. 224.....	497
Robinson v. Oceanic S. N. Co., 112 N. Y. 315.....	960

	PAGE
Robinson v. Oil City Gas Co., 99 Pa. 1.....	1384, 1385
Robinson v. Oregon &c. R. Co., 7 Utah, 493.....	2135
Robinson v. Piocher &c., 5 Cal. 460.... (703)	
Robinson v. Rockland &c. R. Co., 87 Me. 387.....	364
Robinson v. Rohr, 73 Wis. 436.....	89
Robinson v. St. Louis &c. R. Co., 21 Mo. App. 141.... (1018)	
Robinson v. Smith, 3 Paige, 222.....	69, 70
Robinson v. Superior &c. R. Co., 94 Wis. 345.....	907, 1158
Robinson v. Webb. 11 Bush. (Ky.) 464.... (648)	
Robinson Land & Lumber Co. v. Gage, (Miss.) 27 South. 998.....	1496
Roblee v. Indian Lake, 11 App. Div. 435.....	1848
Robson v. French, 12 Met. 24.....	2383
Robson v. North Eastern R. Co., L. R. 10 Q. B. 271.... (444)	
Roby v. West, 4 N. H. 285.....	2378
Roche v. B. C. & N. R. Co., 105 N. Y. 294.....	1174
Roche v. Lowell Bleachery, (Mass.) 63 N. E. Rep. 943.....	1629
Roche v. Redington, 125 Cal. 174.....	912
Roche v. Sawyer, 176 Mass. 71.....	1356
Rochester v. Campbell, 123 N. Y. 405.....	1890
Rochester v. Campbell &c., 55 Hun, 138.....	1299
Rochester v. Montgomery, 72 N. Y. 65.....	1295, 1299, 2261
Rochester White Lead Company v. Rochester, 3 N. Y. 463.....	1899, 1966
Rock v. Denis, 4 Montreal, L. R. 356.....	868
Rock v. Indian Orchard Mills, 142 Mass. 522.....	1565
Rock Falls v. Wells, 59 Ill. App. 155.....	1948, 2370
Rock Falls v. Wells, 65 Ill. App. 557.....	1924
Rockford v. Hildebrand, 61 Ill. 155.....	2261
Rockford v. Rannie, 77 Ill. App. 665.....	1878
Rockford Co. v. Delaney, 82 Ill. 198.... (878)	
Rockford Gas. &c. Co. v. Ernst, 68 Ill. App. 300.....	1382, 1384
Rockford &c. R. Co. v. Blake, 173 Ill. 354.....	1129, 1169
Rockford &c. R. Co. v. Hillmer, 72 Ill. 235.... (735)	
Rockford &c. R. Co. v. Lewis, 58 Ill. 49.... (1016)	
Rockford &c. R. Co. v. Rafferty, 73 Ill. 58.... (1025)	
Rockford &c. R. Co. v. Rogers, 62 Ill. 346.....	1256
Rock Island v. Drost, 71 Ill. App. 613.....	1238, 1819
Rock Island &c. Co. v. Elliott, 59 Kan. 42.....	1980
Rock Island &c. R. Co. v. Fairclough, 52 Ill. 106.....	620
Rock Island &c. R. Co. v. Krapp, 173 Ill. 219.....	2083
Rock Island &c. Works v. Pohlman, 99 Ill. App. 670.....	1487, 1682, 1805
Rockland Water Co. v. Rockland, 83 Me. 267.....	1961
Rockwell v. Eldred, 7 Pa. Super. Ct. 95.... (856)	
Rockwell v. Proctor, 39 Ga. 105.....	141
Rocky Mountain Mills v. Wilmington &c. R. Co., 119 N. C. 693.... (355)	
Rodda v. Detroit, 117 Mich. 412.....	1868, 1872
Roddy v. Mo. &c. R. Co., 104 Mo. 234.....	1764
Rodenbaugh v. Philadelphia Traction Co., 190 Pa. St. 358.....	1374
Roderick v. R. Co., 7 W. Va. 54.....	307
Rodermacher v. Milwaukee &c. R. Co., 41 Iowa, 297.... (1255)	
Rodgers v. Cox, 66 N. J. L. 432.....	2207
Rodgers v. Kansas City &c. R. Co., 52 Neb. 86.....	1257
Rodman v. R. Co., 55 Mich. 57.....	1470
Rodrian v. N. Y. &c. R. Co., 125 N. Y. 526.... (803)	
Roe v. Birkenhead &c. R. Co., 7 Ex. 36.... (529)	
Roe v. Crimmins, 10 Misc. 711.....	2254
Roe v. Winston, (Minn.) 90 N. W. Rep. 122.....	1799
Roeder v. Ormsby, 22 How. Pr. 270.....	875
Roehers v. Remhoff, 55 N. J. L. 475.....	986
Roehrs v. Timmons, (Ind. App.) 63 N. E. Rep. 481.... (1325)	
Roener v. Striker, 142 N. Y. 134.....	2042
Roesner v. Hermann, 8 Fed. Rep. 782.....	1448, 1773
Rogers v. Atlantic City R. Co., 57 N. J. L. 703.....	562
Rogers v. Baltimore &c. R. Co., 150 Ind. 397.... (793)	
	2046

## TABLE OF CASES.

cclxvii

	PAGE
Rogers v. Bloomington, 22 Ind. App. 601.....	1879
Rogers v. Crain, 30 Tex. 289.....	1176
Rogers v. Dunn, 172 Pa. St. 151.....	193
Rogers v. Georgia R. Co., 100 Ga. 699.....	1020
Rogers v. Hughes, 87 Ky. 185.....	954
Rogers v. Kansas City &c. R. Co., 52 Neb. 86.....	1112
Rogers v. Lees, 140 Pa. St. 475.... (718).....	2135
Rogers v. Louisville &c. R. Co., 88 Fed. Rep. 462.....	1419, 1430, 1587
Rogers v. Ludlow Man. Co., 144 Mass. 198.....	1448
Rogers v. Newburyport R. Co., 1 Allen, 16.... (1041).....	1039
Rogers v. New York &c. Bridge, 11 App. Div. 141.....	1530
Rogers v. Orion, 116 Mich. 324.....	860, 1870
Rogers v. Overton, 87 Ind. 410.....	2055
Rogers v. W. U. T. Co., 78 Ind. 169.....	2435, 2438
Rogers v. Warren, 75 Mo. App. 271.... (669).....	628
Rogers v. Wheeler and others as Trustees, 43 N. Y. 589.....	89
Rogers v. Wheeler, 6 Lansing, 420.....	207, 328
Rogers &c. Works v. Hand, 50 N. J. L. 464.....	1615, 1620, 1621
Rogstad v. St. Paul &c. R. Co., 31 Minn. 208.....	769
Rohl v. Parr, 1 Esp. 445.... (230)	
Rohling v. Eich, 23 App. Div. 179.....	2260
Bohrabacher v. Woodward, (Mich.) 82 N. W. Rep. 797.....	1570
Bohrof v. Schultz, 154 Ind. 183.....	628
Roley v. Crabtree, 72 Ill. App. 581.....	1323
Rolfe v. Boston &c. R. Co., 69 N. H. 476.....	1251
Rolipillon v. Abbott, 17 N. Y. St. Rep. 107.....	2361, 2362
Rolke v. Chicago &c. R. Co., 26 Wis. 537.....	1258
Roll v. Northern Cent. R. Co., 15 Hun, 496.....	686, 1715, 1758
Rolling Mill Co. v. Corrigan, 46 Oh. St. 283.....	1504
Rolling Mill Co. v. Johnson, 114 Ill. 57.....	1605
Rollings v. Levering, 18 App. Div. 223.....	1408
Rolseth v. Smith, 38 Minn. 14.....	2049
Romach v. Crescent C. R. Co., 50 La. Ann. 473.... (1099)	
Rombach v. Crescent City R. Co., 50 La. Ann. 473.....	2287
Rome v. Baker, 107 Ga. 347.....	1878, 1881
Rome v. Cheney, 114 Ga. 194.....	2136
Rome &c. R. Co. v. Dempsey, 86 Ga. 499.....	1727
Rome &c. R. Co. v. Sullivan, 25 Ga. 228.... (345)	
Rome &c. R. Co. v. Thompson, 101 Ga. 26.....	1440, 1730
Rome &c. R. Co. v. Wimberly, 75 Ga. 316.... (622)	
Romeo v. Boston &c. R. Co., 87 Me. 540.....	774, 804
Romine v. Evansville &c. R. Co., 24 Ind. App. 230.....	395
Rommeney v. New York, 49 App. Div. 64.....	1917, 2238
Roney v. Aldrich & Baldwin, 44 Hun, 320.....	1364
Ronker v. St. John, 21 Oh. C. 39.....	668
Roodhouse v. Christian, 158 Ill. 137.....	1061
Root v. New Jersey & Pennsylvania Concentrating Works, 76 Hun, 54.....	1762
Roots v. Alabama &c. R. Co., 78 Miss. 91.....	2103
Roots v. Houston &c. R. Co., 10 App. Div. 98.....	2285, 2328
Rooter v. Kling, 150 Ind. 159.....	1200
Rooney v. Compagnie Generale &c., 10 Daly, 241.....	1463
Roos v. Philadelphia &c. R. Co., 13 Pa. Super. Ct. 563.....	1308
Roost v. Brooklyn &c. R. Co., 10 App. Div. 477.....	1240
Root v. Des Moines &c. R. Co., 113 Iowa, 675.....	496, 1054
Root v. Great Western R. R. Co., 46 N. Y. 524.....	337, 340, 341, 346
Rosa v. Volkening, 64 App. Div. 426.....	1411, 1596
Rose v. B. & A. R. Co., 58 N. Y. 217.....	1534
Rose v. U. S. T. Co., 3 Abb. Pr. (N. S.) 408.....	2413, 2423, 2426, 2427
Rose v. W. U. T. Co., 3 Abb. Pr. (N. S.) 408.....	2412
Rose v. Boston A. E. W. Co., 58 N. Y. 217.....	1627
Rose v. Commercial &c. Co., 12 Pa. Super. Ct. 394.....	1310
Rose v. Des Moines Valley C. Co., 39 Iowa, 246.....	263, 416
Rose v. King, (Oh.) 30 N. E. Rep. 267.....	1329

	PAGE
Rose v. McCook, 70 Mo. App. 183.....	739
Rose v. Wilmington R. Co., 106 N. C. 168.....	903
Roseberry v. Newport News &c. R. Co., (Ky.) 39 S. W. Rep. 407.....	1159, 1372, 2159
Rosedale v. Cosgrove, 10 Kan. App. 211.....	1856
Rosen v. Chicago &c. R. Co., 83 Fed. Rep. 300.....	1252
Rosen v. State Bank, 32 Misc. 231.....	164
Rosenbaum v. St. Paul &c. R. Co., 38 Minn. 173.....	403
Rosenbaum v. Shoffner, 98 Tenn. 624..... (1075).....	1079, 1144
Rosenberg v. Third Avenue R. Co., 47 App. Div. 323.....	385
Rosenberg v. West End Street R. Co., 168 Mass. 561.....	2283, 2303
Rosenblatt v. Brooklyn Heights R. Co., 26 App. Div. 600.....	2272
Rosencrans v. Insurance Co., 66 Mo. App. 352.....	1310
Rosencrans v. Lindell R. Co., 108 Mo. 9.....	719
Rosenham v. Galligan, 5 App. Div. 49.....	2265
Rosenkranz v. Lindell R. Co., 108 Mo. 9.....	870
Rosenthal v. Weir, 170 N. Y. 149.....	242, 313
Rosevear v. Osceola Mills, 169 Pa. St. 555.....	1874
Roskee v. Mt. Tom &c. P. Co., 169 Mass. 528.....	1143, 1216, 1235
Ross v. Boston &c. R. Co., 6 Allen, 87.....	1259, 1262
Ross v. Clark, 27 Mo. 549.....	106, 117
Ross v. Davenport, 66 Iowa, 548..... (697)	
Ross v. Kansas City R. Co., 48 Mo. App. 440.....	849
Ross v. Mellin, 36 Minn. 421.....	147
Ross v. N. Y. C. & H. R. Co., 5 Hun, 488.....	375, 1395, 1618
Ross v. Pearson Cordage Co., 164 Mass. 257.....	1448
Ross v. Shanley, 185 Ill. 390.....	1677
Ross v. Shanley, 86 Ill. App. 144.....	1406, 2027
Ross v. Southern Cotton Oil Co., 41 Fed. Rep. 152..... (104).....	115
Ross v. Union Cement & Lime Co., 25 Ind. App. 463.....	1669
Ross v. Western Union Teleg. Co., 81 Fed. Rep. 676.....	2449
Rosse v. St. Paul &c. R. Co., 68 Minn. 216.....	1032
Rossell v. Cotton, 31 Pa. St. 525.....	995
Rosted v. Great Northern R. Co., 76 Minn. 123.....	397, 566
Rotan v. Mardgen, (Tex.) 59 S. W. Rep. 585.....	195
Rotenberg v. Segelke, 6 Misc. 3.....	2294, 2229
Roth v. Barrett Man. Co., 96 Wis. 615.....	678
Roth v. Buffalo and State Line R. R. Co., 34 N. Y. 548..... (307).....	620
Roth v. Buffalo & State Line R. Co., 39 N. Y. 548..... (620)	
Roth v. Union Depot Co., 13 Wash. 525.....	712, 913, 2151, 2158
Rothars v. Illinois C. R. Co., (Miss.) 25 South. Rep. 665..... (787)	
Rothchild v. Chicago, 28 Chic. L. News, 216.....	2022
Rothstein v. Pennsylvania R. Co., 171 Pa. St. 620.....	493
Rotting v. Cleman, 20 Wash. 116.....	181
Rouee v. Youard, 1 Kan. App. 270.....	231
Roughan v. Boston &c. Block Co., 36 N. E. (Mass.) 461.....	1415
Roulston v. McClelland, 2 E. D. Smith, 60.....	112
Rounds v. D., L. & W. R. Co., 64 N. Y. 129; 3 Hun, 329.....	10, 19, 24
Rounds v. Carter, 94 Me. 535.....	1592, 1638
Rouse v. Downs, 5 Kan. App. 549.....	1629
Rouse v. Ledbetter, 56 Kan. 348.....	1688, 2048
Rouse v. Metropolitan &c. R. Co., 41 Mo. App. 298.....	903
Rouse v. Osborne, 3 Kan. App. 139.....	1091
Rouser v. North Part &c. R. Co., 97 Mich. 565.....	560
Rouser v. Washington, 13 App. D. C. 320.....	471
Roux v. Lumber Co., 94 Mich. 607.....	1644
Rouzie v. Daingerfield, 97 Va. 708..... (629)	
Rowe v. Ballard, 19 Wash. 1.....	1934
Rowe v. Baltimore &c. R. Co., 82 Md. 493.....	2260
Rowe v. Bird, 48 Vt. 578.....	997
Rowe v. Chicago &c. R. Co., 102 Iowa, 286..... (888)	
Rowe v. Lent, 42 N. Y. St. Rep. 483.....	2189
Rowe v. Such, 134 Cal. 573.....	1107, 1218, 1235
Rowe v. Young, 16 Ind. 312.....	2366
Rowell v. Boston &c. R. Co., 68 N. H. 358.....	29, 2151

## TABLE OF CASES.

celxix

	PAGE
Bowell v. Lowell, 7 Gray, 100.....	1842
Bowell v. Lowell, 11 Gray, 420.....	1176
Rowland v. Jones, 73 N. C. 52.....	110
Rowland v. Murphy, 66 Tex. 534.....	684
Rowland v. Philadelphia, 202 Pa. 50.....	1870
Rowland v. Wanamaker, 193 Pa. St. 598.....	2349
Rowlstone v. Chesapeake &c. R. Co., (Ky.) 54 S. W. Rep. 2.....	1372
Roxbury v. Central &c. R. Co., 60 Vt. 121.....	96
Royal v. Royal, 30 Or. 448.....	74
Boyce v. Salt Lake City, 15 Utah, 401.....	1966, 2002, 2007, 2008
Royakoyek v. St. Paul &c. Co., 76 Minn. 28.....	1695
Royle v. Litchfield, 113 Fed. 240.....	1405
Rozelle v. Rose, 3 App. Div. 132.....	1637, 1669
Ruane v. Lake Shore &c. R. Co., 64 Ill. App. 359.....	1590
Rubin v. Miller, 30 Pittsb. L. J. (N. S.) 351.....	653, 2261
Ruble v. Turner, 2 Hen. & Munf. 38.....	2201, 2203
Ruby v. Enig, 12 York Leg. Reg. 174.... (627)	
Ruchinsky v. French, 168 Mass. 68.....	1492, 1740
Rucker v. Sherman Oil &c. Co., (Tex. Civ. App.) 68 S. W. Rep. 818.....	1066
Rudder v. Koopman, 116 Ala. 332.....	2077
Rudel v. Los Angeles County, 118 Cal. 281.....	2084
Rudell v. Ogdensburgh Transit Co., 117 Mich. 568.....	276, 287
Rudgesair v. Reading Traction Co., 180 Pa. St. 333.....	32
Rudiger v. Chicago &c. R. Co., 94 Wis. 191.....	965
Rudiger v. Chicago &c. R. Co., 101 Wis. 292.....	886
Rudolph v. Montant, 37 App. Div. 396.....	658
Rudy v. Neyton, 19 Pa. Super. Ct. 312.....	200
Ruff v. Rinaldo, 55 N. Y. 664.... (827)	
Ruffner v. Cincinnati &c. R. Co., 34 Oh. St. 96.....	1260
Ruggles v. Fay, 31 Mich. 141.....	111
Ruggles v. Sherman, 14 John. 446.... (49)	
Ruloff v. People, 45 N. Y. 213.... (1237)	
Rummel v. Dilworth, 131 Pa. St. 109.....	1505, 1753
Rummell v. Dillworth, 111 Pa. St. 343.....	1600
Runnels v. Houston &c. R. Co., (Tex. Civ. App.) 50 S. W. Rep. 172.....	404
Runyan v. Central R. Co., 61 N. J. L. 537, 542.....	264, 614, 617, 619
Runyan v. Central R. Co., 65 N. J. L. 228.....	593, 617, 855
Ruppel v. Manhattan R. Co., 13 Daly, 11.... (1276)	
Ruppert v. Brooklyn &c. R. Co., 154 N. Y. 90.....	2338
Rupprecht v. Brighton Mills, 27 App. Div. 77.....	2048
Rusch v. Dubuque, 116 Iowa, 402.....	1880
Rush v. Mo. &c. R. Co., 36 Kan. 129.....	1550
Rush v. Spokane Falls &c. Co., 23 Wash. 501.....	919, 1630
Rush v. Steele, 93 Va. 526.....	48
Rusher v. Aurora, 71 Mo. App. 418.....	1876
Rushton v. Allegheny, 192 Pa. St. 574.....	1867
Rushville v. Adams, 107 Ind. 475.....	1915
Rushville &c. Tel. Co. v. Irvin, 27 Ind. App. 62.....	2393
Rusk v. Manhattan R. Co., 46 App. Div. 100.....	435
Russ Lumber &c. Co. v. Muscupiabe Land &c. Co., 120 Cal. 521.....	189
Russell v. Adderton, 64 N. C. 417.....	2206
Russell v. American &c. Teleph. Co., 180 Mass. 467.....	1080
Russell v. Atchison &c. R. Co., 70 Mo. App. 88.... (761).....	814
Russell v. Canastota, 98 N. Y. 496.....	1919
Russell v. Carolina C. R. Co., 118 N. C. 1098.... (792)	
Russell v. Columbia, 74 Mo. 480.....	864
Russell v. H. R. R. Co., 17 N. Y. 134.....	375, 1601, 1614
Russell v. Livingston, 16 N. Y. 515.....	323
Russell v. Louisville &c. R. Co., 93 Va. 322.....	1053
Russell v. Minneapolis, 32 Minn. 233.....	1567
Russell v. Missouri &c. R. Co., 12 Tex. Civ. App. 627.....	555
Russell v. Pittsburg &c. R. Co., 157 Ind. 305.....	263
Russell v. Railroad Co., 32 Minn. 230.....	1565

	PAGE
Russell v. Richmond &c. R. Co., 47 Fed. Rep. 204.....	1736
Russell v. Roberts, 3 E. D. Smith, 318....(104).....	114
Russell v. Shreveport Belt R. Co., La. Ann. 501....(544)	
Russell v. Tacoma, 8 Wash. St. 156.....	1990
Russell v. Tillotson, 140 Mass. 201.....	1557
Russell v. Toledo, 19 Oh. C. C. 418.....	1887, 1895
Russell v. Tomlinson et al., 2 Conn. 206.....	996
Russell v. Western Union Teleg. Co., 57 Kan. 230.....	2410, 2411
Russell v. Windsor Steamboat Co., 126 N. C. 961.....	874
Russel Creek Coal Co. v. Wells, 96 Va. 416.....	1560, 1666, 1684
Russell Man. Co. v. N. H. S. Co., 50 N. Y. 121....(109).....	128, 1201
Rust v. Low, 6 Mass. 90.....	1001, 1008
Rusterholtz v. New York &c. R. Co., 191 Pa. St. 390....(767)	
Rustin v. Standard &c. Co., 58 Neb. 792.....	1310
Rutgers v. Lucet, 2 Johns. Cas. 92....(103)	
Rutherford v. Krause, 55 App. Div. 210.....	106
Rutherford v. St. Louis &c. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 161.....	1207
Rutherford v. Schreveport R. Co., 41 La. 793.....	902
Rutherford v. Southern R. Co., 56 S. C. 446.....	1803
Rutland E. L. Co. v. Marble City E. L. Co., 65 Vt. 377....(1058)	
Rutter v. Missouri &c. R. Co., 81 Mo. 169.....	1372
Ryals v. Johnson County Sav. Bank, 106 Ga. 525.....	189
Ryan v. C. V. R. Co., 23 Penn. St. 384.....	1615
Ryan v. Bagaley, 50 Mich. 179.....	1470, 1670
Ryan v. Chelsea Paper Man. Co., 69 Conn. 454.....	1497
Ryan v. Chicago, 79 Ill. App. 28.....	1869
Ryan v. Fowler, 24 N. Y. 410.....	1457, 1478
Ryan v. Gross, 68 Md. 377.....	1253
Ryan v. Manhattan R. Co., 121 N. Y. 126.....	433, 1120
Ryan v. L. I. R. Co., 51 Hun. 607.....	695, 1439
Ryan v. La Crosse City R. Co., 108 Wis. 122.....	2302, 2337, 2334
Ryan v. Los Angeles Ice &c. Co., 112 Cal. 244.....	1502, 1641, 2067
Ryan v. N. Y. C. R. Co., 35 N. Y. 210.....	569, 1265, 1273, 1276, 1282
Ryan v. N. Y. C. & H. R. R. Co., 37 Hun. 186.....	716
Ryan v. N. Y. &c. R. Co., 115 Fed. Rep. 197.....	2165
Ryan v. New York &c. R. Co., 17 App. Div. 221.....	1089, 2156
Ryan v. New York &c. R. Co., 30 App. Div. 153.....	768
Ryan v. New York &c. R. Co., 169 Mass. 267.....	1692
Ryan v. Porter Man. Co., 57 Hun. 253.....	1176, 1556
Ryan v. Smith, 85 Fed. Rep. 758.....	1628
Ryan v. Towar, 128 Mich. 463.....	2134
Ryan v. Thomson, 38 Supr. Ct. 135.....	1172, 2379
Ryan v. Wilson, 87 N. Y. 471.....	1345
Ryder v. Thomas, 13 Hun. 296.....	639
Ryer v. Pennsylvania R. Co., 26 Misc. 715.....	314
Ryerson v. Bathgate, 67 N. J. L. 337.....	2112
Rylands v. Fletcher, L. R. 3 Eng. & T. App. 330....(655)	
Rysdorp v. Pankratz Lumber Co., 95 Wis. 622.....	1449, 1745
Rysdyke v. Mt. Hope, 46 App. Div. 624.....	1909
Ryther v. Austin, 72 Minn. 24.....	1822, 1952, 2247
S. H. S. Co. v. Tipping, 11 H. L. Cas. 642.....	2071
S. & N. &c. R. Co. v. McLendon, 63 Ala. 266....(900)	
S. R. Co. v. O'Connor, 315 Ill. 254.....	1170
S. R. & D. R. Co. v. Lacy, 43 Ga. 461....(958)	
St. Clair v. Chicago &c. R. Co., 80 Iowa, 304.....	301
St. Clair v. Kansas City &c. R. Co., 77 Miss. 789.....	264, 343
St. Clair v. Missouri P. R. Co., 29 Mo. App. 76.....	903
St. Germania v. Fall River, 177 Mass. 550.....	1927, 1949, 1952, 1996
St. Jean v. Boston &c. R. Co., 170 Mass. 213.....	1716
St. Joe &c. Min. Co. v. First Nat. Bank, 10 Colo. App. 339.....	189
St. John v. Van Santvoord, 25 Wend. 600.....	2439
St. Johns &c. R. Co. v. Shalley, 33 Fla. 397.....	638

## TABLE OF CASES.

ccxxi

	PAGE
St. Joseph &c. R. Co. v. Chase, 11 Kan. 47.....	1257, 1263
St. Joseph &c. R. Co. v. Wheeler, 35 Kan. 185.....	12
St. Louis v. Barker, 77 Fed. Rep. 810.... (762)	
St. Louis v. Karr, 85 Mo. App. 608.....	86
St. Louis v. Siegrist, 46 Mo. 593.....	149
St. Louis R. Co. v. Gaines, 46 Ark. 555.....	1488
St. Louis R. Co. v. Rice, 51 Ark. 457.....	1403, 1405, 1619, 1727
St. Louis &c. Fire Proofing Co. v. Dawson, (Tex. Civ. App.) 59 S. W. Rep. 847.....	1539
St. Louis &c. R. Co. v. Abermathy, (Tex. Civ. App.) 68 S. W. Rep. 539..	2154, 2160
St. Louis &c. R. Co. v. Adams, 24 Tex. Civ. App. 231.....	1039, 1049, 1165
St. Louis &c. R. Co. v. Ayres, 67 Ark. 371.....	888
St. Louis &c. R. Co. v. Baker, 67 Ark. 531.....	439, 681, 917
St. Louis &c. R. Co. v. Ball, (Tex. Civ. App.) 66 S. W. Rep. 879.....	503, 895
St. Louis &c. R. Co. v. Barnett, 65 Ark. 255.....	425
St. Louis &c. R. Co. v. Bashan, 47 Ark. 321.... (1023)	
St. Louis &c. R. Co. v. Beecher, 65 Ark. 64.....	85
St. Louis &c. R. Co. v. Bennett, 69 Fed. Rep. 525.....	2141, 2142, 2163
St. Louis &c. R. Co. v. Berger, 64 Ark. 613.....	523, 1113
St. Louis &c. R. Co. v. Bishop, 14 Tex. Civ. App. 504.....	885, 2143, 2148, 2149
St. Louis &c. R. Co. v. Bland, (Tex. Civ. App.) 34 S. W. Rep. 675.....	215, 219
St. Louis &c. R. Co. v. Blinn, 10 Kan. App. 468.....	934
St. Louis &c. R. Co. v. Blackwell, (Tex. Civ. App.) 40 S. W. Rep. 860..	1033, 1042
St. Louis &c. R. Co. v. Branch, 45 Ark. 524.....	582
St. Louis &c. R. Co. v. Bragg, 66 Ark. 248.....	1029
St. Louis &c. R. Co. v. Brennan, 20 Ill. App. 555.....	1542
St. Louis &c. R. Co. v. Britz, 72 Ill. 256.....	1542
St. Louis &c. R. Co. v. Brown, 62 Ark. 254.....	583, 1205
St. Louis &c. R. Co. v. Brown, 67 Ark. 295.....	1610
St. Louis &c. R. Co. v. Burrows, 62 Kan. 89.... (1178).....	403, 1104
St. Louis &c. R. Co. v. Byas, 12 Tex. Civ. App. 657.....	819
St. Louis &c. R. Co. v. Campbell, (Tex. Civ. App.) 34 S. W. Rep. 186.....	1223
St. Louis &c. R. Co. v. Campbell, (Tex. Civ. App.) 69 S. W. Rep. 451.....	412, 561
St. Louis &c. R. Co. v. Cantrell, 37 Ark. 519.....	384, 432, 443, 485, 776
St. Louis &c. R. Co. v. Carr, 47 Ill. App. 353.....	580
St. Louis &c. R. Co. v. Carwile, (Tex. Civ. App.) 67 S. W. Rep. 160.....	1119
St. Louis &c. R. Co. v. Casseday, 92 Tex. 525.... (454)	
St. Louis &c. R. Co. v. Casseday, (Tex. Civ. App.) 40 S. W. Rep. 198.....	444
St. Louis &c. R. Co. v. Casseday, (Tex. Civ. App.) 48 S. W. Rep. 6.....	684
St. Louis &c. R. Co. v. Cates, 15 Tex. Civ. App. 135.....	215, 826
St. Louis &c. R. Co. v. Chambliss, 93 Tex. 62.....	941
St. Louis &c. R. Co. v. Clark, 48 Kan. 321.....	224
St. Louis &c. R. Co. v. Cline, 69 Ark. 659.....	1020
St. Louis &c. R. Co. v. Cohen, (Tex. Civ. App.) 55 S. W. Rep. 1123.....	354
St. Louis &c. R. Co. v. Coulson, 8 Kan. App. 4.....	386, 427
St. Louis &c. R. Co. v. Crawford, (Tex. Civ. App.) 35 S. W. Rep. 748.....	319
St. Louis &c. R. Co. v. Curl, 28 Kan. 622.....	1335
St. Louis &c. R. Co. v. Dalby, 19 Ill. 353.... (554)	
St. Louis &c. R. Co. v. Davis, 55 Ark. 462.....	879
St. Louis &c. R. Co. v. Dawson, 68 Ark. 1.....	717, 923, 950
St. Louis &c. R. Co. v. Dawson, (Kan.) 67 Pac. Rep. 521.... (792)	
St. Louis &c. R. Co. v. Denty, 63 Ark. 177.....	451, 743
St. Louis &c. R. Co. v. De Shong, 63 Ark. 443.... (824)	
St. Louis &c. R. Co. v. Dickens, (Tex. Civ. App.) 56 S. W. Rep. 124.....	229
St. Louis &c. R. Co. v. Dingham, 62 Ark. 245.....	2148, 2155
St. Louis &c. R. Co. v. Dooley, 70 Ark. 389.....	2111
St. Louis &c. R. Co. v. Dorsey, 189 Ill. 251.....	1142, 1717
St. Louis &c. R. Co. v. Dunn, 78 Ill. 197.... (784)	
St. Louis &c. R. Co. v. Edwards, 78 Fed. Rep. 745.....	216
St. Louis &c. R. Co. v. Eggmann, 161 Ill. 155.....	1564
St. Louis &c. R. Co. v. Elgin &c. Milk Co., 175 Ill. 557.....	340
St. Louis &c. R. Co. v. Elgin Condensed Milk Co., 74 Ill. App. 619....	276, 282, 1142
St. Louis &c. R. Co. v. Ellis, 58 Ill. App. 110.....	2090

	PAGE
St. Louis &c. R. Co. v. Farr, (Ark.) 68 S. W. Rep. 243.....	439, 440
St. Louis &c. R. Co. v. Fenlaw, (Tex. Civ. App.) 36 S. W. Rep. 295.....	2166, 2167
St. Louis &c. R. Co. v. Ferguson, 37 Ark. 16.... (1031)	
St. Louis &c. R. Co. v. Ferguson, 65 Ark. 126.....	1626
St. Louis &c. R. Co. v. Ferguson, (Tex. Civ. App.) 64 S. W. Rep. 797.....	400
St. Louis &c. R. Co. v. Franklin, (Tex. Civ. App.) 44 S. W. Rep. 701....	
(371).....	528
St. Louis &c. R. Co. v. Freeman, 36 Ark. 41.....	717, 778, 809
St. Louis &c. R. Co. v. French, 56 Kan. 584.....	682, 878, 925, 1743
St. Louis &c. R. Co. v. Gates, 15 Tex. Civ. App. 135.....	826
St. Louis &c. R. Co. v. Germany, (Tex. Civ. App.) 56 S. W. Rep. 586.....	927
St. Louis &c. R. Co. v. Gilham, 39 Ill. 455.... (1251)	
St. Louis &c. R. Co. v. Gill, 55 S. W. Rep. 386.....	810, 1156, 1157, 1160, 1179
St. Louis &c. R. Co. v. Greenthall, 77 Fed. Rep. 150.....	533
St. Louis &c. R. Co. v. Griffith, 12 Tex. Civ. App. 631.....	528
St. Louis &c. R. Co. v. Hall, 53 Ark. 7.....	900
St. Louis &c. R. Co. v. Hall &c. Mach. Co., 23 Tex. Civ. App. 211.....	320
St. Louis &c. R. Co. v. Hays, 13 Tex. Civ. App. 577.....	1113
St. Louis &c. R. Co. v. Hecht, 38 Ark. 357.....	1261
St. Louis &c. R. Co. v. Henson, 61 Ark. 302.....	1609
St. Louis &c. R. Co. v. Hicks, 69 Fed. Rep. 531.....	2164
St. Louis &c. R. Co. v. Higgins, 33 Ark. 458.....	1545
St. Louis &c. R. Co. v. Hoover, 3 Kan. App. 577.....	888, 1253
St. Louis &c. R. Co. v. Hopkins, 54 Ark. 209.....	2266
St. Louis &c. R. Co. v. Hurimond, (Ark.) 68 S. W. Rep. 488.....	1619
St. Louis &c. R. Co. v. Hurst, 25 Ill. App. 181.... (1022)	
St. Louis &c. R. Co. v. Hurst, 67 Ark. 407.... (240)	
St. Louis &c. R. Co. v. Jacobs, (Ark.) 68 S. W. Rep. 248.... (240)	
St. Louis &c. R. Co. v. Jacobson, (Tex. Civ. App.) 66 S. W. Rep. 1111.... (659)	
St. Louis &c. R. Co. v. Johnson, (Tex. Civ. App.) 68 S. W. Rep. 58.....	528
St. Louis &c. R. Co. v. Johnston, 78 Tex. 536.....	880, 953
St. Louis &c. R. Co. v. Kelton, (Tex. Civ. App.) 66 S. W. Rep. 887.....	
.....	921, 1480, 1564, 1630, 2047, 2050
St. Louis &c. Packet Co. v. Keokuk &c. Co., 31 Fed. Rep. 755.....	1136
St. Louis &c. R. Co. v. Kilpatrick, 67 Ark. 47.....	369, 418, 525, 580
St. Louis &c. R. Co. v. Kinman, 9 Kan. App. 633.....	1057
St. Louis &c. R. Co. v. Knight, (Tex. Civ. App.) 49 S. W. Rep. 250.....	1253
St. Louis &c. R. Co. v. Knowles, 6 Kan. App. 790.... (736)	
St. Louis &c. R. Co. v. Law, 68 Ark. 218.....	2223
St. Louis &c. R. Co. v. Leathers, 62 Ark. 235.....	2147
St. Louis &c. R. Co. v. Leigh, 45 Ark. 368.....	554
St. Louis &c. R. Co. v. Lemon, 83 Tex. 143.....	1671
St. Louis &c. R. Co. v. Lewis, 69 Ark. 81.....	576, 580
St. Louis &c. R. Co. v. Linam, 68 Ark. 621.....	908
St. Louis &c. R. Co. v. Ludlum, 63 Kan. 719.... (1254)	
St. Louis &c. R. Co. v. Ludlum, 6 Kan. App. 700.....	1260
St. Louis &c. R. Co. v. McCain, 67 Ark. 377.....	924
St. Louis &c. R. Co. v. McCormick, 71 Tex. 660.... (964)	
St. Louis &c. R. Co. v. McCullough, 18 Tex. Civ. App. 534.....	400, 444, 578, 1127
St. Louis &c. R. Co. v. Mackie, 71 Tex. 491.....	528, 565
St. Louis &c. R. Co. v. Maddy, 57 Ark. 306.....	883
St. Louis &c. R. Co. v. Manly, 58 Ill. 300.... (741)	
St. Louis &c. R. Co. v. Marker, 41 Ark. 542.....	1714
St. Louis &c. R. Co. v. Martin, 61 Ark. 549.....	208, 675, 1112, 2156
St. Louis &c. R. Co. v. May, (Tex. Civ. App.) 44 S. W. Rep. 408.....	831, 865
St. Louis &c. R. Co. v. Miles, 69 Fed. Rep. 530.....	2164
St. Louis &c. R. Co. v. Miles, 79 Fed. Rep. 257.....	2164
St. Louis &c. R. Co. v. Miller, (Tex. Civ. App.) 66 S. W. Rep. 139.....	4, 1262
St. Louis &c. R. Co. v. Mitchell, (Tex. Civ. App.) 60 S. W. Rep. 891.....	788
St. Louis &c. R. Co. v. Montgomery, 39 Ill. 335.... (208)	
St. Louis &c. R. Co. v. Myrtle, 51 Ind. 566.... (553)	
St. Louis &c. R. Co. v. Neal, 66 Ark. 543.....	439, 959
St. Louis &c. R. Co. v. Neeley, 63 Ark. 636.....	2140, 2342



# TABLE OF CASES.

celxxiii

	PAGE
St. Louis &c. R. Co. v. Nelson, 20 Tex. Civ. App. 536.....	375, 387, 1196, 1445
St. Louis &c. R. Co. v. Osborn, 67 Ark. 399.....	583, 592
St. Louis &c. R. Co. v. Paine, 29 Kan. 166.... (767)	
St. Louis &c. R. Co. v. Person, 49 Ark. 182.... (473)	776
St. Louis &c. R. Co. v. Pflugmacher, 9 Ill. App. 300.....	793
St. Louis &c. R. Co. v. Putnam, 1 Tex. Civ. App. 142.....	1612
St. Louis &c. R. Co. v. Rawley, 90 Ill. App. 653.....	739, 1335
St. Louis &c. R. Co. v. Ray, 13 Tex. Civ. App. 628.....	611
St. Louis &c. R. Co. v. Russell, 64 Ark. 236.....	1020, 1028
St. Louis &c. R. Co. v. Rogan, 75 Ill. App. 35.....	917
St. Louis &c. R. Co. v. Ross, 61 Ark. 617.....	2144, 2146
St. Louis &c. R. Co. v. Ricketts, 22 Tex. Civ. App. 515.....	387, 578
St. Louis &c. R. Co. v. Rickman, 65 Ark. 138.....	1737
St. Louis &c. R. Co. v. Ridge, 20 Ind. App. 547.....	2165, 2167
St. Louis &c. R. Co. v. Scott, 68 Ark. 415.....	1029
St. Louis &c. R. Co. v. Shifflet, 94 Tex. 131.....	2153
St. Louis &c. R. Co. v. Shifflet, (Tex. Civ. App.) 56 S. W. Rep. 697.....	722, 1207, 2148, 2151
St. Louis &c. R. Co. v. South, 43 Ill. 176.....	552
St. Louis &c. R. Co. v. Stevens, 3 Kan. App. 176.....	1263
St. Louis &c. R. Co. v. Stewart, 68 Ark. 606.....	800
St. Louis &c. R. Co. v. Stroud, 67 Ark. 112.....	1136
St. Louis &c. R. Co. v. Taylor, 64 Ark. 364.... (766)	2148
St. Louis &c. R. Co. v. Threat, 12 Tex. Civ. App. 375.....	1725
St. Louis &c. R. Co. v. Tribbey, 6 Kan. App. 467.....	263
St. Louis &c. R. Co. v. Triplett, 54 Ark. 289.....	1656
St. Louis &c. R. Co. v. Tuohey, 67 Ark. 209.....	1585, 1746, 1802
St. Louis &c. R. Co. v. Turry, 114 Fed. Rep. 898.....	1611
St. Louis &c. R. Co. v. Valirius, 56 Ind. 511.....	1503
St. Louis &c. R. Co. v. Vaughan, (Tex. Civ. App.) 41 S. W. Rep. 415.....	1093
St. Louis &c. R. Co. v. Vincent, 36 Ark. 451.... (1023)	
St. Louis &c. R. Co. v. Waggoner, 90 Ill. App. 556.....	416, 535
St. Louis &c. R. Co. v. Warren, 65 Ark. 619.....	931, 2146
St. Louis &c. R. Co. v. Washburn, 97 Ill. 253.... (1045)	
St. Louis &c. R. Co. v. Weakly, 50 Ark. 397.....	244
St. Louis &c. R. Co. v. Weaver, 35 Kan. 412.....	1615, 1632
St. Louis &c. R. Co. v. White, (Tex. Civ. App.) 34 S. W. Rep. 1042.....	382
St. Louis &c. R. Co. v. Whittle, 74 Fed. Rep. 296.....	445, 454
St. Louis &c. R. Co. v. Wilkerson, 46 Ark. 513.... (809)	
St. Louis &c. R. Co. v. Williams, (Tex. Civ. App.) 32 S. W. Rep. 225.....	229
St. Louis &c. R. Co. v. Wilson, 70 Ark. 136.....	425, 532
St. Louis &c. R. Co. v. Zachary, (Ind. Terr.) 53 S. W. Rep. 327.....	1024
St. Louis &c. Yards v. Burns, 97 Ill. App. 175.....	1434
St. Luke's Hospital v. Foster, 86 Ill. App. 282.....	873, 2045
St. Paul Trust Co. v. Kittson, 62 Minn. 408.....	60
St. Paul Trust Co. v. Strong, 85 Minn. ....	47
St. Peter v. Denison, 58 N. Y. 416.....	1966, 2069
St. Paul v. Johnson, 69 Minn. 184.....	2097
Saare v. Union R. Co., 20 Mo. App. 211.... (473)	
Sachs v. Sioux City, 109 Iowa, 224.....	2013
Sackewitz v. American &c. Man. Co., 78 Mo. App. 144.....	1100, 1113, 1490, 1684
Sacks v. Schimmel, 3 Pa. Super. Ct. 428.....	1323
Saddler v. Alexander, (Ky.) 56 S. W. Rep. 518.....	2103
Sadorus v. Black, 65 Ill. App. 72.....	2245
Sadowski v. Car Co., 84 Mich. 100.....	1473, 1489, 1490
Saffer v. Westchester Electric R. Co., 22 Misc. 555.....	2325
Safford v. Drew, 3 Duer, 627.....	945
Safford v. Green Island, 74 Hun, 306.....	1885
Sager v. P. I. & P. R. Co., 31 Me. 228.....	248, 271
Saginaw Union St. R. Co. v. Michigan Central R. Co., 91 Mich. 657.....	1063
Saginville v. Pock, (Cal.) 69 Pac. Rep. 98.....	2083
Sahlgaard v. St. Paul &c. R. Co., 48 Minn. 232.....	473
Saiko v. St. Paul City R. Co., 67 Minn. 8.....	497

	PAGE
Sakol v. Rickel, 113 Mich. 476.....	1720
Sale v. Amora, 147 Ind. 324.....	2055
Salem v. Goller, 76 Ind. 291..... (702)	
Salem v. Walker, 16 Ind. App. 687.....	1091, 1877, 1952
Salem v. Webster, 192 Ill. 369.....	901, 1125, 1155, 1206, 1819, 1876, 1934
Salem v. Webster, 95 Ill. App. 120.....	919
Salem-Bedford Stone Co. v. O'Brien, 150 Ind. 656.....	1447
Salem-Bedford Stone Co. v. Hobbs, 144 Md. 146.....	2044
Salida v. McKinna, 16 Colo. 523..... (841)	
Salina v. Kerr, 7 Kan. App. 223.....	1872, 2019, 2051
Salina Mill & Elevated Co. v. Hoyne, 10 Kan. App. 579.....	851, 2126
Salinger v. Simmons, 2 Lansing, 325.....	311
Salisbury v. Washington County, 30 App. Div. 187.....	1911
Salisbury v. Washington County, 22 Misc. 41.....	2013
Salkwell v. Milwarde, 26 Hen. 6, 23..... (1008)	
Sally v. R. Co., 54 S. C. 481..... (992)	
Salter v. Utica & C. R. Co., 59 N. Y. 631..... (686)	790
Salter v. Utica & B. R. R. Co., 75 N. Y. 273.....	746
Salter v. U. & B. R. Co., 86 N. Y. 401.....	939, 947
Salter v. Utica & B. R. R. Co., 86 N. Y. 401.....	939, 947
Salter v. U. & B. R. Co., 88 N. Y. 42.....	773
Salters v. D. & H. C. Co., 3 Hun, 338.....	1140, 1141, 1409
Salt Lake Gas & Electric Light Co., 19 Utah, 493.....	1743
Saltonstall v. Stockton, Taney, (U. S.) 11.....	365
Saltsman v. The N. Y., L. E. & W. R. R. Co., 65 Hun, 448.....	299
Salzer v. Milwaukee, 97 Wis. 471.....	1876, 1887
Sammis v. Chicago & C. R. Co., 97 Ill. App. 28.....	19
Sammon v. N. Y. C. & H. R. R. Co., 62 N. Y. 251.....	1619
Samonset v. Mesnager, 108 Cal. 354.....	117
Sample v. Consolidated L. & C. Co., 50 W. Va. 472.....	1158, 2291
Samuel v. Cheney, 135 Mass. 278.....	2419
Samuels v. McDonald, 3 J. & S. 211.....	99
Samuelson v. Cleveland & C. Min. Co., 49 Mich. 164.....	1333
San Antonio v. Balt, (Tex. Civ. App.) 66 S. W. Rep. 713.....	1836
San Antonio v. Mackey, 14 Tex. Civ. App. 210.....	1964
San Antonio v. Pizzini, (Tex. Civ. App.) 58 S. W. Rep. 635.....	1301
San Antonio v. Porter, 24 Tex. Civ. App. 444.....	861, 1849, 1851
San Antonio v. San Antonio Street R. Co., 15 Tex. Civ. App. 1.....	1812
San Antonio v. Smith, 94 Tex. 266.....	1964
San Antonio v. Smith, (Tex. Civ. App.) 59 S. W. Rep. 1109.....	1302
San Antonio v. White, (Tex. Civ. App.) 57 S. W. Rep. 858.....	2007
San Antonio Edison Co. v. Dixon, 17 Tex. Civ. App. 320.....	1462
San Antonio Gas Co. v. Singleton, (Tex. Civ. App.) 59 S. W. Rep. 920.....	2031
San Antonio Gas & C. Co. v. Speegle, (Tex. Civ. App.) 60 S. W. Rep. 884.....	1065
San Antonio & C. R. Co. v. Adams, (Tex. Civ. App.) 45 S. W. Rep. 844.....	1046
San Antonio & C. R. Co. v. Aycock, (Tex. Civ. App.) 68 S. W. Rep. 1001.....	1019
San Antonio & C. R. Co. v. Barnett, 12 Tex. Civ. App. 321.....	289, 299, 341, 1162, 1223
San Antonio & C. R. Co. v. Beam, (Tex. Civ. App.) 50 S. W. Rep. 411.....	1124
San Antonio & C. R. Co. v. Bell, (Tex. Civ. App.) 32 S. W. Rep. 374.....	819
San Antonio & C. R. Co. v. Belt, 24 Tex. Civ. App. 281..... (841)	
San Antonio & C. R. Co. v. Belt, (Tex. Civ. App.) 59 S. W. Rep. 607..... (767)	
San Antonio & C. R. Co. v. Belt, (Tex. Civ. App.) 46 S. W. Rep. 374.....	21, 820, 1160
San Antonio & C. R. Co. v. Beysland, 12 Tex. Civ. App. 97.....	770
San Antonio & C. R. Co. v. Botte, (Tex. Civ. App.) 57 S. W. Rep. 853.....	290
San Antonio & C. R. Co. v. Bowles, 88 Tex. 634..... (743)	
San Antonio & C. B. Co. v. Brooking, (Tex. Civ. App.) 51 S. W. Rep. 537.....	1434, 1677
San Antonio & C. R. Co. v. Choate, 22 Tex. Civ. App. 618.....	400
San Antonio & C. R. Co. v. Connett, (Tex. Civ. App.) 66 S. W. Rep. 246.....	913
San Antonio & C. R. Co. v. Dixon, 17 Tex. Civ. App. 320.....	2164
San Antonio & C. R. Co. v. Dykes, (Tex. Civ. App.) 45 S. W. Rep. 758.....	466, 488, 493
San Antonio & C. R. Co. v. Gray, 67 S. W. Rep. 763.....	1157
San Antonio & C. R. Co. v. Green, 20 Tex. Civ. App. 5.....	742, 766, 911, 921
San Antonio & C. R. Co. v. Grier, 20 Tex. Civ. App. 138.....	905, 1053

## TABLE OF CASES.

ccclxxv

	PAGE
San Antonio &c. R. Co. v. Hardina, 11 Tex. Civ. App. 497.....	1799
San Antonio &c. R. Co. v. Harding, 11 Tex. Civ. App. 497.....	926
San Antonio &c. R. Co. v. Horken, (Tex. Civ. App.) 45 S. W. Rep. 391.....	2089
San Antonio &c. R. Co. v. Ilse, (Tex. Civ. App.) 59 S. W. Rep. 564.....	927
San Antonio &c. R. Co. v. Keller, 11 Tex. Civ. App. 569.....	837, 1616
San Antonio &c. R. Co. v. Manning, 20 Tex. Civ. App. 504.....	1160
San Antonio &c. R. Co. v. Newman, 17 Tex. Civ. App. 606.....	266
San Antonio &c. R. Co. v. Lindsay, (Tex. Civ. App.) 65 S. W. Rep. 668. 1469,	1687
San Antonio &c. R. Co. v. Long, 19 Tex. Civ. App. 649.....	885
San Antonio &c. R. Co. v. Lynch, (Tex. Civ. App.) 40 S. W. Rep. 631.....	382, 1124, 1135, 1144, 1196
San Antonio &c. R. Co. v. Lynch, (Tex. Civ. App.) 55 S. W. Rep. 517.....	404, 413, 565, 1093, 1117
San Antonio &c. R. Co. v. Stollers, (Tex. Civ. App.) 49 S. W. Rep. 679.. (736)	1602
San Antonio &c. R. Co. v. Raylor, (Tex. Civ. App.) 35 S. W. Rep. 855.....	1038, 1049
San Antonio &c. R. Co. v. Robinson, 17 Tex. Civ. App. 400.....	841, 2135
San Antonio &c. R. Co. v. Skidmore, (Tex. Civ. App.) 65 S. W. Rep. 215. 841,	(736)
San Antonio &c. R. Co. v. Stollers, (Tex. Civ. App.) 49 S. W. Rep. 679....	739, 819
San Antonio &c. R. Co. v. Stone, (Tex. Civ. App.) 60 S. W. Rep. 461.....	890
San Antonio &c. R. Co. v. Taylor, (Tex. Civ. App.) 35 S. W. Rep. 855.....	1513
San Antonio &c. R. Co. v. Thompson, (Tex. Civ. App.) 66 S. W. Rep. 792.. 350,	824
San Antonio &c. R. Co. v. Wallace, 76 Tex. 636.....	1731
San Antonio &c. R. Co. v. Waller, (Tex. Civ. App.) 65 S. W. Rep. 210.....	875, 935, 1598, 1690
San Antonio &c. R. Co. v. Weigers, 22 Tex. Civ. App. 344.....	850, 2050
San Antonio &c. R. Co. v. White, 94 Tex. 468.....	885
San Antonio &c. R. Co. v. Williams, (Tex. Civ. App.) 52 S. W. Rep. 89.....	1589
San Antonio &c. R. Co. v. Williams, (Tex. Civ. App.) 57 S. W. Rep. 883.....	277
San Antonio &c. R. Co. v. Wright, 20 Tex. Civ. App. 136.... (290)	
San Antonio &c. R. Co. v. Yeager, (Tex. Civ. App.) 43 S. W. Rep. 25.....	1055
San Antonio &c. Street R. Co. v. Wray, (Tex. Civ. App.) 37 S. W. Rep. 641	
San Antonio Street R. Co. v. Renken, 15 Tex. Civ. App. 229.....	926, 953, 1135, 2272, 2277, 2279
San Antonio Waterworks Co. v. White, (Tex. Civ. App.) 44 S. W. Rep. 181..	712
	891, 941
Sanborn v. A. T. &c. R. Co., 35 Kan. 292.....	1503, 1698
Sanborn v. Madera &c. Co., 70 Cal. 261.....	1567
Sandberg v. St. Paul &c. R. Co., 80 Minn. 442.... (755)	
Sandberg v. Victor Gold &c. Co., 18 Utah, 66.....	2182
Sanden v. Bannon, 85 Ill. App. 17.....	1415
Sanders v. Boston, 167 Mass. 595.....	2013
Sanders v. Chicago &c. R. Co., 10 Okl. 325.....	502
Sanders v. Etiwan Phosphate Co., 19 S. C. 510.....	1460
Sanders v. Illinois C. R. Co., 90 Ill. App. 582.....	419
Sanders v. McGhee, 114 Ala. 373.....	1727
Sanders v. O'Callaghan, 111 Iowa, 574.....	863, 975, 987
Sanders v. Smith, 5 Misc. 1.....	1327
Sanders v. Southern R. Co., 107 Ga. 132.....	491
Sanders v. Southern Electric R. Co., 147 Mo. 411.....	2279
Sanders v. Stuart, 17 Eng. Rep. Moak's Notes, 286.....	2448
Sanderson v. Caldwell, 2 Aiken, 195.....	2207
Sanderson v. Holland, 39 Mo. App. 233.....	2191
Sanderson v. Lamberson, 6 Binn. 129.... (358)	
Sanderson v. Missouri P. R. Co., 64 Mo. App. 655.....	486
Sanderson v. Panther Lumber Co., 50 W. Va. 42.....	1541, 1666
Sanderson v. Scranton, 105 Pa. St. 472.....	629
Sandersville v. Hurst, 111 Ga. 453.....	1831
Sandford v. Eighth Ave. R. Co., 23 N. Y. 343.....	518, 583
Sandford v. Railroad Co., 136 Pa. St. 84.....	511
Sandham v. R. Co., 38 Iowa, 88.....	1624
Sandmann v. Baylies, 21 Misc. 523.....	1878, 2255
Sandowski v. Michigan Car Co., 84 Mich. 100.....	1629
Sands v. Edgar, 59 N. Y. 28.....	1334

	PAGE
Sands v. Lilienthal, 46 N. Y. 541.... (824)	
Sands v. Southern R. Co., (Tenn.) 64 S. W. Rep. 478.....	382
Sandusky v. Central City (Ky) 58 S. W. Rep. 516.....	1814
Sandy River &c. Coal Co. v. Caudill, (Ky.) 60 S. W. Rep. 180.....	659
Saner v. Lake Shore &c. R. Co., 108 Mich. 31.....	1712
Sanford v. American District Telegraph Co., 6 Misc. 534.....	2424
Sanford v. Calamssa &c. R. Co., 2 Phila. (Penn.) 107.... (366)	
Sanford v. Pawtucket Street R. Co., 19 R. I. 537.....	653
Sanford v. Standard Oil Co., 118 N. Y. 571.....	1757
Sann v. H. W. Johns Man. Co., 16 App. Div. 252.....	1397
Sanner v. Atchison &c. R. Co., 17 Tex. Civ. App. 337..... 1524, 1630, 1656	
Sansol v. Compagnie Generale Transatlantique, 101 Fed. Rep. 390.....	1464, 1625
Sansom v. Southern R. Co., 111 Fed. Rep. 887.....	489
Sappington v. Chicago &c. R. Co., (Mo. App.) 69 S. W. Rep. 32.....	1033, 1057
Sappington v. Missouri &c. R. Co., 14 Mo. App. 86.....	1258
Sarber v. Chicago &c. R. Co., 104 Iowa, 59.....	1056
Sarch v. Blackburn, 4 Car. & P. 296.... (986)	
Sarenberger v. Houghton, 40 Vt. 150.....	1002
Sarno v. Atlantic Stevedoring Co., 66 App. Div. 611.....	1628
Satterly v. Hallock, 5 Hun, 178.....	695
Sattler v. Hallock, 160 N. Y. 291.....	99
Sauer v. New York, 60 N. Y. Supp. 648.....	1963
Sauerborn v. Hudson R. Co., 69 Hun, 429.....	727
Sauerborn v. N. Y. C. & H. R. R. Co., 69 Hun, 429.....	782
Sauers v. Union T., 193 Pa. St. 602.....	2326
Saulisbury v. Herchenroder, 106 Mass. 458.....	2379
Sauls v. Alderman &c. Co., 55 S. C. 395.... (1013)	
Saulsbury v. Hirschenrader, 106 Mass. 458.... (1172)	
Saulsbury v. Ithaca, 94 N. Y. 27.....	1811, 1858
Saumby v. Rochester, 72 Hun, 489.....	1880
Saunders v. Boston, . . 167 Mass. 595.....	1092
Saunders v. City &c. R. Co., 99 Tenn. 130.....	1160, 2299, 2308, 2319
Saunders v. Eastern &c. Brick Co., 63 N. J. L. 554.....	1456, 1756
Saunders v. Fort Madison, 111 Iowa, 102.....	1987
Saunders v. Hartsook, 85 Ill. App. 55.... (103).....	106, 115
Saunders v. Southern R. Co., 13 Utah, 275.....	288, 405
Sauter v. N. Y. C. R. R. Co., 66 N. Y. 50.....	461, 893, 897
Savage v. Bauland Co., 42 App. Div. 285.....	1072
Savage v. Gerstner, 36 App. Div. 220.....	2343, 2350
Savage v. Nassau &c. R. Co., 42 App. Div. 241.....	1606, 1715, 1717
Savage v. Third Ave. R. Co., 25 Misc. 426.....	1227
Savanson v. Keokuk &c. R. Co., (Iowa) 89 N. W. Rep. 1088.....	1146
Savannah v. Charney, 101 Ga. 420.....	2044
Savannah v. Cullens, 38 Ga. 334.....	1977
Savannah v. Trusty, 98 Ill. App. 277.....	1870, 1875, 1876
Savannah &c. R. Co. v. Austin, 101 Ga. 629.....	340
Savannah &c. R. Co. v. Bonaud, 58 Ga. 180.....	575
Savannah &c. R. Co. v. Booth, 98 Ga. 20.....	2165
Savannah &c. R. Co. v. Chaney, 101 Ga. 420.....	2149
Savannah &c. R. Co. v. Collins, 77 Ga. 376.....	619
Savannah &c. R. Co. v. Commercial Guano Co., 103 Ga. 590.....	274, 356
Savannah &c. R. Co. v. Evans, 115 Ga. 315.....	682
Savannah &c. R. Co. v. Flaherty, 110 Ga. 335.....	426
Savannah &c. R. Co. v. Folks, 66 Ga. 527.....	1730
Savannah &c. R. Co. v. Harris, 26 Fla. 148.....	353
Savannah &c. R. Co. v. Giegner, 21 Fla. 669.... (1013)	
Savannah &c. R. Co. v. Godkin, 104 Ga. 655.... (418)	
Savannah &c. R. Co. v. Gray, 77 Ga. 282.....	1016
Savannah &c. R. Co. v. Jarvis, 95 Ala. 149.....	1022
Savannah &c. R. Co. v. Morton, 71 Ga. 24.... (11)	
Savannah &c. R. Co. v. Quo, 103 Ga. 125.....	526
Savannah &c. R. Co. v. Shearer, 58 Ala. 672.... (657)	
Savannah &c. R. Co. v. Stewart, 71 Ga. 427.....	2145

## TABLE OF CASES.

ccLxxvii

	PAGE
Savannah &c. R. Co. v. Tiedeman, 39 Fla. 196.....	1112
Savannah &c. R. Co. v. Waller, 97 Ga. 164.....	2162
Savannah &c. R. Co. v. Watts, 82 Ga. 229.....	491
Savannah &c. R. Co. v. Wideman, 99 Ga. 245.... (1027)	
Savannah &c. R. Co. v. Wilcox, 48 Ga. 432.....	234
Savero-Cella v. Brooklyn Union El. R. Co., 55 App. Div. 98.....	2136
Savings Bank v. Nat. Bank, 98 Tenn. 337.....	12
Savings Bank v. R. Co., 20 Kan. 519.... (1082)	
Savings Bank v. Ward, 100 U. S. 195.... (82)	
Sawyer v. Arnold Shoe Co., 90 Me. 369.....	1216, 1418, 1796
Sawyer v. King, 21 App. Div. 624.....	1089
Sawyer v. Perry, 88 Me. 42.....	951
Sawyer v. Rumbord Falls Paper Co., 90 Me. 354.....	928, 1447, 1735
Sawyer v. Sauer, 10 Kan. 466, 519.....	659, 871
Sawyer v. Vermont &c. R. Co., 105 Mass. 196.... (1043)	
Saxe v. Burlington, 70 Vt. 449.....	2007
Saxton v. Bacon, 31 Vt. 540.....	1005
Saxton v. Northwestern Exch. Co., 81 Minn. 314.....	1495, 1598
Sayer v. King, 21 App. Div. 624.....	680
Sayles v. Fitzgerald, 72 Conn. 391.....	2193
Sayre v. New York, 123 N. Y. 291.....	2222
Sayward v. Carlson, 1 Wash. St. 29.....	1405, 1662
Scaffer v. Baker Transp. Co., 29 App. Div. 459.....	2358
Scaggs v. The President, Managers and Company of the Delaware & Hudson Canal Company, 74 Hun, 198.....	803
Scamion v. Chicago, 25 Ill. 424.... (652)	
Scammon v. Wells, Fargo &c. Co., 84 Cal. 311.....	234
Scandell v. Columbia Construction Co., 50 App. Div. 512.....	1214, 1487
Scanlan v. Kahn, 40 App. Div. 62.....	1447
Scanlan v. Tenney, 72 Fed. Rep. 225.....	445
Scanlon v. Railroad Co., 147 Mass. 484.....	1692
Scanlon v. Wedger, 156 Mass. 462.....	1292
Scannell v. Boston &c. R. Co., 176 Mass. 170.....	2298
Searborough v. Watkins, 9 B. Mon. (Ky.) 540.... (51)	
Scarff v. Metcalf, 107 N. Y. 211.....	204, 1625, 1770
Schade v. Gehner, 133 Mo. 252.....	1372
Schaefer v. Fond du Lac, 99 Wis. 333.....	2014, 2340
Schaefer v. Fond du Lac, 104 Wis. 39.....	1369
Schaefer v. Central Crosstown R. Co., 30 Misc. 114.....	460
Schaefer v. North Chicago Street R. Co., 82 Ill. App. 473.....	584, 659
Schaefer v. Union R. Co., 29 App. Div. 261.....	513
Schaefer v. Chicago &c. R. Co., 62 Iowa, 624.....	753, 793
Schafer v. New York, 154 N. Y. 466.....	1119, 1826
Schafer v. New York, 12 App. Div. 384.....	1927, 1953
Schafer v. St. Louis &c. R. Co., 65 Mo. App. 201.....	1054
Schaffer v. Baker Transfer Co., 29 App. Div. 459.....	718, 877, 933
Schaidler v. Chicago &c. R. Co., 102 Wis. 564.....	737
Schalk v. Kingsley, 42 N. J. Law, 32.....	2181
Schall v. Cole, 107 Pa. St. 1.....	689
Schall v. Heck, 8 Oh. C. D. 596.....	1684
Schaller v. Chicago &c. R. Co., 97 Wis. 31.....	291, 1004
Schalscha v. Third Ave. R. Co., 19 Misc. 141.....	470, 827, 890
Schapman v. Boston &c. R. Co., 9 Cush. 24.... (342)	
Schaub v. Hannibal &c. R. Co., 106 Mo. 74.....	1727
Schauf v. Paducah, (Ky.) 50 S. W. Rep. 42.....	2137
Schaum v. Equitable Gas Light Co., 15 App. Div. 74.....	2066
Schausten v. Toledo Consol. Street R. Co., 18 Oh. C. C. 691.....	658, 2317
Scheel v. Detroit, (Mich.) 89 N. W. Rep. 554.....	1872
Scheffer v. Corson, 5 S. D. 233.....	155
Scheffer v. R. Co., 105 U. S. 249.....	896
Schell v. Stein, 76 Penn. St. 398.... (83)	
Schenkel v. Pittsburg &c. T. Co., Pa. St. 182.... (855)	
Schermerhorn v. Gas Co., 5 Daly, 144.....	1384

	PAGE
Schermerhorn v. New York &c. R. Co., 3d App. Div. 17	729
Scherrer v. Baltzer, 84 Ill. App. 126	937
Schertz v. Indianapolis &c. R. Co., 107 Ill. 577.... (1029)	
Scheu v. Erie R. Co., 10 Hun, 498	312
Schick v. Fleischeauer, 26 App. Div. 210	1325
Schiefelbein v. Badger Paper Co., 101 Wis. 402	1754
Schieffelin v. Harvey, 6 Johns. 170	234
Schiffler v. Chicago &c. R. Co., 96 Wis. 141	489, 568
Schild v. C. P. N. & E. R. Co., 133 N. Y. 446	817
Schilling v. Metropolitan Street R. Co., 47 App. Div. 500	2330
Schilling v. Winona &c. R. Co., 66 Minn. 252.... (442)	403
Schilling v. Verona, 96 Wis. 456	1833
Schiltz Brew. Co. v. Blacklay, 10 Oh. C. D. 17	1705
Schimpf v. Sliter, 64 Hun, 463	686, 827, 2346, 2347
Schip v. Babst Brew. Co., 64 Minn. 22	650
Schively v. Jenkintown, 180 Pa. St. 196	1875
Schlereth v. Mo. Pac. R. Co., 115 Mo. 87	1614
Schlessinger v. West Shore R. Co., 88 Ill. App. 273	316
Schley v. Lyon, 6 Ga. 535.... (828)	
Schlichting v. Wintgen, 25 Hun, 626.... (956)	
Schlit v. Nassau Electric R. Co., 44 App. Div. 542	2329
Schlotzhauer v. Missouri &c. R. Co., 89 Mo. App. 65	1038
Schmalzried v. White, 97 Tenn. 36	1329, 1364
Schmeer v. Gas Light Co., 147 N. Y. 529	678, 1380, 1382
Schmid v. Humphreys, 48 Iowa, 652	2377
Schmidt v. Adams, 18 Mo. App. 432	13
Schmidt v. Bauer, 80 Cal. 565	2114
Schmidt v. Blood, 9 Wend. 268	109, 310
Schmidt v. Brouse, 89 Mo. App. 218	2083
Schmidt v. C. & C. R. Co., 83 Ill. 405.... (659)	
Schmidt v. Coney Island &c. R. Co., 26 App. Div. 391	392, 1141
Schmidt v. Cook, 1 Misc. 227	2110
Schmidt v. Gillen, 41 App. Div. 302	1408, 1622, 1737
Schmidt v. Kansas R. Co., 90 Mo. 284	2110
Schmidt v. Menasha Woodenware Co., 99 Wis. 300	1374
Schmidt v. Parker, 1 N. Y. L. Reg. 16	2047
Schmidt v. R. Co., 23 Wis. 186.... (1040)	
Schmidt v. Railway Co., 132 N. Y. 566	2229
Schmidt v. Steinway & H. R. Co., 132 N. Y. 566	2334
Schmidt v. Chicago &c. R. Co., 99 Iowa, 425.... (1091)	
Schmitt v. Missouri P. R. Co., 160 Mo. 43	2149
Schmitz v. St. Louis &c. R. Co., 46 Mo. App. 380	860, 870, 880
Schneekloth v. Chicago &c. R. Co., 108 Mich. 1	1013, 1054
Schneidan v. New Orleans &c. R. Co., 48 La. Ann. 866	2296
Schneider v. Chicago &c. R. Co., 99 Wis. 378.... (761)	779
Schneider v. Detroit, 72 Mich. 240	1832
Schneider v. Evans, 25 Wis. 241.... (351)	
Schneider v. Lebanon Dairy &c. Co., 73 Ill. App. 612	190
Schneider v. Market Street R. Co., 134 Cal. 482	1094, 2274, 2320, 2325
Schneider v. Missouri &c. R. Co., 75 Mo. 295	2049
Schneider v. New Orleans &c. R. Co., 54 Fed. R. 466	541
Schneider v. Northern P. R. Co., 81 Minn. 383.... (804)	
Schneider v. Second Ave. R. Co., and the Houston &c. R. Co., 133 N. Y. 583	406 543, 686, 1213
Schneider Brew. Co. v. American Ice Mach. Co., 77 Fed. Rep. 138.... (1199)	
Schnurr v. Huntington County, 22 Ind. App. 188	84, 648, 1980, 1983
Schoen v. Houghton, 50 Cal. 528.... (182)	
Schoenblum v. New York, 58 App. Div. 285	2354
Schoener v. Metropolitan Street R. Co., 76 N. Y. Supp. 157	2281, 2318
Schoenfeld v. Mill City R. Co., 74 Wis. 433	2129
Schoenholtz v. Third Ave. R. Co., 16 Misc. 7	2277
Schoenwald v. Metropolitan Savings Bank, 57 N. Y. 418	157, 160, 163
Schoepper v. Hancock Chemical Co., 113 Mich. 582	2068

## TABLE OF CASES.

celxxix

	PAGE
Schofield v. Chicago &c. R. Co., 114 U. S. 615.....	753
Schofield v. Chicago &c. R. Co., 2 McCrary, 268.... (752)	
Schofield v. Wood, 170 Mass. 415.....	2127
Scholler v. Chicago &c. R. Co., 97 Wis. 31.....	258
School District v. Boston &c. R. Co., 102 Mass. 552.....	247
School District v. Burress, (Neb.) 89 N. W. Rep. 609.....	829
School Dist. v. Stoner, 16 Montg. Co. L. Rep. 107.....	87
Schoonover v. Holden, (Iowa) 87 N. W. Rep. 737.....	2196
Schopman v. Railroad Corp. 9 Cush. 24.....	1474
Schott v. Onondaga S. Bk., 49 App. Div. 503.....	1622
Schovely v. Jenkintown, 180 Pa. St. 196.....	1862
Schrank v. Rochester Railway Company, 83 Hun, 290.....	2242
Schreiber v. United Tel. Co., 153 Ind. 609.....	2048
Schreiner v. New York &c. R. Co., 12 App. Div. 551.....	501
Schrier v. Milwaukee &c. R. Co., 65 Wis. 457.....	926
Schroeck v. Reiss, 46 App. Div. 502.....	1332
Schroeder v. Baraboo, 93 Wis. 95.....	1905
Schroeder v. C. R. I &c. R. Co., 47 Iowa, 375.....	2032, 2036
Schroeder v. Hudson R. Co., 5 Duer 55.... (338)	
Schroeder v. Seitz, 68 Mo. App. 233.....	192
Schroeppe v. Shaw, 3 N. Y. 448.... (177)	
Schron v. Staten Island Electric R. Co., 16 App. Div. 111.....	728, 2302, 2324
Schubert v. Cowles, 31 App. Div. 418.....	1878, 2243
Schubert v. J. R. Clarke Co., (Minn.) 45 A. L. J. 497.....	1380
Schueps v. Sturm, 25 Misc. 168.... (99)	
Schug v. Chicago &c. R. Co., 102 Wis. 515.... (785)	
Schuler v. Hudson R. Co., 38 Barb. 553.... (1)	1399
Schuler v. Third Ave. Co., 1 Misc. 351.....	1177
Schulman v. Houston &c. R. Co., 15 Misc. 30.....	2286
Schultz v. Bear Creek Refining Co., 180 Pa. St. 272.....	1419
Schultz v. Bower, 64 Minn. 123.....	2100
Schultz v. Chicago &c. R. Co., 44 Wis. 638.....	690
Schultz v. Fairbault &c. Electric Co., 82 Minn. 100.....	910
Schultz v. Griffith, 103 Iowa, 150.....	986, 987
Schultz v. N. Y. C. & H. R. R. Co., 69 Hun, 515.....	804
Schultz v. Pulver, 11 Wend. 362.... (91)	
Schultz v. R. Co., 48 Wis. 375.....	1470
Schultz v. Railroad Co., 67 Wis. 616.....	1663
Schultz v. Rohe, 149 N. Y. 132.....	1483, 1571
Schultz v. Third Ave. R. Co., 89 N. Y. 242.....	520, 1197, 2041
Schultz v. Thompson Lumber Co., 91 Wis. 626.....	1722
Schum v. Pennsylvania R. Co., 107 Pa. St. 8.... (762)	
Schumacher v. New York, 166 N. Y. 103.....	2002
Schumacher v. New York, 40 App. Div. 320.....	1965
Schumacher v. Trent, 18 Tex. Civ. App. 17.... (43)	
Schus v. Powers-Simpson Co., (Minn.) 89 N. W. Rep. 68.....	1596, 1798
Schussler v. Hannepin County, 67 Minn. 412.....	2006
Schutte v. Stillwater, 80 Minn. 287.....	1965
Schwalbach v. Skinkle &c. Co., 97 Fed. Rep. 483.....	1357, 1365
Schwander v. Birge, 33 Hun, 186.....	1458
Schwarting v. Van Wie &c. Grocery Co., 69 App. Div. 282.....	10
Schwartz v. A. & P. Tel. Co., 18 Hun, 157.....	2390, 2396, 2398, 2408, 2413
Schwartz v. Adsit, 91 Ill. App. 576.....	2078
Schwartz v. Apple, 21 Misc. 513.....	1329
Schwartz v. Shull, 45 W. Va. 405.....	670, 678, 1404, 1747
Schwartz v. United Traction Co., 30 Pittsb. Leg. L. (N. S.) (Pa.) 153.....	2305
Schwarzchild v. National Steamship Co., 74 Fed. Rep. 257.....	216, 256
Schwarzchild &c. Co. v. Savannah &c. R. Co., 76 Mo. App. 623.....	318
Schwarzwaelder v. Detroit, 77 Fed. Rep. 886.....	1983
Schweinfurth v. Cleveland &c. R. Co., 60 Oh. St. 215.....	667, 671
Schweinfurth v. Dover, 91 Ill. App. 319.....	2356
Schweitzer v. Louisville &c. Light Co., (Ky.) 52 S. W. Rep. 830.... (1062)	
Schwenforth v. Cleveland &c. R. Co., 60 Oh. St. 215.... (1094)	

	PAGE
Schwerin v. McKie, 51 Hun, 180.....	109, 152
Schwinger v. Raymond, 83 N. Y. 193.... (1080)	
Schwingschlegl v. Munroe, 113 Mich. 683.....	894
Sciolina v. Erie Preserving Co., 7 App. Div. 417.....	1627
Sciortino v. Crescent City R. Co., 49 La. Ann. 7.....	2296
Sciota v. Norton, 63 Ill. App. 530.....	1862
Sciurba v. Metropolitan Street R. Co., 73 App. Div. 170.....	947, 2306
Scotfield v. Pennsylvania R. Co., 112 Fed. 855.....	573
Scott v. Allegheny Valley R. Co., 172 Pa. St. 646.....	306
Scott v. Bank &c. 72 Pa. St. 471.....	108
Scott v. Bank of Cherry Valley, 12 Penn. 471.....	127
Scott v. Bergen County Traction Co., 63 N. J. L. 407.....	510, 1102
Scott v. C. P. &c. R. Co., 53 Hun, 414.....	22, 524
Scott v. Chesapeake R. Co., 43 W. Va. 484.....	907
Scott v. Cleveland &c. R. Co., 144 Ind. 125.....	563
Scott v. DePeyster, 1 Edw. Ch. 513.... (68)	70
Scott v. Donald, 165 U. S. 58.....	2224
Scott v. Fishblate, 117 N. C. 265.....	87
Scott v. Lillienthal, 9 Bos. (N. Y.) 225.... (1222)	
Scott v. National Bank &c., 72 Pa. St. 471.....	74
Scott v. New Orleans, 75 Fed. Rep. 373.....	1239
Scott v. New York, 27 App. Div. 240.....	2007
Scott v. Penn. &c. R. Co., 130 N. Y. 679.....	763
Scott v. Provo City, 14 Utah, 31.....	1819
Scott v. St. Louis &c. R. Co., 112 Iowa, 54.....	12, 776, 1158, 2139
Scott v. Scott, 2 App. Div. 240.....	187
Scott v. Scranton, 5 Lack. L. News, 73.....	1886
Scott v. Shepard, 2 W. Bl. 892.....	1291
Scott v. Simons, 54 N. H. 426.....	1328
Scott v. Springfield, 81 Mo. App. 312.....	651
Scott v. Sweeney, 34 Hun, 292.....	1668
Scott v. Texas &c. R. Co., (Tex.) 57 S. W. Rep. 801.....	1091
Scott v. U. S., 18 Court of Claims, 1.....	88
Scott v. Wilmington R. Co., 96 N. C. 428.... (755)	
Scotti v. Behsmann, 81 Hun, 604.....	2228, 2230, 2255
Scovill v. Griffith, 12 N. Y. 509.....	211
Scoville v. Hannibal &c. R. Co., 81 Mo. 434.....	2148, 2157
Scranton v. Baxter, 4 Sandf. (N. Y.) 5.....	117
Scrope v. Trustees, 111 Iowa, 113.....	2083
Scudder v. Ames, 142 Mo. 187.....	51
Scullane v. Kellogg, 169 Mass. 544.....	860
Scully v. New York, Lake Erie & Western Railroad Co., 80 Hun, 197....	498, 1205
Scurry v. Seattle, 8 Wash. 278.....	2010
Seaboard Man. Co. v. Woodson, 98 Ala. 378.... (850)	
Seaboard &c. R. Co. v. Cauthen, (Ga.) 41 S. E. Rep. 653.....	223
Seaboard &c. R. Co. v. Joyner, 92 Va. 354.....	2142, 2144
Seal v. Farmers & Merchants' Ins. Co., 59 Neb. 253.....	1312
Seals v. Edmondson, 71 Ala. 509.....	1136
Seaman v. Koehler, 122 N. Y. 646.....	1109, 1110, 1758
Seaman v. Marshall, 116 Mich. 327.....	1905
Seamans v. Delaware &c. R. Co., 174 Pa. St. 421.... (756)	
Seamen v. Litts, 21 R. I. 236.....	1217
Seamons v. Fitts, 20 R. I. 443.....	1939, 1941, 2022
Seare v. Prentice, 8 East, 353.....	2189
Searight v. Austin, (Tex. Civ. App.) 42 S. W. Rep. 857.....	955
Searing v. Saratoga Springs, 39 Hun, 307.....	1908
Searle v. Parke, 68 N. H. 311.....	668
Searle v. Laverick, L. R. 9 Q. B. 122.....	1376
Searles v. Kannawha &c. R. Co., 32 W. Va. 370.....	886
Searles v. Manhattan R. Co., 101 N. Y. 661.....	1115, 1250, 1273
Searles v. Milwaukee &c. R. Co., 35 Iowa, 490.....	1013, 1015, 1017, 1022, 1024
Searls v. Manhattan R. Co., 49 Supr. Ct. 425.....	1142
Sears v. Denins, 105 Mass. 310.... (688)	
Sears v. Eastern R. R. Co., 14 Allen, 433.....	575



## TABLE OF CASES.

celxxxi

	PAGE
Sears v. Merrick, 175 Mass. 25.....	2116
Sears v. Windgate, 3 Allen, 103.... (1082)	
Seasongood v. Tennessee &c. T. Co., (Ky.) 54 S. W. Rep. 193.... (346).....	207
Seaver v. Boston & Maine R. Co., 14 Gray, 466.... (375)	
Seaver v. Union, 113 Wis. 322.....	2349
Seavey v. Dennett, 69 N. H. 479.....	861
Seavey Co. v. Union Transit Co., 106 Wis. 394.....	302
Seawell v. Raleigh &c. R. Co., 106 N. Car. 272.... (1027)	
Sebeck v. Plattdeutsche Volkfestverein, 64 N. J. L. 624.....	652, 2129
Sebree Deposit Bank v. Clark, (Ky.) 48 S. W. Rep. 1089.....	191
Second National Bank v. Burt, 93 N. Y. 233.....	69
Second National Bank v. Weston, 161 N. Y. 520.... (187)	
Secor v. Toledo &c. R. Co., 10 Fed. Rep. 15.... (472).....	493
Secord v. Chicago &c. R. Co., 107 Mich. 540.....	1546
Secord v. St. Paul &c. R. Co., 18 Fed. Rep. 221.....	606, 607
Security National Bank v. National Bank, 67 N. Y. 458.... (1180)	
Security &c. R. Co. v. West Chicago Street R. Co., 91 Ill. App. 332.....	950
Seefeld v. Chicago &c. R. Co., Wis. 216.... (752)	
Seegar v. Ashland, 101 Wis. 515.....	2016
Seeley v. New Amsterdam, 54 App. Div. 9.....	1990
Seeley v. N. Y. C. & H. R. R. Co., 102 N. Y. 719.....	1274
Seeley v. New York &c. R. Co., 8 App. Div. 402.....	751, 923
Seeley v. Citizens' Traction Co., 179 Pa. St. 334.....	2207
Seeley v. Peters, 5 Gilm. 130.... (1008)	1000
Seelig v. Metropolitan Street R. Co., 18 Misc. 383.... (580).....	392
Seffell v. W. U. T. Co., (Tex. Civ. App.) 57 S. W. Rep. 857.....	2396
Seger v. Town of B., 22 Conn. 290.... (854)	
Seibel v. Lebanon &c. Co., 197 Pa. St. 106.....	1313
Seibel v. Siemon, 72 Mo. 526.... (903)	
Seiber v. Amunson, 7 Wis. 679.....	2366
Seidlinger v. B. C. R. Co., 28 Hun. 503.....	535
Seifert v. Brooklyn, 101 N. Y. 136.....	1902, 1903, 1965
Seifter v. Brooklyn Heights R. Co., 55 App. Div. 10.....	2306
Seigel v. Eisen, 41 Cal. 109.... (541)	
Seigman v. Keeler, 4 Misc. (N. Y.) 528.....	149
Seimers v. Eisen, 54 Cal. 418.....	1168
Seiter v. Mowe, 81 Ill. App. 346.....	92
Seither v. Philadelphia Traction Co., 125 Penn. St. 397.....	2207
Seitner v. Ransom, 82 Minn. 404.....	85
Seitz v. Dry Dock &c. R. Co., (N. Y. C. P.) 32 N. Y. St. R. 56.... (836)	
Sejalon v. Woolverton, 31 Misc. 752.....	1092
Selby v. Detroit R. Co. 122 Mich. 311.....	473
Selby v. Wilmington &c. R. Co., 113 N. C. 588.....	252
Selden v. Canal Co., 24 Barb. 363.....	2073
Selden v. Myers, 20 How. (U. S.) 506.....	629
Seldomridge v. Chesapeake &c. R. Co., 46 W. Va. 569.....	1553, 1713
Seldon v. St. Johns, 114 Mich. 698.....	2019
Seletsky v. Third Ave. R. Co., 69 App. Div. 27.....	2274
Sell v. Lumber Co., 70 Mich. 479.....	1626
Selleck v. Janesville, 100 Wis. 157.... (898)	
Selleck v. Janesville, 104 Wis. 570.....	1239
Selleck v. Langdon, 55 Hun. 19.....	1537
Selleck v. Tallman, 93 Wis. 246.....	2262
Seller v. Pacific &c. R. Co., 1 Ore. 409.....	252
Sellers v. Dempsey, 26 App. Div. 22.....	1072, 2119
Sellick v. Langdon, 13 N. Y. Supp. 855.....	1487
Selma R. Co. v. Lacy, 43 Ga. 461.....	962
Selma R. & D. R. Co. v. Lacey, 49 Ga. 106.... (961)	
Selma &c. R. Co. v. Owen, (Ala.) 31 South. Rep. 598.....	393, 1168
Belover v. Sheardown, 73 Minn. 393.....	85
Sels v. Greene, 81 Fed. Rep. 555.....	1980, 2097
Seltzer v. Saxton, 71 Ill. App. 229.....	1240, 1289, 2108
Semel v. N. Y. &c. R. Co., 9 Daly, 321.....	796
Semple's Estate, 189 Pa. St. 385.....	61

	PAGE
Semuelson v. Cleveland Iron Co., 49 Mich. 164.....	2128
Sendzikowski v. McCormick Harvesting Co., 58 Ill. App. 418.....	1572
Senior v. Anderson, 115 Cal. 496.....	2028
Senn v. Southern R. Co., 135 Mo. 512.....	2291
Serafina v. Galveston & C. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 142.....	865, 895
Serry v. Knepper, 101 Iowa, 372.....	102
Service v. Shoneman, 196 Pa. St. 63.....	1419, 1421
Serwe v. No. P. R. Co., 48 Minn. 78.....	893, 1054
Sesselman v. Metropolitan Street R. Co., 65 App. Div. 484.....	2306
Sessions v. N. Y., L. E. & W. R. Co., 78 Hun, 541.....	598
Settoon v. Texas & C. R. Co., 48 La. Ann. 807.....	2156
Seventeenth Ward Bank v. Webster, 67 App. Div. 228.....	1368
Severin v. Eddy, 52 Ill. 189.....	2233
Severy v. Chicago & C. R. Co., 6 Okla. 153.... (791)	
Severy v. Nickerson, 120 Mass. 306.....	1400, 2106
Sewall v. Allen, 6 Wend. 349.... (271)	
Seward v. Draper, 112 Ga. 673.....	2111
Seward v. Wales, 167 N. Y. 538.....	81
Seward v. Wilmington, 2 Marv. (Del.) 189.....	1828, 1863, 1869, 1875, 2260
Sewell v. Butler, 16 App. Div. 77.....	2034
Sewell v. Cohoes, 75 N. Y. 45.....	1820, 1830, 1925
Sewell v. New York & C. R. Co., 171 Mass. 302.....	721, 770, 816
Sewell v. Syracuse, 75 N. Y. 45.....	1138
Sewell v. Webster, 59 New Utah, 586.....	2377
Sexton v. Metropolitan Street R. Co., 40 App. Div. 26.....	470, 478
Sexton v. Zett, 44 N. Y. 430.....	2227, 2233, 2249
Seybel v. National Currency Bank, 54 N. Y. 288.....	183
Seybold v. Terra Haute & C. R. Co., 18 Ind. App. 367.....	818, 1949
Seybolt v. N. Y., L. E. & W. R. Co., 95 N. Y. 562....	261, 373, 1096, 1100, 1949
Seymer v. Lake, 66 Wis. 651.....	704
Seymour v. Cook, 53 Barb. 451.....	155
Seymour v. Cummings, 119 Ind. 148.....	1817, 1904
Seymour v. Central Vt. R. Co., 69 Vt. 555.....	2162
Seymour v. Greenwood, 7 Hurl. & Nor. 354.... (527)	518
Seymour v. Maddox, 5 Eng. L. & Eq. 260.....	1547, 1570
Seymour v. Salamanca, 137 N. Y. 364.....	1826
Seymour v. Wilson, 14 N. Y. 567.... (77)	
Shaber v. St. Paul & C. R. Co., 28 Minn. 103.....	763, 794, 874, 875, 1122, 1216
Shackelton v. Manistee & C. R. Co., 107 Mich. 16.....	1546
Shaddock v. Rand, 142 Mass. 83.....	1076
Shadford v. Ann Arbor Street R. Co., 111 Mich. 390.....	1411
Shaeber v. Osterbrink, 67 Wis. 495.....	2349
Shafer v. Eau Claire, 105 Wis. 239.....	1837
Shaffer's Estate, 46 Pa. St. 131.... (51)	
Shaffer v. Evans, 53 Cal. 32.....	1205
Shahan v. Alabama & C. R. Co., 115 Ala. 181.....	2089
Shaier v. Broadway Imp. Co., 162 N. Y. 641.....	862
Shallcross v. Philadelphia, 187 Pa. St. 143.....	1880
Shampay v. Chicago, 76 Ill. App. 429.....	1936
Shanahan v. Agricultural Ins. Co., 6 Pa. Super. Ct. 65.....	1311
Shanchan v. N. Y. & C. R. Co., 10 Abb. Pr. (N. Y.) 588.... (1041)	
Shanewerk v. Ft. Worth, 11 Tex. Civ. App. 271.....	1987
Shanke v. United States Heater Co., 125 Mich. 346.....	1744
Shanley v. Laclede & C. Co., 63 Mo. App. 123.....	2206
Shanley v. Union R. Co., 14 Misc. 442.....	2312
Shannon v. Boston & C. R. Co., 78 Maine, 52.... (487)	
Shannon v. Comstock, 21 Wend. 461.... (665)	
Shannon v. Hudson River R. Co., 14 N. Y. 218.....	1272
Shannon v. Jefferson County, 125 Ala. 384.....	900
Shanny v. Androscoggin Mills, 66 Me. 420.....	1466, 1751, 1800
Shapleigh v. Wyman, 134 Mass. 118.....	2343
Sharkey v. Lake Roland El. R. Co., 84 Md. 163.....	497
Sharpe v. Southern R. Co., 130 N. C. 613.....	895
Sharpe's Case, 61 N. J. Eq. 601.....	60

## TABLE OF CASES.

celxxxiii

	PAGE
Sharpsteen v. Livonia &c. Co., 3 App. Div. 144.....	1559
Sharrer v. Paxson, 171 Pa. St. 26.....	477
Shattuck v. Bill, 142 Mass. 56.....	2180
Shaw v. Berry, 31 Me. 478....(137).....	141
Shaw v. Boston &c. R. Co., 8 Gray, 73....(792)	
Shaw v. Chicago &c. R. Co., 123 Mich. 629.....	2165
Shaw v. Chicago &c. R. Co., (Mich.) 82 N. W. Rep. 618.....	1134
Shaw v. Craft, 37 Fed. Rep. 317.....	726, 977, 979
Shaw v. Jewett, 86 N. Y. 616.....	746, 1110
Shaw v. Northern Pac. R. Co., 41 N. W. (Minn.) 548.....	614
Shaw v. Potsdam, 11 App. Div. 508.....	1832, 1836
Shaw v. Salt Lake City R. Co., 21 Utah, 76.....	661
Shaw v. Saline, 113 Mich. 342.....	1832, 1835
Shaw v. Sheldon, 103 N. Y. 667.....	1554
Shaw v. Van Rensselaer, 60 How. Pr. 143.....	2032
Shaw v. Webber, 79 Hun, 307.....	2204
Shayer v. Lowell, 134 Cal. 357.....	1074
Shea v. Kansas City &c. R. Co., 76 Mo. App. 29.....	1597
Shea v. Minneapolis &c. R. Co., 63 Minn. 228.....	249, 1113
Shea v. Murphy, 164 Ill. 614.....	628
Shea v. New York &c. R. Co., 173 Mass. 177.....	1776, 1803
Shea v. Potrero &c. R. Co., 44 Cal. 414.....	2228, 2271
Shea v. Railway Co., 44 Cal. 414.....	2229
Shea v. Reams, 36 La. Ann. 966.....	2369
Shea v. Sixth Ave. R. Co., 62 N. Y. 180.....	19, 24
Shearer v. Pacific Ex. Co., 43 Ill. App. 64.....	316
Sheafe v. Seattle, 18 Wash. 298.....	2013
Shed v. Troy &c. R. Co., 40 Vt. 88....(571)	
Sheedy v. Chicago &c. R. Co. (Minn.) 57 N. W. Rep. 60.....	1466
Sheehan v. Edgar, 58 N. Y. 631.....	2230, 2355
Sheehan v. N. Y. &c. R. Co., 91 N. Y. 332.....	1522, 1640
Sheehan v. St. Paul &a. R. Co., 76 Fed. Rep. 201.....	2146
Sheehy v. Burger, 62 N. Y. 558.....	2230, 2355
Sheehy v. New York, 160 N. Y. 139.....	2021
Sheetram v. Trexler Stave &c. Co., 13 Pa. Super. Ct. 219.....	1506, 1752, 1753
Sheffer v. Louisville &c. R. Co., (Ky.) 60 S. W. Rep. 403.....	464
Sheffer v. Willoughby, 61 Ill. App. 263.....	150
Sheffield v. Central Union &c. Co., 36 Fed. Rep. 164....(726)	
Shelby v. Missouri P. R. Co., 77 Mo. App. 205.....	219, 825
Shelby County v. Castetter, 7 Ind. App. 309.....	848
Shelby Co. Com'rs v. Deprez, 87 Ind. 509.....	2001
Shelbyville v. Brant, 61 Ill. App. 153.....	1872
Sheldon v. W. U. T. Co., 51 Hun, 591.....	2241
Sheldon v. Hudson River R. Co., 14 N. Y. 218..1130, 1250, 1256, 1259, 1260,	1269
Sheldon v. Kibbe, 3 Conn. 214.....	2207
Shelton v. M. D. T. Co., 59 N. Y. 258.....	2374
Shelton v. Lake Shore &c. R. Co., 29 Oh. St. 214....(564)	569
Shelton v. Louisville &c. R. Co., (Ky.) 39 S. W. Rep. 842.....	539
Shelton v. Merchants' Despatch Trans. Co., 59 N. Y. 258.....	273
Sheltrawn v. Michigan C. R. Co., 128 Mich. 669.....	2169
Shenandoah v. Erdman, 11 Cent. (Pa.) 440.....	698
Shenandoah Valley R. Co. v. Lucado, 19 Va. L. J. 866.....	1728
Shenk v. McKinnan, 11 Pa. Super. Ct. 84.....	2101
Shepard v. Buffalo &c. R. Co., 36 N. Y. 641...1034, 1039, 1041, 1045, 1051,	1172
Shepard v. Davis, 42 App. Div. 462.....	1305
Sheperd v. Mo. Pac. Ry. Co., 85 Mo. 629.....	2038
Shepard v. Metropolitan Street R. Co., 169 N. Y. 160.....	1222
Shepherd v. Chicago &c. R. Co., 77 Iowa, 54.....	832
Shepherd v. Hees, 12 Johns. 433....(1008)	
Shepherd v. Lincoln, 17 Wend. 250....(76).....	77, 78
Sherall v. W. U. T. Co., 109 N. C. 527.....	2432
Shorley v. Bartley, 4 Sneed. 58....(986).....	977
Sheridan v. Bean, Metc. 284.....	994, 996

	PAGE
Sheridan v. Bigelow, 93 Wis. 426.....	2170
Sheridan v. Brooklyn &c. R. Co., 36 N. Y. 43.....	414, 504, 534, 705, 709, 715
Sheridan v. Charlich, 4 Daly, 338....(16)	
Sheridan v. Foley, 58 N. J. L. 230.....	1105
Sheridan v. Long Island &c. R. Co., 40 App. Div. 381.....	1735
Sheridan v. Palmyra, 180 Pa. St. 439.....	1832
Sherlby v. Billings, 8 Bush. (Ky.) 147.....	526
Sherlock v. Alling, 93 U. S. 99....(968)	
Sherlock v. Sherlock, 66 App. Div. 328.....	1697
Sherman v. Anderson, 27 Kan. 333....(1041)	
Sherman v. Chicago &c. Co., 34 Minn. 259.....	1544
Sherman v. Commercial Printing Co., 29 Mo. App. 31.....	132
Sherman v. Delaware &c. Canal Co., 71 Vt. 325.....	1604
Sherman v. D., L. & W. R. Co., 106 N. Y. 542.....	1139, 1154
Sherman v. Fall River Iron Co., 5 Allen, 213.....	1385
Sherman v. Fram, 30 Barb. 478....(204)	
Sherman v. Hannibal &c. R. Co., 70 Mo. 62.....	23
Sherman v. Hudson River R. Co., 64 N. Y. 254.....	310, 353, 824
Sherman v. Inman S. Line, 26 Hun, 107.....	242
Sherman v. Menominee &c. Co., 72 Wis. 122.....	1403
Sherman v. Page, 85 N. Y. 128....(62)	
Sherman v. R. Co., 34 Minn. 259.....	1690
Sherman v. R. N. &c. R. Co., 40 Iowa, 45.....	571
Sherman v. Syracuse & Rochester R. Co., 17 N. Y. 153.....	1661, 1662, 1668
Sherman v. Vermillion, 51 La. Ann. 880.....	1986
Sherman v. Western Stage Co., 24 Iowa, 515.....	1369
Sherman v. Western Trans. Co., 62 Barb. 158....(1037)	
Sherman &c. R. Co. v. Bridges, 16 Tex. Civ. App. 64.....	14, 740, 767
Sherrill v. Western Union Teleg. Co., 117 N. C. 352.....	2457
Sherry v. N. Y. C. & H. R. R. Co., 104 N. Y. 652.....	790
Sherwood v. Chicago &c. R. Co., 82 Mich. 374.....	856, 860
Sherwood v. Fischer, 3 Hun, 606.....	3
Shewalter v. Missouri &c. R. Co., 84 Mo. App. 589....(351)	
Shidet v. Dreyfuss, 50 La. Ann. 280.....	922, 1875, 1876, 2246
Shields v. Durham, 118 N. C. 450.....	1984, 2013
Shields v. Kansas City R. Co., 87 Mo. App. 637.....	1590
Shields v. N. Y. C. & H. R. R. Co., 133 N. Y. 557.....	694
Shields v. Norfolk &c. R. Co., 129 N. C. 1....(1254)	
Shields v. Robins, 3 App. Div. 582.....	1595, 1673
Shields v. Yonge, 15 Ga. 349....(943)	
Shietart v. Detroit, 108 Mich. 309.....	1865
Shiff v. New York Central R. Co., 16 Hun, 278.....	298
Shifflet v. St. Louis &c. R. Co., 18 Tex. Civ. App. 57.....	2151
Shine v. Cocheco Man. Co., 173 Mass. 558.....	1504
Shingard v. Union T. Co., 201 Pa. St. 562.....	1615
Ship Invincible, 3 Sawyer, 176....(230)	
Shipley v. Colclough, 81 Mich. 624.....	1011
Shipley v. Fifty Associates, 106 Mass. 194.....	2061, 2073, 2081
Shipley v. Proctor, 177 Mass. 498.....	2259
Shippey v. Grand Rapids Leather Co., 124 Mich. 533.....	1720
Shippey v. Ausable, 85 Mich. 280.....	706
Shipsey v. Bowery Nat. Bank, 59 N. Y. 485.....	35
Shires v. Railroad Co., 103 Mo. 378.....	1670
Shires v. Fonda, Johnstown & Gloversville Railroad Co., 80 Hun, 92.....	774
Shirk v. Neible, 156 Ind. 66.....	190
Shirk v. Wabash R. Co., 14 Ind. App. 126.....	770, 771, 779
Shoecraft v. Bailey, 25 Iowa, 553....(147)	
Shoemaker v. Bryant Lumber &c. Co., (Wash.) 68 Pac. Rep. 380.....	1499, 1566
Shook v. Cohoes, 108 N. Y. 648.....	1926, 2237
Shorning v. Knickerbocker Ice Co., 13 N. Y. Supp. 434.....	1454
Short v. Baltimore City R. Co., 50 Md. 73.....	2338
Short v. Bohle, 64 Mo. App. 242.....	980, 2365
Short v. White Lake, 8 S. D. 148.....	2013
Shorter v. Southern R. Co., 121 Ala. 158.....	1195, 1727

## TABLE OF CASES.

cc|xxxv

	PAGE
Shortaleeves v. New York &c. R. Co., 40 N. Y. Supp. 1105.... (932)	
Shotwell v. Reading, 4 Oh. Dec. 326.....	1955
Show v. McCracken, 107 Mich. 49.....	2047
Shreeves v. Allen, 79 Ill. 553.... (182)	
Shriver v. Bean, 112 Mich. 508.....	1290
Shrum v. Washington County, 13 Ind. App. 585.....	1982
Shuber v. Omaha &c. R. Co., 87 Mo. App. 618.....	1103
Shufeldt v. Searing, 59 Ill. App. 341.....	2067
Shultz v. Faribault &c. Electric Co., 82 Minn. 100.....	1063
Shultz v. Griffith, 103 Iowa, 150.....	994
Shultz v. Pulver, 3 Paige, 184.... (48).....	49
Shultz v. Wall, 134 Pa. St. 262.....	141
Shumacher v. St. Louis &c. R. Co., 39 Fed. Rep. 174.... (660)	
Shumway v. Burlington, 108 Iowa, 424.....	1169
Shumway v. Walworth, 98 Mich. 411.....	896
Shurts v. Colvin, 55 Oh. St. 274.....	1085
Shute v. Burkhardt, 104 Mass. 59.....	2383
Savagzdys v. Pittsburg &c. R. Co., 31 Pittab. L. J. 136.....	2167
Siack v. Northern Cent. R. Co., 92 Md. 213.....	2296
Sias v. Rochester R. Co., 92 Hun. 140.....	501
Sias v. Rochester R. Co., 18 App. Div. 506.....	538
Sias v. Consolidated T. Co., 73 Vt. 35.....	1163, 1424, 1639
Sibildrud v. Minneapolis &c. R. Co., 29 Minn. 58.....	1257
Sibley v. Aldrich, 33 N. H. 533.... (137)	
Sibley v. New Orleans City &c. R. Co., 49 La. Ann. 588.....	515
Sibley v. Smith, 46 Ark. 295.....	2036
Sick v. Covenant &c. Ins. Co., 79 Mo. App. 609.....	1315
Sickles v. Missouri &c. R. Co., 13 Tex. Civ. App. 434.....	502
Sickles v. New Jersey Ice Co., 153 N. Y. 83.....	721
Sickles v. New Jersey Ice Co., 80 Hun. 213.....	1845
Siek v. Toledo Consol. Street R. Co., 16 Oh. C. C. 393.....	2273, 2298, 2299
Siek v. Toledo &c. R. Co., 9 Oh. C. D. 51.....	2326
Siddall v. Jansen, 168 Ill. 43.....	712, 1075
Sidders v. Riley, 22 Ill. 109.... (1335)	
Sidekum v. W. St. L. & P. R. Co., 93 Mo. 400.....	2038
Sidmonds v. Brooklyn &c. R. Co., 69 App. Div. 471.....	917
Sieber v. Amunson, 78 Wis. 679.....	2368
Sieber v. Blane, 76 Cal. 173.....	1355
Sieber v. Great Northern R. Co., 76 Minn. 269.....	925, 1216
Siebert v. McManus, 104 La. 404.....	2102
Siebrecht v. East River Gas Co., 21 App. Div. 110.....	1381
Siebrecht v. Pennsylvania R. Co., 21 Misc. 615.....	212, 230, 304
Siedentop v. Buse, 21 App. Div. 592.....	1569
Siefert v. City of Brooklyn, 101 N. Y. 136.....	1817
Siegel, Cooper & Co., 90 Ill. App. 49.... (660)	
Siegler v. Mellinger, 203 Pa. St. 256.....	1847
Siegrist v. Arnot, 10 Mo. App. 197.....	688
Siensen v. Oakland &c. R. Co., 134 Cal. 494.....	409
Sievers v. Peters Box &c. Co., 151 Ind. 642.....	1076, 1397, 1412, 1461, 1703
Sievers v. San Francisco, 115 Cal. 648.....	1982
Sigafus v. Porter, 84 Fed. Rep. 430.....	1235
Siglin v. Coos Bay &c. R. Co., 35 Or. 79.....	1031, 1144
Sikes v. Shelden, 58 Iowa, 744.....	2246
Silberstein v. R., W. S. & P. F. R. Co., 117 N. Y. 293.....	816
Silberstein v. William Wicke Co., 29 Abb. N. C. 291.....	879
Silcock v. Rio Grande &c. R. Co., 22 Utah, 179.... (658).....	678, 701, 767, 1104
Silliman v. Lewis, 49 N. Y. 379.... (665)	
Silsby v. Michigan Car Co., 95 Me. 204.....	839
Silsby Man. Co. v. State of New York, 104 N. Y. 562.....	2219
Silver Lake Bank v. North, 4 Johns. Ch. 370.... (355)	
Silveria v. Iversen, 128 Cal. 187.....	1158, 1162, 1463, 1468, 1483
Silverman v. St. Louis &c. R. Co., 51 La. Ann. 1785.... (824).....	937
Silvey v. Axley, 118 N. C. 959.....	118
Silvia v. Wampanoag Mills, 177 Mass. 194.....	1504, 1558

	PAGE
Simes's Estate, 9 Pa. Dist. 31.....	48
Simmonds v. Holmes, 61 Conn. 1.....	989
Simmons v. Chicago &c. R. Co., 110 Ill. 340.....	1542, 1722
Simmons v. Everson, 124 N. Y. 319.....	1890, 2077
Simmons v. M'Connell, 14 Va. L. J. 106.....	885
Simmons v. Oregon R. Co., (Or.) 69 Pac. Rep. 440.....	376
Simmons v. Peters, 20 App. Div. 251.....	1628
Simmons v. Poughkeepsie &c. R. Co., 2 App. Div. 117.... (1012)	
Simon v. Henry, 62 N. J. L. 486.....	2073
Simon v. Miller, 7 La. Ann. 360.....	141
Simon-Reigel Cigar Co. v. Gordon &c. Battery Co., 20 Misc. 598.....	1361
Simonds v. Baraboo, 93 Wis. 40.....	1127, 1948
Simonds v. Henry, 39 Ma. 155.....	2185, 2190
Simonin v. N. Y., L. E. & W. R. Co., 36 Hun, 214.....	435
Simons v. Gaynor, 89 Ind. 165.....	2343
Simons v. Southern R. Co., 96 Va. 152.....	788
Simonson v. Falihee, 25 Hun, 570.... (83)	
Simonton v. Citizens' Electric &c. Co., (Tex. Civ. App.) 67 S. W. Rep. 530...	2137
Simpson v. Bloss, 7 Taunton, 246.....	2378
Simpson v. Central V. R. Co., 5 App. Div. 614.....	1527
Simpson v. Doufour, 126 Ind. 322.... (129)	
Simpson v. Gerken, 19 App. Div. 68.....	1460, 1723
Simpson v. Griggs, 58 Hun, 393.....	993
Simpson v. Mercer, 144 Mass. 413.....	2261
Simpson v. N. Y. Rubber Co., 80 Hun, 415.....	1556, 1782
Simpson v. New York &c. R. Co., 16 Misc. 613.....	616, 830, 890
Simpson v. Waldby, 63 Mich. 439.....	2180
Sims v. Lindsay, 122 N. C. 678.....	1683, 1699
Sims v. Metropolitan Street R. Co., 65 App. Div. 270.....	495
Sinard v. Southern R. Co., 101 Tenn. 473.....	1030, 1033
Sincer v. Bell, 47 La. Ann. 1548.....	1300, 2131
Sincere v. Union Compress &c. Co., (Tex. Civ. App.) 40 S. W. Rep. 326....	1419, 1672
Sinclair v. Chicago &c. R. Co., 133 Mo. 233.....	2144, 2149, 2157
Sinclair v. Missouri &c. R. Co., 70 Mo. App. 588.... (1033)	1118
Sinclair v. Pearson, 7 N. H. 219.....	104
Sinclair v. Slawson, 44 Mich. 123.... (82)	
Sinclair Co. v. Waddell, 99 Ill. App. 334.....	1679
Sindeman v. N. Y. C. & H. R. R. Co., 42 Hun, 306.....	803
Siner v. G. W. R. Co., L. R. 3 Exch. 150.... (522)	
Singer v. Steele, 125 Ill. 426.....	2174
Singer Man. Co. v. Rahn, 132 U. S. 518.....	15
Singleton v. Felton, 101 Fed. Rep. 526.....	455, 2141
Singleton v. Prudential Ins. Co., 11 App. Div. 403.....	1310
Siniard v. Green, 123 Ala. 527.....	53
Sinkling v. Illinois C. R. Co., 10 S. D. 560.... (1013)	
Sinnott v. Louisville &c. R. Co., 104 Tenn. 233.....	557
Sinsheimer v. New York &c. R. Co., 21 Misc. 45.....	314
Sinton v. Butler, 40 Oh. St. 158.....	1317, 1329
Sioux City &c. R. Co. v. Finlayson, 16 Neb. 578.....	1718, 2038
Sioux City &c. R. Co. v. Smith, 22 Neb. 775.....	1645
Sipple v. State, 99 N. Y. 284.....	1202, 2217, 2219
Sisco v. Lehigh & Hudson River Railway Co., 75 Hun, 582.....	1436
Sisk v. Crump, 112 Ind. 504.....	2113
Siskiyou Lumber &c. Co. v. Rostel, 121 Cal. 511.....	2102
Sisson v. Cleveland &c. R. Co., 14 Mich. 489.... (824)	
Sizes v. Syracuse & B. & N. Y. R. Co., 7 Lansing, 67.....	1512
Skaarup v. Stover, 56 Hun, 86.....	1509
Skelley v. Crutchfield, 17 Pa. Super. Ct. 198.....	1461
Skelton v. Larkin, 82 Hun, 388.....	2242
Skendahl v. Hayes, 10 App. Div. 487.....	1749
Skidmore v. West Virginia &c. R. Co., 41 W. Va. 293.....	1487
Skinner v. Atchison &c. R. Co., 39 Fed. Rep. 188.....	529
Skinner v. Central Vermont R. Co., 73 Vt. 336.....	1689
Skinner v. McLaughlin, 94 Md. 524.....	1503

	PAGE
Skinner v. New York &c. R. Co., 64 N. Y. St. Rep. 325.... (786)	
Skip v. Eastern Counties Railway Co., 24 L. & E. 396.....	1601
Skipper v. Clifton Man. Co., 58 S. C. 143.....	30
Skipton v. St. Joseph &c. R. Co., 82 Mo. App. 134.....	2149, 2167, 2169
Slacer v. Field Engineering Co., 4 Misc. 493.....	1502
Slade v. Union Traction Co., 7 Pa. Dist. R. 34.....	498
Sladky v. Marinette Lumber Co., 107 Wis. 250.....	1492, 1700, 1722
Slater v. Adler, 8 Misc. 310.....	1361
Slater v. Baker, 2 Wils. 359.....	2189
Slater v. Burlington &c. R. Co., 71 Iowa, 209.... (714)	
Slater v. Chapman, 67 Mich. 523.....	1644
Slater v. Jewett, 85 N. Y. 61.....	1487, 1522, 1533, 1606, 1661, 1664, 1731
Slater v. Mersereau, 64 N. Y. 138.....	634
Slattery v. O'Connell, 153 Mass. 94.... (706).....	719
Slattery v. Toledo &c. R. Co., 23 Ind. 81.....	1614, 1620
Slaughter v. Met. Street R. Co., (Mo.) 23 S. W. Rep. 760.....	2051
Slava v. Jones, 83 Ala. 139.... (76)	
Slavens v. Northern P. R. Co., 97 Fed. Rep. 255.....	1158, 1508, 1563, 1616, 1638
Sleat v. Flagg, 5 B. & Ald. 342.... (271)	
Sleath v. Wilson, 9 Carr. & P. 607.....	6
Sleeper v. Sandown, 52 N. H. 244.... (702).....	2368
Slivitski v. Wien, 93 Wis. 460.....	1925, 1953
Sloan v. Courtenay, 54 S. C. 314.....	627
Sloan v. Georgia &c. R. Co., 86 Ga. 25.....	1532
Sloan v. N. Y. &c. R. Co., 4 Thomp. & C., (N. Y.) 135.... (846)	
Sloan v. Pelzer, 54 S. C. 314.....	1201
Sloan v. St. Louis &c. R. Co., 58 Mo. 220.....	306
Sloane v. Elmer, 64 N. Y. 201.....	1
Sloane v. Georgia R. Co., 86 Ga. 15.....	1736
Sloane v. McCauley, 33 Misc. 652.....	928
Sloane v. Southern &c. R. Co., 111 Cal. 668.....	560, 561, 681, 854
Slobodesky v. Phenix Ins. Co., 53 Neb. 816.....	1312
Slocum v. Barry, 38 N. Y. 46.....	77, 80
Slocovich v. The Orient Mutual Ins. Co., 108 N. Y. 56.....	1222
Sloman v. Great Western R. Co., 67 N. Y. 211.... (616)	
Sloman v. Great Western R. Co., 6 Hun, 546.....	615
Sloney v. Grand Rapids, 95 Ill. App. 39.....	2044
Sloniker v. Great Northern R. Co., 76 Minn. 306.....	661, 913
Sloop v. St. Louis &c. R. Co., 22 Mo. App. 593.... (1028).....	214
Sly v. Union Depot R. Co., 134 Mo. 681.....	482
Slyke v. Snell, 6 Lansing, 299.....	1331
Small v. Allington &c. Man. Co., 94 Me. 551.....	1602, 1629, 1665, 1667
Small v. Chicago &c. R. Co., 50 Iowa, 338.....	1256, 1260, 1264
Small v. Chicago &c. R. Co., 55 Iowa, 582.....	1267
Small v. Brooklyn City & Newtown R. Co., 10 Misc. 266.....	1203
Smalley v. Southern R. Co., 57 S. C. 243.....	2143, 2150
Smallina v. Kreech, (Tenn.) 46 S. W. Rep. 1019.....	958
Smalls v. Southern R. Co., 115 Ga. 137.....	1546
Smallwood v. Bedford Quarries Co., (Ind. App.) 63 N. E. Rep. 869.....	1623
Smaltz v. Boyce, 109 Mich. 382.....	13
Smedis v. Brooklyn & R. B. R. Co., 88 N. Y. 13.....	747, 759
Smedley v. Hestonville &c. R. Co., 184 Pa. St. 620.....	400, 863
Smeizel v. Odanah Iron Co., 116 Mich. 149.....	1679
Smeltz v. Pennsylvania R. Co., 186 Pa. St. 364.....	788
Smethurst v. Proprietors &c., 148 Mass. 261.....	2263
Smid v. Mayor, 17 J. & S. 126.... (1138)	
Smillie v. St. Bernard &c. Stove, 47 Mo. App. 402.....	1077
Smionsen v. Brooklyn &c. R. Co., 53 App. Div. 478.....	916
Smith v. Amcannon, 3 Brewst. (Pa.) 344.....	150
Smith v. American Express Co., 108 Mich. 572.....	249, 287, 1091
Smith v. American Society &c., 7 Misc. 158.....	2344, 2347
Smith v. Atlanta &c. R. Co., (N. C.) 42 S. E. Rep. 139.....	1335
Smith v. Backus Lumber Co., 64 Minn. 447.....	1513, 1580
Smith v. Barre, 64 Vt. 21.... (1046)	

	PAGE
Smith v. Beaudry, 175 Mass. 286.....	1698
Smith v. Benick, 87 Md. 610.....	649
Smith v. Boston Gas &c. Co., 129 Mass. 318.....	2299
Smith v. Boston &c. R. Co., 120 Mass. 490.....	2375
Smith v. British & N. Am. R. M. S. Packet Co., 86 N. Y. 408.....	406
Smith v. Brooklyn, 36 Hun. 224.....	1894
Smith v. Brooklyn Savings Bank, 101 N. Y. 58.....	156, 157, 160
Smith v. Brunswick, 61 Mo. App. 578.....	1819
Smith v. Car Works, 60 Mich. 502.....	1470
Smith v. Chester, 1. T. R. 654....(166)	
Smith v. Chicago, 38 Fed. Rep. 388.....	1892
Smith v. Chicago &c. R. Co., 86 Ill. App. 647.....	676
Smith v. Chicago &c. R. Co., 55 Iowa, 33....(439)	
Smith v. Chicago &c. R. Co., (Iowa) 80 N. W. Rep. 658.....	1797
Smith v. Chicago &c. R. Co., 119 Mo. 246.....	844
Smith v. Chicago &c. R. Co., 91 Wis. 503.....	1616, 1801
Smith v. City, 55 Mo. 456....(846)	
Smith v. City &c. R. Co., 29 Or. 539.....	387, 1098, 2314
Smith v. Clark, 3 Lansing, 208.....	2367
Smith v. Clark Hardware Co., 100 Ga. 163.....	1378
Smith v. Clarkstown, 69 Hun. 155.....	1933
Smith v. Conway, 121 Mass. 216.....	663
Smith v. Countryman, 30 N. Y. 681.....	627
Smith v. Day, 100 Fed. Rep. 244.....	698, 2074, 2113
Smith v. Donohue, 49 N. J. L. 548....(979)	
Smith v. Dummond, 6 N. Y. Supp. 242.....	2189
Smith v. Duncan, (Mass.) 63 N. E. Rep. 938.....	1162
Smith v. Dygert, 12 Barb. 613.....	2345
Smith v. East End &c. Light Co., 193 Pa. St. 19.....	1066
Smith v. East Mauch Chunk, 3 Pa. Super. Ct. 495.....	1857, 1871
Smith v. Eastern &c. R. Co., 35 N. H. 356....(1037)	1018, 1034
Smith v. Electric T. Co., 187 Pa. St. 110.....	2317
Smith v. Electric T. Co., 6 Pa. Dist. Rep. 471.....	2314, 2317
Smith v. First National Bank, 99 Mass. 605.....	108
Smith v. Frio County, (Tex. Civ. App.) 66 S. W. Rep. 711.....	927
Smith v. Gardner, 11 Gray, 418.....	2346
Smith v. Gas Light Co., 129 Mass. 318.....	1382, 1384
Smith v. Georgia &c. R. Co., 88 Ala. 538.....	439
Smith v. German Ins. Co., 107 Mich. 270.....	1309
Smith v. Gold Stock Co., 42 Hun. 453.....	2390
Smith v. Gould, 61 Wis. 31.....	88
Smith v. Grant, 29 Ch. L. 145.....	1237
Smith v. Gulf &c. R. Co., (Tex. Civ. App.) 65 S. W. Rep. 83.....	1484, 1598
Smith v. Han. &c. R. Co., 37 Mo. 287.....	1256
Smith v. Hatcher, 102 Ga. 158.....	877
Smith v. Havermeyer, 36 Fed. Rep. 927.....	2117
Smith v. Henderson, 54 App. Div. 26.....	1847
Smith v. Hestonville &c. R. Co., 92 Pa. St. 450.....	718
Smith v. Hillside Coal &c. I. Co., 186 Pa. St. 28.....	1634
Smith v. Houston &c. R. Co., 17 Tex. Civ. App. 502.....	2142, 2147, 2156
Smith v. Iron Co., 42 N. J. L. 467.....	1640
Smith v. Jaques, 6 Conn. 530.....	994
Smith v. Jones, 95 Tenn. 339.....	1007
Smith v. Kenrick, 7 C. B. 515.....	2072
Smith v. King, 77 N. Y. Supp. 3.....	1752
Smith v. Kingston City R. Co., 55 App. Div. 143.....	407, 470
Smith v. Kurrus, 31 Ill. 276.....	2028
Smith v. Lee, 84 Fed. Rep. 557.....	119
Smith v. Lidgerwood Man. Co., 56 App. Div. 528.....	1524
Smith v. Little Pittsburg Coal Co., 75 Mo. App. 177.....	1568
Smith v. Livingston, 111 Mass. 342....(182)	
Smith v. Louisiana &c. R. Co., 49 La. Ann. 1325.....	1108
Smith v. Louisville &c. R. Co., 124 Ind. 394.....	31
Smith v. Maine C. R. Co., 87 Me. 339....(753)	784



## TABLE OF CASES.

cclxxxix

	PAGE
Smith v. Major, 16 Oh. C. C. 362.....	2007
Smith v. Manhattan Railway Co., 45 N. Y. State R. 865.....	590
Smith v. Matteson, 41 Hun, 216.....	2230, 2360
Smith v. Mayor, 66 N. Y. 295.....	1817, 1818, 1900
Smith v. Memphis &c. R. Co., 18 Fed. R. 304.....	1432
Smith v. Mercer, 6 Taunt. 76.... (166)	
Smith v. Metropolitan Street R. Co., 7 App. Div. 253.....	679, 2272
Smith v. Metropolitan Street R. Co., 66 App. Div. 600.....	2306
Smith v. Metropolitan Street R. Co., 15 Misc. 158.....	947
Smith v. Middleton, (Ky.) 66 S. W. Rep. 388.....	12, 838
Smith v. Miller, 43 N. Y. 171.....	34, 35
Smith v. Milwaukee &c. Exchange, 91 Wis. 360.... (647)	2267
Smith v. Minneapolis &c. R. Co., 26 Minn. 419.... (751)	
Smith v. Munch, 65 Minn. 256.....	13
Smith v. Nassau &c. R. Co., 57 App. Div. 152.....	922
Smith v. Newark Ice &c. Co., 8 Oh. S. & C. P. Dec. 283.....	2129
Smith v. New Castle, 178 Pa. St. 298.....	1876, 1951
Smith v. N. & L. R. Co., 7 Foster, (N. H.) 86.....	102
Smith v. New Haven &c. R. Co., 94 Mass. 531.....	305
Smith v. New York, 17 App. Div. 438.....	1935, 1945
Smith v. N. Y. &c. R. Co., 46 N. J. L. 7.....	1444, 2375
Smith v. N. Y. &c. R. Co., 19 N. Y. 127.....	405, 1756
Smith v. N. Y. &c. R. Co., 24 N. Y. 222.....	260
Smith v. N. Y. &c. R. Co., 118 N. Y. 645.....	1427
Smith v. New York &c. R. Co., 164 N. Y. 491.....	1420
Smith v. N. Y. &c. R. Co., 38 Hun, 33.....	727
Smith v. New York &c. R. Co., 78 Hun, 524.....	17
Smith v. New York &c. R. Co., 4 App. Div. 493.....	728, 768
Smith v. N. Y. &c. R. Co., 42 Barb. 225.... (341)	
Smith v. New York &c. R. Co., 96 Fed. Rep. 504.....	2031
Smith v. Norfolk &c. R. Co., 48 W. Va. 69.....	529
Smith v. North American Transp. &c. Co., 20 Wash. 580.....	566, 832
Smith v. O'Connor, 48 Pa. St. 218.... (714)	720
Smith v. Old Colony R. Co., 10 R. I. 22.....	1259
Smith v. Oxford Iron Co., 42 N. J. L. 467.....	1498, 1510, 1667
Smith v. Pacific R. Co., 61 Mo. 17.....	1335
Smith v. Parkersburg Co-Op. Ass'n, (W. Va.) 37 S. E. Rep. 645.....	2131
Smith v. Pelah, 2 Strange, 126.... (983)	
Smith v. Peninsula Car Works, 60 Mich. 501.....	1593
Smith v. Pennsylvania R. Co., 201 Pa. St. 131.....	1832
Smith v. Philadelphia &c. R. Co., 87 Md. 48.....	902
Smith v. Philadelphia T. Co., 3 Pa. Super. Ct. 129.....	2333
Smith v. Pittsburg &c. R. Co., 23 Oh. St. 10.... (553)	
Smith v. Pittsburg &c. R. Co., 90 Fed. Rep. 783.....	856, 919, 2165, 2342, 2343
Smith v. Postal Teleg. &c. Co., 174 Mass. 576.... (867)	
Smith v. Potter, 46 Mich. 258.....	1473, 1612, 1685
Smith v. Price, 2 F. & F. 748.....	1303
Smith v. Quarles, (Tenn.) 46 S. W. Rep. 1035.....	2031
Smith v. R. Co., 37 Mo. 287.....	1263
Smith v. Railroad Co., 108 Mo. 243.....	2051
Smith v. Railroad Co., (Mo.) 23 S. W. Rep. 784.....	2052
Smith v. R. Co., 64 N. C. 235.....	251
Smith v. R. Co., 44 N. H. 325.... (616)	
Smith v. R. Co., 42 Wis. 520.....	1470
Smith v. Rathbun &c., 22 Hun, 150.....	2042
Smith v. Read, 6 Daly, 33.... (104)	
Smith v. Rochester, 76 N. Y. 506.....	2000, 2001
Smith v. St. Joseph, 45 Mo. 449.....	698
Smith v. St. Louis &c. R. Co., 91 Mo. 58.....	1147
Smith v. St. Louis &c. R. Co., 151 Mo. 391.....	1089, 1520, 1645
Smith v. St. Paul &c. R. Co., 60 Minn. 169.....	2049
Smith v. St. Paul City R. Co., 79 Minn. 254.....	991, 1014, 1028
Smith v. Savannah &c. R. Co., 100 Ga. 96.....	418
Smith v. Seattle, 18 Wash. 484.....	1369

	PAGE
Smith v. Seattle, 20 Wash. 613....(654)	
Smith v. Shakopee, 103 Fed. Rep. 240.....	1957
Smith v. Simms, 51 How. Pr. 305.....	132
Smith v. Smith, 84 Ky. 664.....	2435
Smith v. Smith, 2 Pick. 621.....	2353
Smith v. Smith, 134 N. Y. 62.....	1081
Smith v. Southern R. Co., 129 N. C. 374.....	2054, 2166, 2168
Smith v. Spokane, 16 Wash. 403.....	919, 2037, 2038
Smith v. State, 92 Md. 518.....	1356
Smith v. Texas &c. R. Co., (Tex. Civ. App.) 58 S. W. Rep. 151.....	1539
Smith v. Tromanhauser, 63 Minn. 98.....	1684
Smith v. Union Trunk Line, 18 Wash. 351.....	455
Smith v. Van Seiver, 58 N. J. L. 190.....	1077
Smith v. W. U. T. Co., 82 Ky. 104.....	2397, 2399, 2436
Smith v. W. U. T. Co., (Tex.) 19 S. W. Rep. 441.....	2429
Smith v. Wabash &c. R. Co., 92 Mo. 359.....	1165
Smith v. Walker, 117 Mich. 14.....	1898, 1899, 1941, 1946
Smith v. Webb, 1 Barb. 230.....	1140
Smith v. Weston, 159 N. Y. 194.....	186
Smith v. White, 165 Mo. 590.....	849
Smith v. Wilcox, 24 N. Y. 354.....	2373
Smith v. Wilds, 143 Mass. 556.....	702
Smith v. Wilmington &c. R. Co., 129 N. C. 173.....	577, 1557
Smith v. Wilson, 36 Minn. 334.....	135, 142
Smith v. Wood, 111 Ga. 221.....	189
Smith v. Wright, 24 Barb. 306....(77)	77
Smith Am. Organ Co. v. Abbott, 1 Pa. Dist. R. 174.....	1307
Smithson v. Chicago &c. R. Co., 71 Minn. 216.....	737, 1196, 1602
Smithson v. U. S. Tel. Co., 29 Md. 167.....	2391
Smithson v. Southern P. Co., 37 Or. 74.....	443, 465, 850
Smity v. Mayor, 66 N. Y. 295.....	1902
Smook v. Anaconda, 26 Mont. 128.....	1814
Smoot v. Railway Co., 67 Ala. 13.....	1403, 1405, 1661, 1788
Smothers v. Hanks, 34 Iowa, 287.....	2190
Smyth v. Ames, 169 U. S. 466.....	2224
Smyth v. Harvie, 31 Ill. 62.....	2180
Snader v. Murphy, 19 Pa. Super. Ct. 35.....	2257
Snader v. Murphy, 19 Pa. Super. Ct. 35.....	1871
Snaman v. Missouri &c. R. Co., (Tex. Civ. App.) 42 S. W. Rep. 1003.....	614
Snap v. The People, 19 Ill. 80....(989)	
Sned a v. Liberia, 65 Minn. 337.....	1489, 1564
Snedeker v. Snedeker, 164 N. Y. 58.....	871
Snedeker v. Snedeker, 47 App. Div. 471.....	961
Snediker v. Nassau Electric R. Co., 41 App. Div. 628.....	542
Sneed v. Bonnoil, 166 N. Y. 325.....	81
Sneed v. Morehead, 70 Miss. 690.....	2128
Sneed v. Salisbury, (Mo. App.) 68 S. W. Rep. 369.....	1865
Sneesby v. Railroad Co., 9 Q. B. 263....(740)	
Sneeson v. Kupfer, 21 R. I. 560.....	2248
Sneider v. Geiss, 1 Yeates, (Pa.) 34....(142)	
Sneider v. Treichler, 56 Hun, 309.....	1467, 1476
Snell v. Rochester R. Co., 64 Hun, 476.....	2229, 2271
Snelling v. Yetter, 25 App. Div. 590.....	200
Snider v. Adams Ex. Co., 63 Mo. 376....(280)	351
Snider v. Crawford, 47 Mo. App. 8.....	23
Snider v. New Orleans &c. R. Co., 48 La. Ann. 1.....	2278, 2315
Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228.....	1518, 1520
Snook v. Anaconda, 26 Mont. 128.....	1824
Snow v. Adams, 1 Cush. 443.....	1914
Snow v. Chandler, 10 N. H. 92.....	2202
Snow v. Housatonic R. Co., 8 Allen, 441. 1433, 1466, 1572, 1578, 1685, 1688, 1716	
Snowden v. Norfolk &c. R. Co., 95 N. Car. 93....(1027)	
Snowden v. Pleasant Valley C. Co., 16 Utah, 366.....	1138
Snowden v. Somerset, 171 N. Y. 99.....	1931

## TABLE OF CASES.

ccxcii

	PAGE
Snowden v. Somerset, 52 App. Div. 84.....	1920
Snydacker v. Blatchley, 176 Ill. 506....(133)	
Snyder v. Albion, 113 Mich. 275.....	1134, 1837, 2013
Snyder v. Cleveland &c. R. Co., 60 Oh. St. 487.....	1498, 1695, 1755
Snyder v. Ex. Co., 63 Mo. 76....(283)	
Snyder v. Han. & St. Joseph &c. R. Co., 60 Mo. 413....(23)	
Snyder v. Hancock, 9 Pa. Dist. B. 159.....	193
Snyder v. Holt Man. Co., 134 Cal. 324.....	1215
Snyder v. Lexington, (Ky.) 49 S. W. Rep. 765.....	2269
Snyder v. Patterson, 161 Pa. St. 98.....	995
Snyder v. Penn. Township, 14 Pa. Super. Ct. 145....(671).....	701, 1829, 1950
Snyder v. Philadelphia &c. R. Co., 9 Pa. Dist. 3.....	953
Snyder v. Wheeling Electrical Co., 43 W. Va. 661.....	1066, 1098, 1113
Snyder v. Witt, 99 Tenn. 618.....	2248
Soderman v. Kemp, 145 N. Y. 427.....	1535
Soderman v. Troy Steel & Iron Co., 70 Hun, 449.....	921, 1428
Soderstrom v. Holland &c. Lumber Co., 114 Mich. 83.....	1740
Sodowsky v. McFarland, 3 Dana, 204....(102)	
Solar Refining Co. v. Elliott, 15 Oh. C. C. 581.....	953, 957, 1372
Solarz v. Man. R. Co., 8 Misc. 656.....	1106, 1703, 2379, 2381
Solomon v. Bates, 118 N. C. 311.....	73
Solomon v. Central Park &c. R. Co., 1 Sweeney, 298....(500)	
Solomon v. Manhattan R. Co., 103 N. Y. 437.....	480, 673
Solomon R. Co. v. Jones, 30 Kan. 601.....	1466
Solon v. Williamsburgh Savings Bank, 35 Hun, 414....(174)	
Sommer v. Carbon Hill Coal Co., 89 Fed. Rep. 54.....	1490, 1725, 1784
Sommers v. Carbon Hill Coal Co., 91 Fed. Rep. 337.....	1595, 1723
Sonn v. Smith, 57 App. Div. 372.....	314
Sonnefield v. Mayton, (Tex. Civ. App.) 39 S. W. Rep. 166.....	1705
Sontag v. O'Hare, 73 Ill. App. 432.....	1118, 1343
Soper v. Greenwich, 48 App. Div. 354.....	2023
Soper v. Pontiac &c. R. Co., 113 Mich. 443....(240)	
Sopherstein v. Bertels, 178 Pa. St. 401.....	1094, 1134, 1570
So Relle v. Western U. T. Co., 55 Tex. 310.....	2432, 2454
Sorenson v. Balaban, 11 App. Div. 164.....	945
Sosat v. State, 2 Ind. App. 586.....	989
Soule v. Mogg, 35 Hun, 79.....	37
Soule v. Union Bank, 45 Barb. 111.....	1305
Sours v. Great Northern R. Co., 84 Minn. 230.....	1683
Souter v. Minneapolis &c. E. Co., 68 Minn. 18.....	1705
South Bend v. Hardy, 98 Ind. 577.....	697
South Carolina R. Co. v. Wise, 68 Ga. 572.....	587
South Chicago &c. R. Co. v. Kinnare, 96 Ill. App. 210.....	2273, 2286
South Covington &c. R. Co. v. Beatty, (Ky.) 50 S. W. Rep. 239.....	386
South Covington &c. R. Co. v. Bolt, (Ky.) 59 S. W. Rep. 26.....	851
South Covington &c. R. Co. v. Herrklotz, (Ky.) 47 S. W. Rep. 265.....	708
South Covington &c. R. Co. v. Stroth, (Ky.) 66 S. W. Rep. 177.....	2037
South Covington &c. R. Co. v. Ware, 84 Ky. 267.....	688
South Covington &c. Street R. Co. v. Enslen, (Ky.) 38 S. W. Rep. 850....	2283, 2286, 2331
South Covington &c. Street R. Co. v. Hernklotz, 104 Ky. 400.....	2354
South Covington &c. Street R. Co. v. McCleave, (Ky.) 38 S. W. Rep. 1055....	515
South Covington &c. Street R. Co. v. Merrklotz, 104 Ky. 400.....	2368
South Omaha v. Powell, 50 Neb. 798.....	1828
South Omaha Waterworks Co. v. Vocassek, 62 Neb. 710.....	1063
South & North Ala. &c. B. Co. v. Jones, 56 Ala. 507.....	1027
South. &c. R. Co. v. Chappell, 61 Ala. 527.....	2236
South. &c. R. Co. v. Henlein, 52 Ala. 606.....	243
South. &c. R. Co. v. McLendon, 63 Ala. 266.....	863
South. &c. R. Co. v. Schaufier, 75 Ala. 136....(492).....	498
South. &c. R. Co. v. Thompson, 62 Ala. 494.....	2045
Southern Agricultural Works v. Franklin, 111 Ga. 319.....	1633
Southern Bell Tel. &c. Co. v. Cassin, 111 Ga. 575.....	957
Southern Build. &c. Ass'n v. Lawson, 97 Tenn. 367.....	1079

	PAGE
Southern Cotton-Oil Co. v. Wallace, (Tex. Civ. App.) 54 S. W. Rep. 638....	1401
Southern Exp. Co. v. Ashford, 126 Ala. 591.....	223
Southern Exp. Co. v. Bank of Tupelo, 108 Ala. 517.... (240)	
Southern Exp. Co. v. Brown, 67 Miss. 260.....	4, 849
Southern Exp. Co. v. Caldwell, 88 U. S. (21 Wall.) 264.....	2389, 2414
Southern Exp. Co. v. Fitzner, 59 Miss. 581.....	32
Southern Exp. Co. v. Holland, 109 Ala. 362.....	330
Southern Exp. Co. v. Moon, 39 Miss. 822.....	250
Southern Exp. Co. v. Seide, 67 Miss. 609.....	250
Southern Exp. Co. v. Shea, 38 Ga. 519.... (341)	
Southern Exp. Co. v. United States Exp. Co., 88 Fed. Rep. 659.....	351
Southern Exp. Co. v. Williams, 99 Ga. 482.....	315
Southern Exp. Co. v. Wood, 98 Ga. 268.....	270
Southern I. R. Co. v. Peyton, 157 Ind. 690.....	2058
Southern Indiana R. Co. v. Moore, 29 Ind. App. 52.....	1408, 1682
Southern Indiana R. Co. v. Peyton, 157 Ind. 690.....	2046
Southern Ins. Co. v. Parker, 61 Ark. 207.....	1314
Southern Kansas R. Co. v. Clark, 52 Kan. 398.... (617).....	616
Southern Queen Man. Co. v. Morris, 105 Tenn. 654.....	925
Southern P. Co. v. Adkins, 114 Ga. 135.....	1020
Southern P. Co. v. Booth, (Tex. Civ. App.) 39 S. W. Rep. 510.....	301
Southern P. Co. v. Hall, 100 Fed. Rep. 760.....	829, 842, 1218
Southern P. Co. v. Hooper, 110 Ga. 779.... (817)	
Southern P. Co. v. Johnson, 69 Fed. Rep. 559.....	1586
Southern P. Co. v. McGill, (Ariz.) 44 Pac. Rep. 302.....	1618
Southern P. Co. v. Maddox, 75 Tex. 300.....	254
Southern P. Co. v. Maudlin, 19 Tex. Civ. App. 166.....	1771
Southern P. Co. v. Phillipson, (Tex. Civ. App.) 39 S. W. Rep. 958.....	255
Southern P. Co. v. Pool, 160 U. S. 438.....	1713
Southern P. Co. v. Wellington, (Tex. Civ. App.) 36 S. W. Rep. 1114.....	
..... 1373, 1695,	1710
Southern P. Co. v. Winton, (Tex. Civ. App.) 66 S. W. Rep. 477.....	
..... 935, 1412, 1469, 1490, 1547,	1728
Southern P. R. Co. v. Arnett, 111 Fed. Rep. 849.....	2050
Southern P. R. Co. v. Bender, (Tex. Civ. App.) 57 S. W. Rep. 574.....	2151
Southern P. R. Co. v. D'Arcais, (Tex. Civ. App.) 64 S. W. Rep. 813.....	255, 271
Southern P. R. Co. v. Duncan, 16 Ky. L. R. 119.....	355
Southern P. R. Co. v. Hamilton, 54 Fed. Rep. 468.....	595
Southern P. R. Co. v. Schoer, 114 Fed. Rep. 66.....	1804
Southern P. R. Co. v. Tomlinson, 163 U. S. 369.....	2203
Southern R. Co. v. Adams, (Ga.) 42 S. E. Rep. 35.... (240)	
Southern R. Co. v. Arnold, 114 Ala. 183.....	1705, 1706, 2048
Southern R. Co. v. Atlanta Nat. Bank, 112 Fed. Rep. 861.....	135
Southern R. Co. v. Barbour, (Ky.) 51 S. W. Rep. 159.... (815)	
Southern R. Co. v. Barfield, 112 Ga. 181.....	658, 2156
Southern R. Co. v. Barlow, 104 Ga. 213.....	554, 556, 561, 908
Southern R. Co. v. Barr, (Ky.) 55 S. W. Rep. 900.... 874, 1443, 1711, 1734,	1803
Southern R. Co. v. Baston, 99 Ga. 798.....	1756
Southern R. Co. v. Blake, 101 Ga. 217.....	769
Southern R. Co. v. Booth, (Tex. Civ. App.) 39 S. W. Rep. 585.....	301
Southern R. Co. v. Bruce, 97 Va. 92.....	1092, 1104, 2157, 2168
Southern R. Co. v. Bryant, 95 Va. 212.... (755)	
Southern R. Co. v. Bryant, 105 Ga. 316.....	935
Southern R. Co. v. Bush, 122 Ala. 470.....	2142
Southern R. Co. v. Camp, (Ga.) 42 S. E. Rep. 56.... (1016)	
Southern R. Co. v. Cooper, 98 Va. 299.... (793)	
Southern R. Co. v. Corine, 115 Ga. 664.....	1254
Southern R. Co. v. Covenia, 100 Ga. 46.....	876, 877
Southern R. Co. v. Craig, 113 Fed. 76.....	1510, 1527
Southern R. Co. v. Crowder, 130 Ala. 256.....	402, 917, 1155
Southern R. Co. v. Dawson, 98 Va. 577.....	1103
Southern R. Co. v. Duvall, (Ky.) 50 S. W. Rep. 535.....	1716
Southern R. Co. v. Duvall, (Ky.) 54 S. W. Rep. 741.....	1429, 1692
Southern R. Co. v. Elder, 81 Fed. Rep. 791.....	787

## TABLE OF CASES

ccxciii

	PAGE
Southern R. Co. v. Forsythe, (Ky.) 64 S. W. Rep. 506.....	1035, 1092
Southern R. Co. v. Gresham, 114 Ga. 183.....	854
Southern R. Co. v. Guyton, 122 Ala. 231.....	1397, 1399, 1566, 1695
Southern R. Co. v. Hall, 107 Tenn. 512.....	2031
Southern R. Co. v. Hall, 100 Fed. Rep. 760.....	1148, 1239
Southern R. Co. v. Harbin, 110 Ga. 808.....	1742, 1783
Southern R. Co. v. Hart, (Ky.) 64 S. W. Rep. 650.....	1544
Southern R. Co. v. Horner, (Ga.) 41 S. E. Rep. 649.....	281
Southern R. Co. v. Howard, 111 Ga. 842.... (571)	
Southern R. Co. v. Humphries, 108 Ga. 591.....	935
Southern R. Co. v. Hunter, 74 Misc. 444.....	420
Southern R. Co. v. Johnson, 114 Ga. 329.....	1797
Southern R. Co. v. Jones, (Ala.) 31 South. Rep. 591.....	244
Southern R. Co. v. Kendrick, 40 Miss. 384.... (444)	473
Southern R. Co. v. Kinchen, 103 Ga. 186.....	315, 1162
Southern R. Co. v. Loughridge, 114 Ga. 173.....	681
Southern R. Co. v. McKenzie, 102 Ga. 313.....	554
Southern R. Co. v. McLellan, (Miss.) 32 South. Rep. 283.....	850, 1156
Southern R. Co. v. Marshall, (Ky.) 64 S. W. Rep. 418.....	276, 830, 935
Southern R. Co. v. Mauzy, 98 Va. 692.....	1214, 1408, 1668, 1674
Southern R. Co. v. Mitchell, 98 Tenn. 27.....	465, 487
Southern R. Co. v. Moore, 42 S. E. Rep. 82.... (1016)	
Southern R. Co. v. Morrison, 105 Ga. 543.....	2168
Southern R. Co. v. Myers, 87 Fed. Rep. 149.....	831
Southern R. Co. v. New, 105 Ga. 481.....	1022
Southern R. Co. v. O'Bryan, (Ga.) 42 S. E. Rep. 42.....	576, 837
Southern R. Co. v. Phillips, 100 Tenn. 130.....	1030
Southern R. Co. v. Pool, 108 Ga. 808.....	2288
Southern R. Co. v. Posey, 124 Ala. 486.....	820, 1132
Southern R. Co. v. Posten, (Ala.) 31 South. Rep. 21.....	1020
Southern R. Co. v. Pugh, 95 Tenn. 419.....	2148
Southern R. Co. v. Pugh, 97 Tenn. 624.....	1747
Southern R. Co. v. Roebuck, (Ala.) 31 South. Rep. 611.....	485
Southern R. Co. v. Rhodes, 86 Fed. Rep. 422.....	430, 1093
Southern R. Co. v. Shields, 121 Ala. 460.....	1454
Southern R. Co. v. Smith, 86 Fed. Rep. 292.....	372, 454
Southern R. Co. v. Smith, 95 Va. 187.....	467
Southern R. Co. v. Vandergriff, (Tenn.) 64 S. W. Rep. 481.....	465
Southern R. Co. v. Ward, 110 Ga. 793.....	859
Southern R. Co. v. Watson, 110 Ga. 681.....	262, 551, 571
Southern R. Co. v. Watson, 114 Ga. 174.....	1037
Southern R. Co. v. White, 108 Ga. 201.....	546
Southern R. Co. v. Wildman, 119 Ala. 565.....	28, 418
Southern R. Co. v. Wood, 114 Ga. 140.....	394, 556, 926
Southern &c. Asso. v. Perry, 103 Ga. 800.....	189
Southern &c. Man. Co. v. Bradley, 52 Tex. 587.....	2269
Southern &c. R. Co. v. McKay, (Tex. Civ. App.) 47 S. W. Rep. 479.....	1053, 1055
Southern &c. R. Co. v. Michaels, 57 Kan. 474.....	1438, 1691, 2037
Southern &c. Teleg. Co. v. Clements, 98 Va. 1.....	856, 1726
Southerland v. Albany Cold Storage Co., 171 N. Y. 269.....	132
Southerland v. Texas &c. R. Co., (Tex. Civ. App.) 40 S. W. Rep. 193.....	421
Southwestern R. Co. v. Knott, 48 Ga. 516.....	28
Southwestern R. Co. v. Paulk, 24 Ga. 356.... (487, 687)	
Southwestern R. Co. v. Singleton, 67 Ga. 306.... (486)	
Southwestern T. &c. Co. v. Beatty, 63 Ark. 65.....	1060
Southwestern T. &c. Co. v. Gotcher, (Tex.) 53 S. W. Rep. 686.....	1160, 2445, 2428
Southwick v. Esles, 7 Cush. 385.....	12, 29
Southworth v. Old Colony R. Co., 105 Mass. 342.....	2361
Southworth v. Shea, 131 Ala. 419.....	1954
Soverison v. Menasha &c. R. Co., 56 Wis. 338.....	1108
Soward v. R. Co., 30 Ind. 552.... (1005)	
Soward v. R. Co., 33 Ind. 387.... (1005)	
Sowles v. National Union Bank, 82 Fed. Rep. 139.....	95

	PAGE
Spade v. Lynn &c. R. Co., 172 Mass. 488.....	414, 530, 867, 894
Spafford v. Harlow, 3 Allen, 176.....	2373, 2383
Spaight v. McGovern, 16 R. I. 658.....	991
Spaine v. Stiner, 51 App. Div. 481.....	1340
Spalding v. Gates, (Ky.) 41 S. W. Rep. 440.....	179
Spalding v. Vilas, 161 U. S. 483.....	88
Spalding v. Waverly, 12 App. Div. 594.....	2023
Span v. Ely, 8 Hun, 255.....	1568
Spangler v. San Francisco, 84 Cal. 12.....	1907
Spannagle v. Chicago &c. R. Co., 31 Ill. App. 460.....	383
Sparhawk v. Salem, 1 Allen, 30.....	1955, 1957
Sparks Man. Co. v. Newton, 57 N. J. Eq. 367.....	2084
Sparks v. Transfer Co., 104 Mo. 531.... (13)	
Spatz v. Lyons, 55 Barb. 476.... (1176).....	1148
Spaulding v. Beverly, 167 Mass. 149.....	1895
Spaulding v. Chicago &c. R. Co., 98 Iowa, 205.....	873, 1201
Spaulding v. Chicago &c. R. Co., 30 Wis. 110.....	1253, 1256, 1262
Spaulding v. Chicago &c. R. Co., 33 Wis. 582.....	1259
Spaulding v. O'Brien, 26 Misc. 184.....	1682
Spaulding v. Jarvis, 32 Hun, 621.....	2229, 2309
Spear v. Cummings, 23 Pick. 224.....	85
Spear v. Richardson, 34 N. H. 428.....	1207
Spearbracker v. Larrabee, 25 N. W. (Wis.) 555.... (698)	
Spears v. Smith, 9 Lea, (Tenn.) 483.... (87)	
Speckman v. Boehm, 36 App. Div. 202.....	1329
Speckman v. Krieg, 79 Mo. App. 376.....	979, 983, 986
Spees v. Bogs, 198 Pa. St. 112.....	1461, 1625
Spellman v. Bannigan, 36 Hun, 174.....	1317, 1325
Spence v. Chicago &c. R. Co., 25 Iowa, 139.... (1040)	
Spence v. Chicago &c. R. Co., (Iowa) 90 N. W. Rep. 346.....	381
Spence v. Shultz, 37 Pac. Rep., (Cal.) 220.... (646)	
Spencer v. Brooks, 97 Ga. 681.....	1647
Spencer v. Campbell, 9 Watts. & S. 32.....	1108
Spencer v. Chicago &c. R. Co., 105 Wis. 311.....	1103, 1118, 1138
Spencer v. Halstead, 1 Denio. 606.... (665)	
Spencer v. Lovejoy, 96 Ga. 657.....	356, 567
Spencer v. McManus, 5 Misc. 267.....	1099, 1361
Spencer v. Mil. & P. R. Co., 17 Wis. 487.... (540)	
Spencer v. Murphy, 6 Colo. App. 453.....	888, 1245
Spencer v. N. Y. C. &c. R. R. Co., 67 Hun, 196.....	1431, 1584
Spencer v. New York, 135 N. Y. 619.....	2222
Spencer v. Ohio &c. R. Co., 130 Ind. 181.....	1614
Spencer v. Plano Man. Co., 79 Minn. 35.....	118
Spencer v. Sardinia, 42 App. Div. 472.....	1838, 2018
Spencer v. Utica & Schenectady R. Co., 5 Barb. 337.....	757
Spencer v. Shelburne, 11 Tex. Civ. App. 521.....	113
Spencer v. Worthington, 44 App. Div. 496.....	1411, 1574
Spengeman v. Alter, 7 Misc. 61.....	1355
Spering's Appeal, 71 Pa. St. 11.....	68, 74
Spero v. Holoschutz, 36 Misc. 764.....	188
Spero v. Long Island R. Co., 21 Misc. 683.....	460
Spetler v. James, 32 Ind. 202.... (182)	
Spicer v. Chesapeake &c. R. Co., 34 W. Va., 514.... (1021)	
Spicer v. Iron Co., 138 Mass. 426.....	1415
Spicer v. South Boston Iron Co., 138 Mass. 426.....	1468
Spiegel v. Pacific Mail S. S. Co., 26 Misc. 414.....	234
Spier v. The City of Brooklyn, 139 N. Y. 6.....	1291
Spillane v. Eastman's Co., 33 Misc. 463.....	1623
Spillane v. Fitchburg, 177 Mass. 87.....	1886
Spillane v. Missouri &c. R. Co., 135 Mo. 414.....	770
Spille v. Wisconsin B. &c. Co., 105 Wis. 340.....	1108
Spinette v. Atlas S. Co., 14 Hun, 110.... (238)	
Spink v. Louisville &c. R. Co., (Ky.) 52 S. W. Rep. 1067.....	564, 830

## TABLE OF CASES.

CCXCXV

	PAGE
Spinner v. N. Y. &c. R. Co., 67 N. Y. 153.... (1037).....	1001, 1012, 1039, 1047
Spinner v. N. Y. C. & H. R. Co., 6 Hun, 600.....	1047
Splitdorf v. State, 108 N. Y. 205.....	696, 2106, 2132, 2220, 2221
Spofford v. Harlow, 85 Mass. 176.....	663, 2346
Spofford v. Pennsylvania R. Co., 11 Pa. Super. Ct. 97.....	208, 335
Spohn v. Dives, 174 Pa. St. 474.....	2101
Spohn v. Missouri Pac. R. Co., 101 Mo. 417.....	533
Spokane Truck Co. v. Hoefer, 2 Wash. 45.....	907
Spooner v. B. C. R. Co., 54 N. Y. 230.....	534
Spooner v. Delaware, Lack. &c. R. Co., 115 N. Y. 22.....	690, 816
Spooner v. Hannibal &c. R. Co., 23 Mo. App. 403.....	619
Spooner v. Holmes, 102 Mass. 503.... (182)	
Spooner v. Mattoon, 40 Vt. 300.... (102)	
Spooner v. St. Louis &c. R. Co., 66 Mo. App. 32.....	1053
Spradley v. Alabama M. R. Co., 110 Ala. 687.... (751)	
Sprague v. Fremont R. Co., 6 Dak. 86.....	1000
Sprague v. New York &c. R. Co., 68 Conn. 345.....	1527
Sprague v. Rochester, 159 N. Y. 20.....	1870
Sprague v. Southern R. Co., 92 Fed. Rep. 59.....	404
Sprague v. Smith, 29 Vt. 421.....	91, 95, 342
Sprague v. W. U. T. Co., 6 Daly, 200.....	2416, 2447, 2448
Sprangler v. Eicholtz, 25 Ill. 297.... (103)	
Sprankle v. Bart, 25 Ind. App. 681.....	2126
Spray v. Ammerman, 66 Ill. 309.... (989).....	977
Sprenger v. Tacoma T. Co., 15 Wash. 660.....	833
Spring v. Glenn, 12 Bush. (Ky.) 172.... (948)	
Spring v. Hagar, 145 Mass. 186.... (153)	
Spring Co. v. Edgar, 99 U. S. 654.... (983).....	1093
Springer v. Bowdoinham, 7 Greenl. 442.....	1938
Springer v. Detroit, 118 Mich. 69.....	2013
Springer v. Ford, 88 Ill. App. 579.....	1076, 1343, 2125
Springer v. Wescott, 166 N. Y. 117.....	286
Springer v. Westcott, 2 App. Div. 295.....	1099, 1100
Springfield v. Boyle, 164 Mass. 591.....	1917
Springfield v. Purdy, 61 Ill. App. 114.....	1869
Springfield v. Tomlinson, 79 Ill. App. 300.....	1862
Springfield &c. Co. v. Green, 25 Ill. App. 106.....	30
Springfield &c. R. Co. v. Hoeffner, 175 Ill. 634.....	471, 496, 1155
Springfield &c. Ins. Co. v. Keeseville, 148 N. Y. 46.....	1853, 1989, 1994
Spring Valley v. Garvin, 182 Ill. 232.....	1948, 1949
Spring Valley v. Garvin, 81 Ill. App. 456.....	918, 1948
Spring Valley Coal Co. v. Rowatt, 196 Ill. 156.....	1488, 1801
Spring Valley Coal Co. v. Rowatt, 96 Ill. App. 248.....	660, 1678
Spring Valley Coal Co. v. Spring Valley, 65 Ill. App. 571.....	1910
Spring Valley Coal Co. v. Spring Valley, 72 Ill. App. 629.....	1912
Spring Valley Coal Co. v. Spring Valley, 96 Ill. App. 230.....	1912
Springs v. South Bound R. Co., 46 S. C. 104.....	253, 271, 335, 1195
Springside Coal Min. Co. v. Grogan, 67 Ill. App. 487.....	1451
Sprong v. Boston & Albany R. Co., 58 N. Y. 56.....	1514, 1532, 1735
Spronk v. Addyston Pipe &c. Co., 19 Oh. C. C. 714.....	1676, 1721
Sproul v. Seattle, 17 Wash. 256.....	1916
Sprowls v. Morris, 179 Pa. St. 219.....	1851
Spry Lumber Co. v. Duggan, 182 Ill. 218.....	1625
Spry Lumber Co. v. Duggan, 80 Ill. App. 394.....	1603
Spurr v. United States, 87 Fed. Rep. 701.....	75
Squire v. N. Y. &c. R. Co., 98 Mass. 239.....	247, 272, 283
Squire v. W. U. T. Co., 98 Mass. 232.....	2440, 2448
Squires v. Chillicothe, 89 Mo. 226.....	1206
Squiers v. Neenah, 24 Wis. 588.....	88
Sroufe v. Moran Bros. Co., (Wash.) 68 Pac. Rep. 896.....	1634
Staal v. Grand St. &c. R. Co., 107 N. Y. 625.....	836
Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511.....	2276, 2291
Stabenau v. Atlantic Ave. R. Co., 15 App. Div. 408.....	2301

	PAGE
Stacey v. Winona &c. R. Co., 42 Minn. 158.... (1022)	638
Stack v. Bangs, 6 Lansing, 262.....	1322
Stack v. Harris, 111 Ga. 149.....	1956
Stack v. Portsmouth, 52 N. H. 221.....	2037
Stack v. New York &c. R. Co., 177 Mass. 155.....	2169
Stacklie v. St. Paul &c. R. Co., 73 Minn. 37.....	1694
Stackman v. Chicago R. Co., 80 Wis. 428.....	1008, 1010
Stackpole v. Healey, 16 Mass. 33.....	746
Stackus v. N. Y. C. & H. R. R. Co., 79 N. Y. 464.....	1924, 2362
Stacy v. Phelps, 47 Hun, 54.....	1519
Stasch v. Cornwall Ore Bk. Co., 19 Pa. Super. Ct. 113.....	1543
Stafford v. Chicago &c. R. Co., 114 Ill. 244.....	1008
Stafford v. Ingersoll, 3 Hill, 38.... (1007)	
Stafford v. Oskaloosa, 57 Iowa, 749.... (730)	
Stafford v. Oskaloosa, 64 Iowa, 251.....	1081
Stafford v. Rubens, 115 Ill. 196.....	719, 878, 1927
Stager v. Troy Laundry Co., 38 Ore. 480.....	1721
Stagg v. Edward Western Tea &c. Co. (Mo.) 69 S. W. Rep. 391.....	1596, 1777
Stahl v. Lake Shore &c. R. Co., 117 Mich. 273.... (779)	
Stahl v. Duluth, 71 Minn. 341.....	1644
Stahler v. Philadelphia &c. R. Co., 16 Montg. Co. L. Rep. 198.....	937
Stainback v. Meridian, 79 Miss. 447.....	1863
Stalcup v. Louisville &c. R. Co., 16 Ind. App. 584.....	380, 1396
Stalder v. Huntington, 153 Ind. 354.....	1559, 2008
Staley v. New York, 37 App. Div. 598.....	1892
Staley v. Turner, 21 Mo. App. 244.....	2181
Stallnecht v. P. R. R. Co., 13 Hun, 451.....	961
Stanchfield v. Newton, 142 Mass. 110.....	1962, 1966
Standard Brewery v. Malting Co., 171 Ill. 602.... (104)	
Standard Brewery v. Hales &c. Malting Co., 70 Ill. App. 363.....	113
Standard Cement Co. v. Minor, 27 Ind. App. 479.....	2044
Standard Oil Co. v. Eiler, (Ky.) 61 S. W. Rep. 8.....	676, 1503
Standard Oil Co. v. Helmick, 148 Ind. 457.....	1581
Standard Plate Glass Co. v. Butler Water Works, 5 Pa. Super. Ct. 563.....	2084
Stanfield v. Anderson, (Ariz.) 43 Pac. Rep. 221.....	2357, 2358
Stanford v. San Francisco, 111 Cal. 198.....	1965
Stanke v. St. Paul, 71 Minn. 51.....	1895
Stanley v. Durham &c. R. Co., 120 N. C. 514.... (787)	
Stanley v. Durham &c. R. Co., 120 N. C. 514.... (787)	2155
Stanton v. Leland, 4 E. D. Smith, 88.....	137, 151
Stanton v. Met. R. Co., 14 Allen, 485.....	2375
Stanton v. Scranton Co., 11 Pa. Super. Ct. 180.....	1949, 2248
Stanwick v. Butler-Ryan Co., 93 Wis. 430.....	1425
Stapf v. Loewer's &c. Brew. Co., 1 App. Div. 405.....	1484
Staples v. Canton, 69 Mo. 592.....	1842
Staples v. Dickson, 88 Me. 362.....	1867
Stapleton v. Newburgh, 9 App. Div. 39.....	916, 1118
Star Elevator Co. v. Carlson, 69 Ill. App. 212.....	1719
Starboard v. Detroit &c. R. Co., 122 Mich. 23.....	2143
Stark v. Lancaster, 57 N. H. 88.....	1820
Starks v. People, 5 Denio, 108.... (1797)	
Starr v. Great Northern R. Co., 67 Minn. 18.....	264
Starr v. Kreuzberger, 129 Cal. 123.....	1737
Starr v. Rochester, 6 Wend. 654.....	2001
Startler v. McArthur, 33 Mo. App. 218; Bell v. Leslie, 24 Mo. App. 661.....	673
State v. Bangor, 30 Me. 341.....	1932
State v. Bates, 48 S. C. 95.....	2030
State v. Bank of Commerce, 61 Neb. 22.... (1084)	
State v. Baltimore R. Co., 24 Ind. 84.... (778)	
State v. Baltimore &c. R. Co., 58 Md. 221.....	1119
State v. Baltimore R. Co., 58 Md. 482.... (751)	
State v. Baltimore &c. R. Co., 69 Md. 339.....	768, 2148
State v. Bardon, 103 Wis. 297.....	2016
State v. Barnes, 20 R. I. 525.....	1917, 2096



## TABLE OF CASES.

ccxcvii

	PAGE
State v. Bloomfield, 59 N. J. L. 109.....	800, 808
State v. Boston &c. R. Co., 80 Me. 43.... (751)	
State v. Boston &c. R. Co., 38 Alb. L. J. (Me.) 269.... (730)	
State v. Buchanan, (Tenn.) 52 S. W. Rep. 480.....	87
State v. Buswell, (Neb.) 24 L. R. A. 68; 51 N. W. 728.....	2198
State v. Campbell, 80 Mo. App. 110.....	2246
State v. Campbell, 32 N. J. L. 309.... (586).....	587
State v. Cape May, 59 N. J. L. 404.....	2279, 2284
State v. Cass County, 58 Neb. 244.....	1832
State v. Cecil County, 54 Md. 426.....	884
State v. Coit, 8 Oh. S. & C. P. Dec. 62.....	87
State v. Consolidated Gas Co., 85 Md. 637.....	1384
State v. Copeland, 96 Tenn. 296.....	87
State v. Cumberland &c. R. Co., 87 Md. 183.... (761).....	777, 791
State v. Delaware &c. R. Co., 19 Vroom, (N. J.) 55.... (550)	
State v. De Poister, (Nev.) 25 Pac. Rep. 1000.....	1194
State v. Detroit, 113 Mich. 643.....	849
State v. Elizabeth, 58 N. J. L. 619.....	2339
State v. Fox, (Md.) 26 L. R. A. 287.....	955
State v. Gates, 20 Mo. 400.....	1165
State v. Goold, 53 Me. 279.... (553)	
State v. Gooch, 97 N. C. 186.....	94
State v. Goold, 53 Maine, 279.... (553)	
State v. Grand Trunk R. Co., 61 Me. 114.....	942
State v. Halstead, 73 Iowa, 376.....	2181
State v. Hayward, 62 Minn. 474.....	1112
State v. Henzler, N. J. L., 41 Atl. Rep. 228.....	2097
State v. Housekeeper, 7 Md. 163.....	2197
State v. Hungerford, 39 Minn. 6.... (552)	
State v. Janesville St. R. Co., 87 Wis. 72.....	1058, 1064
State v. Kansas City &c. R. Co., 70 Mo. App. 634.....	1166
State v. Kent County, 83 Md. 377.....	1827
State v. Knight, 43 Me. 11.... (1220)	
State v. Kowolski, 96 Iowa, 346.....	2342, 2367
State v. Lake Erie &c. R. Co., 83 Fed. Rep. 284.....	820
State v. Lazaretto Guano Co., 90 Md. 177.....	1557
State v. Lord, 28 Ore. 498.....	2030
State v. Maine &c. R. Co., 76 Me. 357.... (751).....	753
State v. Maine &c. R. Co., 81 Me. 84.....	612
State v. Malster, 37 Md. 287.....	1642
State v. Malster & Reaney, 57 Md. 287 (307).....	1669
State v. Manchester &c. R. Co., 52 N. H. 528.....	663
State v. Mease, 69 Mo. App. 581.....	990
State v. Missouri P. R. Co., 71 Mo. App. 385.....	619
State v. Monroe, 121 N. C. 677.....	1379
State v. Moore, 74 Mo. 413.... (73)	
State v. Morris &c. R. Co., 25 N. J. L. 437.... (818)	
State v. Musgrave, 43 W. Va. 672.....	1236
State v. Neb. Tel. Co., 17 Neb. 126.....	2386, 2390
State v. Neodeaha, 3 Kan. App. 319.....	1809, 2029, 2030
State v. Overton, 24 N. J. L. 434.....	569, 1731
State v. Pierre, (S. D.) 90 N. W. Rep. 1047.....	1085
State v. Pike, 65 Me. 111.... (1220)	
State v. Pittsburg &c. R. Co., 45 Md. 41.... (962)	
State v. Philadelphia &c. R. Co., 60 Md. 555.....	1118
State v. Powell, 67 Mo. 395.... (73)	
State v. Pulle, 12 Minn. 170.... (1001)	
State v. Railroad, 52 N. H. 528.....	663
State v. Rubey, 77 Mo. 610.... (73)	
State v. Ryland, 163 Mo. 280.....	86
State v. Sheppard, 64 Minn. 287.....	1954
State v. Steele, 106 N. C. 766.....	136
State v. Telephone Co., 36 Ohio St. 296.....	2386

	PAGE
State v. Trenton Pass. R. Co., 58 N. J. L. 666.....	2339
State v. W. U. T. Co., 17 Neb. 126.....	2389
State v. Wabash Paper Co., 21 Ind. App. 167.....	2096
State v. Walker, 16 Me. 241.....	1768
State Board of Health v. Jersey City, 55 N. J. Eq. 116.....	2097
State Bank v. McCoy, 69 Pa. St. 204.... (183)	
State Consolidated T. Co. v. Reeves, 58 N. J. L. 573.....	2272
State Nat. Bank v. Chicago &c. R. Co., 72 Mo. App. 82.....	250, 350
State Nat. Bank v. Thomas Man. Co., 17 Tex. Civ. App. 214.....	43
State &c. Bank v. Buhl, (Mich.) 88 N. W. Rep. 471.....	628
State Trust Co. v. Kansas City &c. R. Co., 111 Fed. Rep. 769.....	1710
Staton v. Wimberley, 122 N. C. 107.....	87
Statton v. Stone, (Colo. App.) 61 Pac. Rep. 481.... (175)	
Staub v. Kendriek, 121 Ind. 226.....	614
Stawffacher v. Sylvester, 113 Wis. 559.....	1937
Steam Navigation Co. v. Weed, 17 Barb. 378.....	355
Steamboat Co. v. Brockett, 121 U. S. 637.....	19, 30, 590
Steamboat New World v. King, 16 How. (U. S.) 469.....	389, 417
Steamboat Palace v. Vanderpool, 16 B. Mon. 302.... (610)	
Steamer America, 6 Benedict, (U. S.) 122.....	203, 204
Steamer New Philadelphia, 1 Black, (U. S.) 62.....	535
Stearns v. Ferrand, 29 Misc. 292.....	107, 112
Stearns v. Ontario Spinning Co., 184 Pa. St. 519.....	1098, 1107
Stearns v. Peidy, 33 Ill. App. 246.....	1738
Stearney v. Metropolitan Street R. Co., 58 App. Div. 172.....	1237
Stebbins v. Central Vermont R. Co., 54 Vt. 464.....	1263, 1265
Stebbins v. Crooked Creek R. Co., (Iowa) 90 N. W. Rep. 355.....	1798
Steel v. Flagg, 5 Barn. & Ald. 342.... (300)	
Steele v. Buckhardt, 104 Mass. 59.....	663
Steele v. Kurtz, 28 Oh. St. 191.... (945)	
Steele v. Northern P. R. Co., 21 Wash. 287.....	671, 720, 771, 787
Steele v. Pittsburg &c. R. Co., 4 Oh. Dec. 350.....	2134, 2152
Steele v. Southern R. Co., 55 S. C. 389.... (403).....	1102
Steele v. Townsend, 37 Ala. 247.....	243, 1099
Steen v. Santa Clara Mill &c. Co., 134 Cal. 355.....	1200
Steers v. Liverpool &c. S. Co., 57 N. Y. 1.... (279)	
Steers v. N. Y. C. &c. R. Co. 45 N. Y. 184.....	274, 293, 310
Stehman's Appeal, 5 Barr. 413.... (91)	
Steiger v. Erie R. Co., 5 Hun, 345.....	109
Stein v. Koster, 66 N. J. L. 155.....	217
Steinbock v. Covington &c. Bridge Co., 61 Oh. St. 215.....	1926
Steinbock v. Covington &c. Co., 4 Oh. N. P. 229.....	652
Steinhart v. Boker, 34 Bart. 436.... (184).....	2079
Steinhofel v. Chicago &c. R. Co., 92 Wis. 123.....	183
Steinle v. Metropolitan Street R. Co., 69 App. Div. 85.....	752, 1161
Steinnett v. Sherman, (Tex. Civ. App.) 43 S. W. Rep. 847.....	680
Steinson v. R. Co., 98 Mass. 82.... (348)	
Steinweg v. Biel, 16 Misc. 47.....	1986
Steinweg v. Erie Railway Co., 43 N. Y. 123.... (238)	
Stelk v. McNulta, 99 Fed. Rep. 138.....	1362
Steller v. Hart, 65 Mich. 644.....	271, 1271
Stell's Appeal, 10 Pa. St. 149.... (74)	
Stendal v. Boyd, 67 Minn. 279.....	2278, 2279, 2336
Stendal v. Boyd, 73 Minn. 53.....	1509
Stephani v. Brown, 40 Ill. 428.....	2049
Stephani v. Manitowoc, 101 Wis. 59.....	2134
Stephani v. Southern P. R. Co., 19 Utah, 196.....	2125
Stephen v. Woodruff, 18 App. Div. 625.....	1839
Stephens v. Lafayette R. Co., 9 Ind. 392.....	1616, 1655
Stephens v. People, 4 Park. Cr. R. 397.... (1797)	
Stephens v. Summerfield, 22 Tex. Civ. App. 182.....	1368
Stephens v. Vroman, 16 N. Y. 383.....	2055
Stephens v. White, 2 Wash. (Va.) 203.....	195
	1938
	2185

## TABLE OF CASES.

ccxcix

	PAGE
Stephenson v. Duncan, 73 Wis. 404.....	1573, 1559
Stephenson v. Grand Trunk R. Co., 34 Mich. 323.... (1036)	
Stephenson v. So. Pac. Co., 93 Cal. 558.....	30
Stephenville v. Bower, (Tex. Civ. App.) 68 S. W. Rep. 833.....	1956
Steppe v. Alter, 48 La. Ann. 363.....	2267
Ster v. Tuety, 45 Hun, 49.....	1131
Sterger v. Van Siclen, 132 N. Y. 499.....	1351
Sterling Iron & Co. v. Sparks Man. Co., (N. J. L.) 38 Atl. Rep. 426.....	2096
Stern v. Lannig, 106 La. 738.....	2190
Stern v. Michigan & C. R. Co., 76 Mich. 591.... (1026)	
Sternberg v. Wilcox, 96 Tenn. 163.....	1344
Sternenberg v. Mailhos, 99 Fed. Rep. 43.....	879, 953
Sternfels v. Metropolitan Street R. Co., 73 App. Div. 494.....	883, 924
Stetler v. Railroad Co., 49 Wis. 609.....	1474
Steuer v. Metropolitan Street R. Co., 46 App. Div. 500.....	495
Stevens v. Armstrong, 6 N. Y. 435.....	2, 1395
Stevens v. Chamberlain, 100 Fed. Rep. 378.....	1398, 1666
Stevens v. Dudley, 56 Vt. 157.....	2131
Stevens v. Lake Shore & C. R. Co., 20 Oh. C. C. 41.....	252, 289, 339
Stevens v. Missouri P. R. Co., 67 Mo. App. 356.....	763, 798
Stevens v. Nichols, 155 Mass. 472.....	2112
Stevens v. Pantlind, 95 Mich. 145.....	1247
Stevens v. Reed, 60 N. Y. Supp. 726.....	2205
Stevens v. R. Co., 10 Lea, (Tenn.) 448.... (957)	
Stevens v. San Francisco R. Co., 100 Cal. 554.....	1727
Stevens v. Siegel-Cooper Co., 32 Misc. 250.....	1154, 1162
Stevens v. Walker, 55 Ill. 151.....	2174
Stevens v. Walpole, 76 Mo. App. 213.....	1156, 1876, 2256
Stevens Co. v. Brooklyn Heights R. Co., 59 App. Div. 23.....	2311
Stevenson v. Chicago & C. R. Co., 18 Fed. Rep. 493.... (688)	
Stevenson v. Equitable Gas Light Co., 60 Hun, 77.....	696
Stevenson v. Jewett, 16 Hun, 210.....	1467, 1483, 1640
Stevenson v. Joy, 152 Mass. 45.... (4)	
Stevenson v. Montreal T. Co., 16 U. C. Q. B. 530.....	2394
Stevenson v. Pucci, 32 Misc. 464.....	2072, 2096
Stevenson v. Pullman Palace Car. Co., (Tex. Civ. App.) 32 S. W. Rep. 335.....	297, 601
Stevenson v. West Seattle Land and Improvement Co., 22 Wash. 84.....	366
Stever v. New York & C. R. Co., 7 App. Div. 392.....	1229
Steves v. Oswego & C. R. Co., 18 N. Y. 422.... (757)	
Stewart v. Baltimore & C. R. Co., 168 U. S. 445.....	964
Stewart v. Brooklyn & C. R. Co., 90 N. Y. 588.....	520, 522
Stewart v. Chester & C. R. Co., 6 Del. Co. Rep. 434.....	1937
Stewart v. Chester & C. R. Co., 3 Pa. Super. Ct. 86.....	1123, 2248
Stewart v. Cleveland & C. R. Co., 21 Ind. App. 218.....	282
Stewart v. Comer, 100 Ga. 754.....	300
Stewart v. Everts, 76 Wis. 35.....	1179
Stewart v. Ferguson, 34 App. Div. 515.....	1679, 1784
Stewart v. Head, 70 Ga. 449.....	155
Stewart v. International Paper Co., 96 Me. 30.....	1536, 1596, 1638
Stewart v. International & C. R. Co., 53 Tex. 289.....	431, 443
Stewart v. Jermon, 5 Pa. Super. Ct. 609.....	2257
Stewart v. Long Island R. Co., 54 App. Div. 623.....	735, 910
Stewart v. Louisville & C. R. Co., 83 Ala. 493.... (948)	
Stewart v. Michigan C. R. Co., 119 Mich. 91.....	677, 751
Stewart v. Nashville, 96 Tenn. 50.....	702, 1092
Stewart v. Porter Man. Co., 13 St. Rep. 220.....	2366
Stewart v. Ripon, 38 Wis. 584.... (896)	
Stewart v. Seaboard Air Line R., 115 Ga. 624.....	1403, 1684
Stewart v. St. Paul & C. R. Co., 78 Minn. 110.....	1238
Stewart v. Stone, 127 N. Y. 500.....	109, 129, 1104
Stewart v. Terre Haute R. Co., 103 Ind. 44.... (944)	
Stewart v. Toledo Bridge Co., 15 Oh. C. C. 601.....	1478, 1585
Stewart v. Watterboro & C. R. Co., 64 S. C. 92.....	2030

	PAGE
Stierle v. Union R. Co., 156 N. Y. 70, 684.....	390
Stiles v. Atlanta &c. R. Co., 65 Ga. 370.... (439).....	383, 440
Stiles v. Cardiff &c. Nav. Co., 33 L. J. (Q. B.) 319.... (983)	
Stiles v. Danville, 42 Vt. 282.... (479)	
Stiles v. Richie, 8 Colo. App. 393.....	1451, 1559
Still v. Nassau Electric R. Co., 32 App. Div. 276.....	506
Still v. Houston, (Tex. Civ. App.) 66 S. W. Rep. 76.....	1828, 1942
Stiller v. Bohn Man. Co., 80 Minn. 1.....	929, 1411, 1416, 1564
Stillson v. Han. &c. R. Co., 67 Mo. 671.... (714)	
Stillwell v. South Louisville Land Co., (Ky.) 58 S. W. Rep. 696.....	1324
Stimper v. Fuchs &c. Co., 26 App. Div. 333.....	1597, 1628
Stimpson Computing Scale Co. v. Schetromf, 13 Pa. Super. Ct. 377.....	101
Stimson v. Conn. R. R. Co., 98 Mass. 83.....	616, 617, 623, 651
Stimson v. Milwaukee &c. R. Co., 75 Wis. 381.....	531
Stinson v. Kenny, 176 Mass. 429.... (657)	
Stinson v. N. Y. Central R. R. Co., 32 N. Y. 333.....	261, 303, 1761
Stisser v. New York &c. R. Co., 32 App. Div. 98.....	1031
Stitt v. Huidekopers, 17 Wall. 384.....	1165
Stobba v. Fitzsimmons &c. Co., 58 Ill. App. 427.....	1724
Stock v. Boston, 149 Mass. 410.....	1964
Stock v. Le Boutillier, 18 Misc. 349.....	1132
Stock v. Le Boutillier, 19 Misc. 112.....	1406, 1497
Stock v. Wood, 136 Mass. 353.....	721
Stockwell v. Chicago &c. R. Co., 106 Iowa, 63.....	1465, 1586
Stock-Yarda Co. v. Hawkins, 8 Kan. App. 155.....	825
Stoddard v. Brazell, 92 Hun, 607.....	1104
Stoddard v. New York &c. R. Co., (Mass.) 63 N. E. Rep. 927.....	373
Stoddard v. St. Louis &c. R. Co., 65 Mo. 521.....	698
Stoddard v. Saratoga Springs, 127 N. Y. 261.....	1903
Stoddard v. N. Y., L. E. & W. R. Co., 50 Hun, 221.....	1760
Stokes v. Pease, 79 Hun, 304.....	848
Stokes v. Ralpho, 187 Pa. St. 333.....	1851
Stokes v. Saltonstall, 13 Peters, 181.... (686).....	441, 518, 687
Stokes v. Suffolk &c. R. Co., 107 N. C. 178.... (432)	
Stokes v. Terrell, (Miss.) 23 South. Rep. 371.....	72
Stokes v. Twitchem, 8 Taunt. 492.....	2378
Stoll v. Daly Min. Co., 19 Utah, 271.....	1136, 1805
Stoltz v. Baltimore &c. R. Co., 7 Oh. Dec. 435.....	754, 772, 785, 1094, 1117
Stomne v. Hanford Produce Co., 108 Iowa, 137.....	1564, 1739, 1750
Stone v. C. & N. W. Co., 7 Iowa, 82.....	586
Stone v. Boscawen Mills, (N. H.) 52 Atl. Rep. 119.....	1599
Stone v. Cheshire R. Co., 19 N. H. 427.....	652
Stone v. Chicago &c. R. Co., 47 Ia. 82.....	587
Stone v. Chicago &c. R. Co., 8 S. D. 1.....	319
Stone v. Dickinson, 7 Allen, 26.....	2208
Stone v. Dry Dock &c. R. R. Co., 115 N. Y. 104.....	674, 707, 710, 716, 2301
Stone v. Groton Bridge &c. Co., 77 Hun, 99.....	961
Stone v. Hills, 45 Conn. 44.... (10)	
Stone v. Kopka, 100 Ind. 458.... (1000)	
Stone v. Pendleton, 21 R. I. 332.....	1129, 1849, 1851
Stone v. Poland, 81 Hun, 132.....	1938, 1939
Stone v. Poughkeepsie, 16 App. Div. 582.....	1890, 1897
Stone v. Railway Co., 115 N. Y. 105.....	2228, 2229
Stone v. State, 138 N. Y. 124.....	2222, 2223
Stonebach v. Thomas Iron Co., 2 Cent. Penn. 604.....	1712
Stonebridge v. Brooklyn C. R. Co., 9 App. Div. 129.....	1636
Stoneman v. Erie Ry. Co., 52 N. Y. 429.... (616)	
Stoner v. Chicago &c. R. Co., 109 Iowa, 551.....	213, 276, 283
Stoner v. Shugart, 45 Ill. 76.... (1000)	
Stoner v. Penn. R. Co., 98 Ind. 384.....	441
Stoothoff v. Brooklyn &c. R. Co., 50 App. Div. 585.....	1229
Stoodt v. Detroit &c. R. Co., (Mich.) 83 N. W. 26.....	1112
Stopp v. Fitchburg R. Co., 80 Hun, 178.....	750

## TABLE OF CASES.

ccci

	PAGE
Storrs v. Grand Rapids, 110 Mich. 483.....	2047
Storrs v. Los Angeles T. Co., 134 Cal. 91.....	837
Storrs v. Utica, 17 N. Y. 104.....	631, 633, 1925, 1945, 2249, 2251
Story v. Ashton, L. R. 4 Q. B. 476.... (16)	
Story v. Chicago R. Co., 79 Iowa 402.... (1025)	
Story v. Concord &c. R. Co., (N. H.) 48 Atl. Rep. 288.....	1402
Story v. Railway Co., 90 N. Y. 122.....	2226
Stott v. Churchill, 15 Misc. 80.....	1074
Stottz v. Baltimore &c. R. Co., 7 Oh. N. P. 129.....	1336
Stough v. Ponca Mill Co., 54 Neb. 500.....	192
Stourbridge v. Brooklyn C. R. Co., 9 App. Div. 129.....	1455, 1479
Stover v. Bluehill, 51 Me. 439.... (898)	
Stover Man. Co. v. Millane, 89 Ill. App. 532.....	1122, 1703
Stowe v. Bishop, 58 Vt. 498.....	1145, 1218, 1220
Stowell v. Erie R. Co., 98 Fed. Rep. 520.... (764)	
Stowers v. Citizens' Street R. Co., 21 Ind. App. 434.....	2314
Strabler v. Toledo Bridge Co., 11 Oh. C. D. 87.....	1675, 1679, 3129
Strader v. Monroe County, 202 Pa. St. 626.....	684, 1835
Strahlendorf v. Rosenthal, 30 Wis. 674.....	1510
Straight v. O'Dell, 13 Ill. 232.....	2044
Stranahan &c. Co. v. Coit, 55 Oh. St. 398.....	14, 29
Strand v. Chic. &c. R. Co., 67 Mich. 380.... (704)	
Strattner v. Wilmington City Electric Co., 3 Penn. (Del.) 245.....	837, 1411, 1502
Stratton v. Central &c. R. Co., 95 Ill. 25.... (659)	
Stratton v. Union &c. R. Co., 7 Colo. App. 126.....	1118
Straus v. Kansas City &c. R. Co., 72 Mo. 414.... (472)	
Straus v. K. C. &c. R. Co., 75 Mo. 185.... (474)	
Straus v. Kansas City &c. R. Co., 86 Mo. 421.... (492)	
Strauss v. Haberman Man. Co., 23 App. Div. 1.....	1465
Strauss v. Halerman Man. Co., 25 App. Div. 623.....	1673
Strauss v. Louisville, (Ky.) 55 S. W. Rep. 1075.....	648, 1925
Strauss v. Newburgh &c. R. Co., 6 App. Div. 284.....	728
Strawbridge v. Bradford, 128 Pa. St. 200.....	1079
Streator v. Christman, 182 Ill. 215.....	1872, 1878
Streator v. Christman, 88 Ill. App. 24.....	2260
Streator v. Hamilton, 61 Ill. App. 509.....	1876
Streator v. Liebendorfer, 71 Ill. App. 625.....	1819
Street v. Laumier, 34 Mo. 469.... (828)	
Street R. Co. v. Boddy, 105 Tenn. 666.... (387)	
Street R. Co. v. Bolton, 43 Oh. St. 224.....	1397
Street R. Co. v. Conway, 76 Ill. App. 621.....	1600
Street R. Co. v. Eadie, 43 Oh. St. 91.....	714, 726
Street R. Co. v. Nolthenius, 40 Oh. St. 376.....	2058
Street R. Co. v. Rohner, 6 Oh. C. D. 706.....	921
Streets' Western &c. Line v. Bonander, 196 Ill. 15.....	1597
Street's Western &c. Line v. Bonander, 97 Ill. App. 601.....	1598, 1602
Streifeld v. Shoemaker, 185 Pa. St. 265.....	720, 2356, 2359
Streng v. Ibert Brew. Co., 50 App. Div. 542.....	862
Stricker v. Pennsylvania R. Co., 60 N. J. L. 230.....	565
Stricker v. Reedsburg, 101 Wis. 457.....	1925
Stricksaul v. Barrett, 20 Pick. 415.... (1080)	
Stridgel v. Moore, 55 Iowa, 88.... (888)	
Stringer v. Frost, 116 Ind. 477.....	2343, 2355
Stringer v. Missouri Pac. R. Co., 96 Mo. 299.... (381)	
Stringham v. Hilton, 111 N. Y. 188.....	1067, 1130, 1409
Stringham v. Stewart, 100 N. Y. 516.... (1067).....	1072
Strink v. Pritchett, 27 Ind. App. 582.....	2245
Stroble v. Chicago &c. R. Co., 70 Iowa, 555.....	1543, 1792
Stroher v. Elting, 97 N. Y. 102.....	922, 1364, 2026
Strohm v. N. Y., L. E. &c. R. Co., 96 N. Y. 305.... (1225)	
Strong v. Connell, 115 Mass. 575.... (113)	
Strong v. Sacramento &c. R. Co., 61 Cal. 326.... (810)	
Strother v. South Carolina &c. R. Co., 47 S. C. 375.....	785, 875

	PAGE
Strouse v. Leipf, (Ala.) 23 L. R. A. 622.....	983, 994
Strouse v. Whittesey, 41 Conn. 559.....	2346
Strubing v. Mahar, 46 App. Div. 409.....	974
Struckmeyer v. Lamb, 64 Minn. 57.....	2178
Strudgeon v. Sand Beach, 107 Mich. 496.....	2037
Strup v. Edens, 22 Wis. 432.....	2362
Strutt v. Brooklyn &c. R. Co., 18 App. Div. 134.....	425
Strutzel v. St. Paul &c. R. Co., 47 Minn. 543..... (719)	
Stuart v. Havens, 17 Neb. 211.....	1934, 2038
Stuart v. Hawley, 22 Barb. 619.....	1244, 1246
Stuart v. New Albany Man. Co., 15 Ind. App. 184.....	1682, 1739
Stuart v. W. U. T. Co., 66 Tex. 580.....	2454
Stuber v. Gannon, 98 Iowa, 228.....	1091, 1117
Stuber v. Louisville &c. R. Co., 102 Fed. Rep. 421.....	1618
Stuber v. McEntee, 142 N. Y. 200.....	945, 2042, 2203
Stucke v. Milwaukee &c. R. Co., 9 Wis. 202..... (1022)	1014
Stuckey v. Atlantic Coast-Line Co., 57 S. C. 395.....	936
Studer v. Southern P. R. Co., 121 Cal. 400.....	770
Studeor v. Gouverneur, 15 App. Div. 229.....	1937, 1914, 1915
Studwell v. Rich, 14 Conn. 292..... (1007)	1000
Stump v. Chicago &c. R. Co., 84 Ill. App. 28.....	1030
Stumpe v. Missouri &c. R. Co., 61 Mo. App. 357.....	1054
Stumps v. Kelley, 22 Ill. 140..... (973)	
Sturges v. Theological Education Society, 130 Mass. 414.....	649, 1321
Sturgess v. Bissell, 46 N. Y. 462.....	823
Sturgis v. Robbins, 62 Me. 289.....	1246, 1260
Sturm v. Atlantic Ins. Co., 63 N. Y. 78.....	1308
Sturm v. Boker, 150 U. S. 312..... (104)	101
Sturmwald v. Schrieber, 69 App. Div. 476.....	1132, 1168, 1344
Styles v. Richmond &c. R. Co., 118 N. C. 1084.....	1729
Suber v. Georgia &c. R. Co., 96 Ga. 42..... (463)	
Suburban Electric Co. v. Nugent, 58 N. J. L. 658.....	1063
Suburban R. Co. v. Balkwill, 195 Ill. 535..... (784)	
Succession of Heffner, 49 La. Ann. 407.....	54
Succession of Kaiser, 48 La. Ann. 973.....	59
Suesson v. Kupfer, (R. I.) 45 Atl. Rep. 579.....	2255
Sugar Creek Coal Min. Co. v. Peterson, 177 Ill. 324.....	1136, 1451
Sullivan v. Boston & A. R. Co., 156 Mass. 378..... (1058)	
Sullivan v. Brooks, 8 Misc. 532.....	2356
Sullivan v. City National Bank, (Tex. Civ. App.) 65 S. W. Rep. 39.....	2237
Sullivan v. Consolidated T. Co., 198 Pa. St. 187.....	2317
Sullivan v. Crysolite &c. Co., 21 Fed. Rep. 892.....	1119
Sullivan v. Delaware &c. Canal Co., (Vt.) 47 Atl. Rep. 1084.....	431, 1129
Sullivan v. Dunham, 10 App. Div. 438.....	1132
Sullivan v. Dunham, 35 App. Div. 342.....	642
Sullivan v. Durham, 161 N. Y. 290.....	945, 2115
Sullivan v. Dwyer, (Tex. Civ. App.) 42 S. W. Rep. 355.....	181
Sullivan v. Indiana Man. Co., 113 Mass. 396.....	1443, 1583, 1544, 1565
Sullivan v. Jefferson Ave. R. Co., 133 Mo. 1.....	531
Sullivan v. Lewiston Ins. Co., 56 Maine, 507.....	156, 161
Sullivan v. Louisville Bridge Co., 9 Bush. (Ky.) 81.....	663
Sullivan v. McGraw, 118 Mich. 39.....	2193
Sullivan v. McManus, 19 App. Div. 167.....	9, 1937
Sullivan v. Marin, 175 Mass. 422.....	850, 896
Sullivan v. Metropolitan Street R. Co., 53 App. Div. 89.....	1508
Sullivan v. Metropolitan Street R. Co., 54 App. Div. 632..... (932)	
Sullivan v. Nicholson File Co., 21 R. I. 540.....	1622, 1704, 1747
Sullivan v. N. Y. Central &c. R. Co., 34 N. Y. 29..... (673)	
Sullivan v. New York &c. R. Co., 73 Conn. 203.....	787, 1604
Sullivan v. New York &c. R. Co., 175 Pa. St. 361..... (758)	
Sullivan v. Phila. &c. R. Co., 30 Pa. St. 234.....	1013
Sullivan v. Philadelphia R. Co., 6 Cas. (Pa.) 234..... (513)	411
Sullivan v. Pittsburg, 5 Pa. Super. Ct. 357.....	1813

## TABLE OF CASES.

ccciiii

	PAGE
Sullivan v. Poor, 32 Misc. 575.....	1477
Sullivan v. St. Louis &c. R. Co., (Tex. Civ. App.) 36 S. W. Rep. 1020.....	2144
Sullivan v. Salt Lake City, 13 Utah, 122.....	1127
Sullivan v. Scripture, 3 Allen, 564.....	2363
Sullivan v. Simplex Electrical Co., 178 Mass. 35.....	1504
Sullivan v. Staten Island Electric R. Co., 50 App. Div. 558.....	2338
Sullivan v. Syracuse, 77 Hun, 440.....	2018
Sullivan v. Third Ave. R. Co., 19 App. Div. 195.....	1445, 1710
Sullivan v. Tioga R. Co., 112 N. Y. 643.....	897
Sullivan v. Tioga R. Co., 44 Hun, 304.....	1757
Sullivan v. Union Pac. R. Co., 1 McCrary, (U. S.) 301.....	943
Sullivan v. Vicksburgh &c. R. Co., 39 La. Ann. 801.....	384
Summer v. Utley, 7 Conn. 263.....	2189
Summerhays v. Kan. Pac. R. Co., 2 Colo. 484.....	1602
Summers v. Crescent City R. Co., 34 La. Ann. 139.....	541
Summers v. Hannibal &c. R. Co., 29 Mo. App. 41.... (1043)	
Summit Coal Co. v. Shaw, 16 Ind. App. 9.....	1678, 2058
Sun Oil Co. v. Ohio Farmers' Ins. Co., 15 Oh. C. C. 355.....	1300
Sun &c. Ins. Co. v. Brown, (Tex.) 36 S. W. Rep. 591.....	1314
Sunasack v. Morey, 196 Ill. 569.....	1322
Sundy v. Savannah Street R. Co., 96 Ga. 819.....	1710
Supple v. Agnew, 191 Ill. 439.....	1538, 1597
Susong v. Florida &c. R. Co., (Ga.) 41 S. E. Rep. 566.....	223
Sutherland v. Brush, 7 Johns. Ch. 17.... (63).....	62
Sutherland v. Cleveland &c. R. Co., 148 Ind. 308.....	772
Sutherland v. Troy & B. B. R. Co., 125 N. Y. 737.....	1516, 1736
Sutherland v. Troy & Boston Railroad Company, 74 Hun, 162.....	1131
Sutphen v. Hedden, 67 N. J. L. 324.....	2257
Sutphen v. North Hempstead, 80 Hun, 409.....	1936
Suttle v. Lawrence, 119 Mass. 276.....	663
Sutton v. N. Y. C. & H. R. R. Co., 66 N. Y. 243.....	811, 813, 2106
Sutton v. Chicago &c. R. Co., 14 S. D. 111.....	276, 339
Sutton v. Chicago &c. R. Co., 98 Wis. 157.....	779, 820, 1034
Sutton v. Clarke, 6 Taunt. 44.....	2073
Sutton v. Wauwautosa, 29 Wis. 26.....	2377, 2382
Sutwiler v. Chesapeake &c. R. Co., 95 Va. 443.....	1254
Suydam v. Moore, 8 Barb. 358.....	1767
Svenson v. A. M. S. Co., 57 N. Y. 108.....	1757
Swain v. Brooklyn &c. Co., 57 App. Div. 56.....	1606
Swain v. Union &c. Asso., 95 Iowa, 477.....	628
Swan v. Jackson, 55 Hun, 194.....	1380, 1378
Swan v. Manchester &c. R. Co., 132 Mass. 116.... (554).....	553, 586, 587
Swan v. Norvell, 107 Wis. 625.....	954
Swan v. Vogel, 31 La. Ann. 38.... (82)	
Swans v. Keokuk &c. R. Co., (Iowa) 89 N. W. Rep. 1088.....	1235
Swanson v. Central R. &c., 63 N. J. L. 605.... (791)	
Swanson v. Chicago &c. R. Co., 79 Minn. 398.....	1049
Swanson v. Great Northern R. Co., 68 Minn. 184.....	1584
Swanson v. Keokuk &c. R. Co., (Iowa) 89 N. W. Rep. 1088.... (889).....	1258
Swanson v. Menominee &c. R. &c. Co., 113 Mich. 603.....	2267
Swanton v. King, 72 App. Div. 578.....	928
Swart v. Central Trust Co., 27 N. Y. S. R. 113.... (92)	
Swart v. District of Columbia, 17 App. D. C. 407.....	1877, 1927
Swarthout v. N. J. S. Co., 48 N. Y. 209.....	1172
Swartout v. N. Y. C. & H. R. R. Co., 7 Hun, 571.....	1213
Sweain v. Donahue, 105 Wis. 142.....	1462
Sweeney v. Berlin & J. E. Co., 101 N. Y. 520.....	1406, 1582, 1584
Sweeney v. Kansas City &c. R. Co., 150 Mo. 385.... (398).....	510, 516, 2273
Sweeney v. Old Colony &c. R. Co., 92 Mass. 378.... (814).....	1340
Sweeney v. Rozell, 31 Misc. 640.....	1378
Sweeny v. Central Pacific Co., 57 Cal. 15.....	1567
Sweeny v. Scranton T. Co., 5 Lack. Leg. N. 86.....	2335
Sweet v. Barney, 23 N. Y. 335.....	198, 272, 308

	PAGE
Sweet v. Buffalo, 92 Hun, 404.....	2014
Sweet v. Coal Co., 78 Wis. 127.....	1704
Sweet v. Gloversville, 12 Hun, 302.....	639
Sweet v. Louisville &c. R. Co., (Ky.) 67 S. W. Rep. 4.....	458
Sweet v. Postal &c. Tel. Co., 22 R. I. 344.....	2395
Sweet v. Railroad Co., 87 Mich. 559.....	1567, 1692
Sweetland v. Ill. &c. T. Co., 27 Iowa, 432, 433, 455.....	2391, 2397, 2398, 2412, 2429
Sweetland v. Lynn &c. R. Co., 177 Mass. 574.....	509, 546
Sweetwater v. Pate, (Tenn.) 59 S. W. Rep. 480.....	1962, 2084
Swenson v. Bender, 114 Fed. Rep. 1.....	864, 1597, 1628, 1679
Swenson v. Erlandson, (Minn.) 90 N. W. Rep. 534.... (1118)	
Swift v. Applebone, 23 Mich. 252.... (883)	
Swift v. Pacific Mail S. S. Co., 106 N. Y. 206.....	279, 337, 356
Swift v. S. I. R. T. Co., 123 N. Y. 645.....	758, 813
Swift v. Trustees of Schools, 189 Ill. 584.....	84
Swift v. Tyson, 16 Peters, 1.... (184)	
Swift v. Williamsburg, 24 Barb. 427.....	2001
Swift's Estate, 6 Northampton Co. Rep. 105.....	67
Swift El. Light Co. v. Grant, (Mich.) 51 N. W. Rep. 539.....	1162
Swift River Co. v. Fitchburg R. Co., 169 Mass. 326.....	825
Swift & Co. v. Bleise, (Neb.) 89 N. W. Rep. 310.....	1660
Swift & Co. v. Creasey, 9 Kan. App. 303.....	1507
Swift & Co. v. Foster, 163 Ill. 50.....	1370
Swift & Co. v. Fue, 66 Ill. App. 651.....	1497, 1556
Swift & Co. v. Holoubek, 55 Neb. 228.....	864, 1403
Swift & Co. v. Madden, 165 Ill. 41.....	1572
Swift & Co. v. McNery, 90 Ill. App. 294.....	1626, 1724
Swift & Co. v. O'Neill, 187 Ill. 337.....	1572
Swift & Co. v. O'Neill, 88 Ill. App. 162.....	838, 920, 1240, 1673
Swift & Co. v. Rutkowski, 167 Ill. 156.....	1563
Swift & Co. v. Rutkowski, 82 Ill. App. 108.....	1673
Swift & Co. v. Short, 92 Fed. Rep. 567.....	1199, 1633
Swift & Co. v. Wyatt, 75 Ill. App. 348.....	1629, 1677
Swift &c. Co. v. Zerwick, 88 Ill. App. 558.....	1121
Swift &c. R. Co. v. Holoubek, 62 Neb. 231.....	1098
Swigert v. Hannibal &c. R. Co., 75 Mo. 475.....	474, 476
Swinarton v. Le Boutillier, 7 Misc. 639.....	2122
Swingert v. Wingard, 48 S. C. 321.....	1365
Swisher v. Illinois &c. R. Co., 182 Ill. 533.....	1606, 1608
Switzer v. Kee, 69 Ill. App. 499.....	56
Swoboda v. Ward, 40 Mich. 420.....	1448, 1470, 1510, 1585
Sword v. Young, 89 Tenn. 126.....	319
Swords v. Edgar, 59 N. Y. 28.....	1316, 1317, 1318, 1335, 1336, 1345, 1346, 2122
Sydleman v. Beckwith, 43 Conn. 9.....	1207
Sykes v. Bonner, (Cinn. Sup. Ct. R. 464).... (1080)	
Sykes v. St. Louis &c. R. Co., 88 Mo. App. 193.... (850)	2169
Sylvester v. Casey, 110 Iowa, 256.....	1868, 1897
Sylvester v. Moag, 155 Pa. St. 225.....	983, 986
Syracuse &c. Salt Co. v. Rome &c. R. Co., 43 App. Div. 203.....	888, 892
Syracuse &c. R. Co. v. Collins, 57 N. Y. 641.... (34)	
Szathmary v. Adams, 166 Mass. 145.....	1325, 1333
Szotak v. Berwind-White Coal Min. Co., 36 Misc. 98.....	1482, 1571
Szymanski v. Blumenthal, (Del.) 52 Atl. Rep. 347.....	962
T. P. & W. R. Co. v. Dealon, 63 Ill. 91.... (1025)	
T. & B. &c. R. Co. v. B. H., &c. R. Co., 86 N. Y. 107.....	1334
T. & P. R. Co. v. Casey, 52 Tex. 112.....	586
T. & P. R. Co. v. Chapman, 57 Tex. 75.... (768)	
T. & P. R. Co. v. Best, 66 Tex. 116.... (384)	
T. & P. R. Co. v. Hamilton, 66 Tex. 92.....	1469
T. & P. R. Co. v. Levi, 59 Tex. 674.....	684
T. & P. R. Co. v. Lowry, 61 Tex. 149.....	797
Taake v. Seattle, 16 Wash. 90.....	1828, 2006



# TABLE OF CASES.

CCCV

	PAGE
Taber v. D., L. & W. R. Co., 71 N. Y. 489.....	389, 462
Taber v. Hutson, 5 Ind. 322.....	849
Tabello v. Delaware &c. R. Co., (N. J. L.) 52 Atl. Rep. 561.....	800
Tabler v. Railroad Co., 93 Mo. 79.....	1644
Tabor v. Missouri &c. R. Co., 46 Mo. 353.... (761)	
Tacoma Lumber Co. v. Tacoma, 1 Wash. 12.... (1267)	
Tacoma R. Co. v. Hays, 110 Fed. Rep. 496.....	2274, 2322
Taft v. Brooklyn &c. R. Co., 14 Misc. 410.....	580
Tagg v. McGeorge, 155 Pa. St. 368.....	1510, 1753
Taggart v. Fall River, 170 Mass. 325.....	1893, 1989
Taggart v. Street R. Co., 16 R. I. 668.... (1058)	
Tague v. Westinghouse &c. Co., 30 Pitts. L. J. (N. S.) 67.....	1506
Tailor v. Bailey, 74 Ill. 178.....	1356
Talbot v. Chicago &c. R. Co., 72 Mo. App. 291.... (442).....	429
Talbott v. West Virginia &c. R. Co., 42 W. Va. 560.....	907, 1091
Talcott v. Wabash R. Co., 68 Hun, 456.....	344, 345, 616
Talkenan v. Abrahamson, 66 Ill. App. 352.....	2048
Tall v. Baltimore Steam-Packet Co., 90 Md. 248.....	532
Tallassce Falls Man. Co. v. Western R. &c., 128 Ala. 167.....	244, 299, 330
Talley v. Great Western R. Co., L. R. 6 C. P. 44.... (619).....	231
Tallon v. Hoboken, 60 N. J. L. 212.....	2002
Talmadge v. Rensselaer &c. R. Co., 13 Barb. 493.....	1046
Tangney v. Wilson, 87 Mich. 453.....	1473
Tankard v. Roanoke &c. R. Co., 117 N. C. 558.....	767, 820, 1195
Tanner v. N. Y. C. & H. R. Co., 108 N. Y. 623.....	325, 1260, 1274
Tanner v. Louisville &c. R. Co., 60 Ala. 621.... (741).....	659, 660, 809
Tanner v. New York &c. R. Co., 180 Mass. 572.....	1562
Tarba v. Rochester, 41 App. Div. 188.....	1942
Tarbell v. Northern Central R. Co., 24 Hun, 51.....	7, 559, 566
Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170.....	326
Tarbutton v. Tennile, 110 Ga. 90.....	1814
Tarler v. Metropolitan Street R. Co., 21 Misc. 684.....	2333
Tarras v. Winona, 71 Minn. 22.....	1846
Tarver v. Torrance, 81 Ga. 261.....	59
Tashjian v. Worcester Consol. R. Co., 177 Mass. 75.....	2287
Tasker v. Farmingdale, 88 Me. 102.....	1952
Tasker v. Farmingdale, 91 Me. 521.....	1851
Tatman v. Benton Harbor, 115 Mich. 695.....	1917
Taubert v. St. Paul, 68 Minn. 519.....	1813
Taussig v. Bode, 134 Cal. 260.....	133
Taylor v. Atchison &c. R. Co., 64 Kan. 888.....	1371
Taylor v. Carew Man. Co., 140 Mass. 150.....	1544
Taylor v. Chicago &c. R. Co., 103 Wis. 27.....	923
Taylor v. Cohoes, 105 N. Y. 54.....	2010
Taylor v. Constable, 57 Hun, 371.....	1833
Taylor v. Day, 6 Oh. N. P. 447.....	2100
Taylor v. Delaware &c. R. Co., 113 Pa. St. 162.... (708)	
Taylor v. Felsing, 164 Ill. 331.....	1447, 1742
Taylor v. Evansville R. Co., 121 Ind. 124.....	1642
Taylor v. Georgia Marble Co., 99 Ga. 512.....	1642
Taylor v. Georgia Marble Co., 108 Ga. 807.....	675
Taylor v. Haddonfield &c. Co., 65 N. J. L. 102.....	2111
Taylor v. Lawrence County, 17 Pa. Co. Ct. 396.....	1832
Taylor v. Man. Co., 143 Mass. 470.....	672
Taylor v. Mankato, 81 Minn. 276.....	1877
Taylor v. Maine C. R. Co., 87 Me. 299.... (346)	
Taylor v. Missouri Pac. R. Co., 26 Mo. App. 336.... (474)	
Taylor v. Mo. Pac. R. Co., 16 S. W. Rep. 206.....	1656
Taylor v. Missouri R. Co., 86 Mo. 457.... (751)	
Taylor v. Monnot, 4 Duer, 117.... (137).....	149
Taylor v. Nassau &c. R. Co., 32 App. Div. 486.....	829
Taylor v. Owensboro, 98 Ky. 271.....	1985
Taylor v. Pennsylvania R. Co., 8 N. J. Law. J. 149.....	251
Taylor v. Pennsylvania R. Co., 174 Pa. St. 171.....	1255

	PAGE
Taylor v. Penn. R. Co., 50 Fed. Rep. 755.....	461
Taylor v. Railroad Co., 121 Ind. 124.....	5, 1659
Taylor v. South. &c. R. Co., 14 Ky. L. R. 355.....	2159
Taylor v. Star Coal Co., 110 Iowa, 40.....	1122, 1452, 1578, 1806, 2376
Taylor v. Telsing, 63 Ill. App. 624.....	2048
Taylor v. Union T. Co., 184 Pa. St. 465.....	2345
Taylor v. Wabash R. Co., (Mo.) 38 S. W. Rep. 304.....	397
Taylor v. Western U. T. Co., 95 Iowa, 740.....	2435
Taylor v. Yonkers, 105 N. Y. 202.....	1115, 1887, 1888, 1891
Taylor &c. R. Co. v. Warner, 88 Tex. 642.....	653, 817
Taylor &c. R. Co. v. Warner (Tex. Civ. App.) 60 S. W. Rep. 442.....	719, 926
Taylor's Estate, 4 Pa. Dist. 691.....	54
Taylor Will Case, 10 Abb. N. Y. Pr. N. S. 300.... (1237)	
Taylorville v. Stafford, 196 Ill. 288.....	1875
Teager v. Flemingsburg, (Ky.) 60 S. W. Rep. 718.....	1961
Teal v. American Mining Co., 84 Minn. 320.....	2165
Teasdale v. Malone, 17 App. Div. 185.....	1141
Tebbs v. Cleveland &c. R. Co., 20 Ind. App. 192.....	316, 824
Tebo v. Jordan, 67 Hun, 392.....	202
Tebo v. Jordan, 73 Hun, 218.....	203
Tebo v. New York, 61 Fed. Rep. 692.....	1302
Techt v. Chouteau, 91 Mo. 138.....	2181
Tecumseh Mills v. Louisville &c. R. Co., (Ky.) 57 S. W. Rep. 9.....	247
Tedford v. Los Angeles E. Co., 134 Cal. 76.....	926, 1506
Teeney v. Spaulding, 89 Me. 111.....	2190
Teerpenning v. Corn Exchange Ins. Co., 43 N. Y. 279.....	1212
Teetsel v. Simmons, 88 Hun, 621.....	1412
Tefft v. Wilcox, 6 Kan. 33.....	2190
Teipel v. Hilsendegen, 44 Mich. 461.... (658)	
Tel. Co. v. Dryburg, 35 Pa. St. 300.....	2448
Tel Co. v. Griswold, 37 Oh. St. 301.....	2390, 2397, 2430, 2431, 2449
Tel Co. v. Jones, 8 Am. & Eng. Corp. Cas. 47.....	2412
Tel Co. v. Meredith, 8 Am. & Eng. Corp. Cas. 47.....	2412
Telfer v. Northern R. Co., 30 N. J. L. 188.... (657).....	741, 776, 794
Telford v. Ashland, 100 Wis. 238.....	2013, 2016
Teliferro v. Western Union Teleg. Co., (Ky.) 54 S. W. Rep. 825.....	2460
Tellefsen v. Fee, 168 Mass. 188.....	85
Temperance Hall Association v. Giles, 33 N. J. L. 260.....	2255, 2257
Templeton v. Montpelier, 56 Vt. 328.....	698
Tenanty v. Boston Man. Co., 170 Mass. 323.....	1558, 1698
Tendrup v. John Stephenson Co., 51 Hun, 462.....	1446, 1682
Tenebroeck v. Wells, Fargo & Co., 47 Fed. Rep. 690.....	2131
Tenhopen v. Walker, 96 Mich. 236.....	990
Tennenbrock v. S. P. &c. R. Co., 59 Cal. 269.....	2156
Tennessee Coal Co. v. Hansford, (Ala.) 28 South. Rep. 45.....	1125
Tennessee Coal &c. Co. v. Herndon, 14 So. (Ala.) 287.....	1463
Tennessee Teleg. Co. v. Simms, (Ky.) 38 S. W. Rep. 131; 99 Ky. 404.....	902
Tennessee &c. R. Co. v. Hansford, 125 Ala. 349.....	763, 2139
Terhune v. Joseph W. Cody &c. Co., 72 App. Div. 1.....	877, 923, 1181
Terhune v. Koellisch, (N. J. L.) 43 Atl. Rep. 656.....	915
Terhuson v. Boston Gaslight Co., 170 Mass. 182.... (1382)	
Terien v. St. Paul City R. Co., 70 Minn. 532.....	2316
Terre Haute Electric R. Co. v. Yant, 21 Ind. App. 486.....	2289
Terre Haute Electric R. Co. v. Lauer, 21 Ind. App. 466.....	580
Terre Haute &c. R. Co. v. Becker, 146 Ind. 202.....	1523
Terre Haute &c. R. Co. v. Brunner, 128 Ind. 554.....	2036
Terre Haute &c. R. Co. v. Buck, 96 Ind. 346.....	444, 577, 766, 896
Terre Haute &c. R. Co. v. Clark, 73 Ind. 168.... (776).....	768
Terre Haute &c. R. Co. v. Fitzgerald, 47 Ind. 79.....	579
Terre Haute &c. R. Co. v. Fowler, (Ind.) 56 N. E. Rep. 228.....	1398
Terre Haute &c. R. Co. v. Graham, 95 Ind. 286.....	741, 2140
Terre Haute &c. R. Co. v. Granfield, 58 Ill. App. 136.....	817
Terre Haute &c. R. Co. v. Grissom, 60 Ill. App. 114.... (1054)	
Terre Haute &c. R. Co. v. Jones, 11 Ill. App. 322.... (796)	

## TABLE OF CASES.

cccvii

	PAGE
Terre Haute &c. R. Co. v. Leeper, 60 Ill. App. 194.....	1443, 1602, 1608
Terre Haute &c. R. Co. v. McCullough, 65 Ill. App. 444.....	1052
Terre Haute &c. R. Co. v. McMurray, 98 Ind. 358.... (730)	
Terre Haute &c. R. Co. v. Pruitt, (Ind. App.) 57 N. E. Rep. 949.....	1528
Terre Haute &c. R. Co. v. Rittenhouse, (Ind. App.) 62 N. E. Rep. 295....	1660, 1862
Terre Haute &c. R. Co. v. Seeper, 60 Ill. App. 194.... (1108)	
Terre Haute &c. R. Co. v. Sheeks, 155 Ind. 74.... (1103).....	918
Terre Haute &c. R. Co. v. Sherwood, 132 Ind. 129.....	305
Terre Haute &c. R. Co. v. Williams, 172 Ill. 379.....	1441, 1590
Terre Haute &c. R. Co. v. Williams, 69 Ill. App. 392.....	1688
Terrell Compress Co. v. Arrington, (Tex. Civ. App.) 48 S. W. Rep. 59.....	1630, 1675, 1725
Terrell v. Russell, 16 Tex. Civ. App. 573.....	1135, 1673
Terry v. Flushing, N. S. &c. R. Co., 13 Hun, 359.....	569
Terry v. Jewett, 78 N. Y. 338.....	446, 447, 448, 882, 938
Terry v. Louisville &c. R. Co., 15 Ind. App. 353.....	1688
Terry v. Mutual Life Ins. Co., 116 Ala. 242.....	627
Terry v. Richmond, 94 Va. 537.....	1919, 1922
Terryll v. Faribault, 81 Minn. 519.....	2020
Tesch v. Milwaukee Electric &c. R. Co., 108 Wis. 593.....	659, 2272, 2299, 2319
Teschner v. Merea, 118 Ind. 586.... (182)	
Tesmer v. Boehm, 58 Ill. App. 609.....	1572
Tessmer v. New York &c. R. Co., 72 Conn. 208.....	788, 796
Teutonia Ins. Co. v. Bussell, (Tenn.) 48 S. W. Rep. 703.....	194
Tewksbury v. Bucklin, 7 N. H. 518.....	1008
Texarkana &c. R. Co. v. Anderson, 67 Ark. 123.....	369, 854, 908
Texarkana &c. R. Co. v. Hartford &c. Ins. Co., 17 Tex. Civ. App. 498.....	1308
Texarkana &c. R. Co. v. Preacher, (Tex. Civ. App.) 59 S. W. Rep. 593.....	1506
Texarkana &c. R. Co. v. Spencer, (Tex. Civ. App.) 67 S. W. Rep. 196.....	2089
Texas Land &c. Co. v. Hemphill County, (Tex. Civ. App.) 61 S. W. Rep. 333.....	88
Texas Loan Agency v. Fleming, 92 Tex. 458.....	1333
Texas Loan Agency v. Fleming, 18 Tex. Civ. App. 668.....	1373
Texas &c. Coal Co. v. Connaughton, 20 Tex. Civ. App. 642.....	1771
Texas &c. R. Co. v. Anderson, (Tex. Civ. App.) 61 S. W. Rep. 424.....	1145
Texas &c. R. Co. v. Archibald, 170 U. S. 665.....	1474, 1676
Texas &c. R. Co. v. Archibald, 75 Fed. Rep. 802.....	1687
Texas &c. R. Co. v. Armstrong, 93 Tex. 333.....	847, 855
Texas &c. R. Co. v. Arnold, 16 Tex. Civ. App. 74.....	228, 824, 1093
Texas &c. R. Co. v. Avery, 19 Tex. Civ. App. 235.....	228, 290, 824
Texas &c. R. Co. v. Ballard, 2 Metc. (Ky.) 177.... (1024)	
Texas &c. R. Co. v. Barrett, 166 U. S. 617.....	1407, 1470
Texas &c. R. Co. v. Barrett, (Tex. Civ. App.) 57 S. W. Rep. 602.....	2151
Texas &c. R. Co. v. Beckworth, 11 Tex. Civ. App. 153.....	489, 714
Texas &c. R. Co. v. Berchfield, 12 Tex. Civ. App. 145.... (824)	
Texas &c. R. Co. v. Berchfield, 19 Tex. Civ. App. 228.....	228
Texas &c. R. Co. v. Bigham, 90 Tex. 223.....	227
Texas &c. R. Co. v. Bigham, (Tex. Civ. App.) 47 S. W. Rep. 814.....	354
Texas &c. R. Co. v. Bigham, (Tex. Civ. App.) 67 S. W. Rep. 522.....	215
Texas &c. R. Co. v. Bingle, 91 Tex. 287.....	1580
Texas &c. R. Co. v. Bingle, 16 Tex. Civ. App. 653.....	1656
Texas &c. R. Co. v. Black, 23 Tex. Civ. App. 119.....	382, 422, 2151
Texas &c. R. Co. v. Bledsoe, 2 Tex. Civ. App. 88.....	95
Texas &c. R. Co. v. Blum Land Co., (Tex. Civ. App.) 49 S. W. Rep. 253.....	1268
Texas &c. R. Co. v. Boggs, (Tex. Civ. App.) 40 S. W. Rep. 20.....	301
Texas &c. R. Co. v. Bond, 62 Tex. 442.....	574
Texas &c. R. Co. v. Born, 20 Tex. Civ. App. 351.....	466, 489
Texas &c. R. Co. v. Bowlin, (Tex. Civ. App.) 32 S. W. Rep. 918.....	528, 914
Texas &c. R. Co. v. Bradford, 66 Tex. 732.....	1547
Texas &c. R. Co. v. Breadow, 90 Tex. 26.....	2141, 2158
Texas &c. R. Co. v. Breadaw, (Tex. Civ. App.) 35 S. W. Rep. 490.....	2146, 2157
Texas &c. R. Co. v. Brown, 11 Tex. Civ. App. 503.... (784).....	2149
Texas &c. R. Co. v. Brown, 14 Tex. Civ. App. 697.....	2146
Texas &c. R. Co. v. Brown, (Tex. Civ. App.) 58 S. W. Rep. 44. 400, 445, 1135, 1240	
Texas &c. R. Co. v. Buckalew, (Tex. Civ. App.) 34 S. W. Rep. 165.....	412, 1373

	PAGE
Texas &c. R. Co. v. Callender, 183 U. S. 632.....	256
Texas &c. R. Co. v. Callender, 98 Fed. Rep. 538.....	257
Texas &c. R. Co. v. Cardwell, (Tex. Civ. App.) 67 S. W. Rep. 157.....	739, 767, 1373
Texas &c. R. Co. v. Carlin, 111 Fed. Rep. 777.....	685, 1756, 1803
Texas &c. R. Co. v. Carr, 91 Tex. 332.....	941
Texas &c. R. Co. v. Clayton, 173 U. S. 348.....	335
Texas &c. R. Co. v. Clayton, 84 Fed. Rep. 305.....	350
Texas &c. R. Co. v. Cody, 166 U. S. 606.... (735)	
Texas &c. R. Co. v. Collins, 19 Tex. Civ. App. 365.... (95)	
Texas &c. R. Co. v. Cox, 145 U. S. Sup. Ct. 593.....	964
Texas &c. R. Co. v. Crockett, (Tex. Civ. App.) 66 S. W. Rep. 114....	914, 1124, 1207
Texas &c. R. Co. v. Cumpston, 15 Tex. Civ. App. 493.....	1196, 1525
Texas &c. R. Co. v. Curlin, 13 Tex. Civ. App. 505.... (797)	
Texas &c. R. Co. v. Cushing, (Tex. Civ. App.) 64 S. W. Rep. 795.....	354
Texas &c. R. Co. v. Davis, (Tex. Civ. App.) 40 S. W. Rep. 167.....	255
Texas &c. R. Co. v. Davis, (Tex. Civ. App.) 54 S. W. Rep. 381.....	215
Texas &c. R. Co. v. De Milley, 60 Tex. 194.....	1135
Texas &c. R. Co. v. Eberhart, 91 Tex. 321.....	1585, 1680
Texas &c. R. Co. v. Eberhart, (Tex. Civ. App.) 40 S. W. Rep. 1060....	1511, 1673
Texas &c. R. Co. v. Echols, 17 Tex. Civ. App. 677.....	921, 1438, 1479, 1675, 1800
Texas &c. R. Co. v. Elliott, 22 Tex. Civ. App. 31.....	568, 1196
Texas &c. R. Co. v. Fambrough, (Tex. Civ. App.) 55 S. W. Rep. 188....	228, 825
Texas &c. R. Co. v. Fisher, 18 Tex. Civ. App. 78.....	1223
Texas &c. R. Co. v. Flanary, (Tex. Civ. App.) 50 S. W. Rep. 726.....	102
Texas &c. R. Co. v. Frazier, 90 Tex. 33.....	1799
Texas &c. R. Co. v. Fuller, 13 Tex. Civ. App. 151.... (792).....	769, 1371
Texas &c. R. Co. v. Funderburk, (Tex. Civ. App.) 68 S. W. Rep. 1006....	445
Texas &c. R. Co. v. Gale, (Tex. Civ. App.) 35 S. W. Rep. 802.....	1718
Texas &c. R. Co. v. Gallagher, (Tex. Civ. App.) 64 S. W. Rep. 809....	339
Texas &c. R. Co. v. Garcia, 62 Tex. 285.....	444
Texas &c. R. Co. v. Gardner, (Tex. Civ. App.) 69 S. W. Rep. 217.....	1557
Texas &c. R. Co. v. Gardner, 114 Fed. Rep. 186.....	401, 467
Texas &c. R. Co. v. Gentry, 163 U. S. 353.....	1111, 1112
Texas &c. R. Co. v. Gilleland, (Tex. Civ. App.) 36 S. W. Rep. 1134....	(808)
Texas &c. R. Co. v. Goldman, (Tex. Civ. App.) 51 S. W. Rep. 275.....	466
Texas &c. R. Co. v. Gott, 20 Tex. Civ. App. 335.....	867
Texas &c. R. Co. v. Harby, 94 Fed. Rep. 303.....	2144, 2153
Texas &c. R. Co. v. Hartnett, (Tex. Civ. App.) 34 S. W. Rep. 1057....	669, 927
Texas &c. R. Co. v. Herbeck, 60 Tex. 602.....	719
Texas &c. R. Co. v. Hassel, (Tex. Civ. App.) 58 S. W. Rep. 54.....	342, 826
Texas &c. R. Co. v. Hightower, 12 Tex. Civ. App. 41.....	2258
Texas &c. R. Co. v. Hughes, (Tex. Civ. App.) 41 S. W. Rep. 821.....	413, 923
Texas &c. R. Co. v. James, 82 Tex. 306.....	893, 1054
Texas &c. R. Co. v. Johnson, 89 Tex. 519.....	1519, 1681
Texas &c. R. Co. v. Johnson, 90 Tex. 304.....	1684
Texas &c. R. Co. v. Johnson, 20 Tex. Civ. App. 572.....	653, 820
Texas &c. R. Co. v. Johnson, (Tex. Civ. App.) 34 S. W. Rep. 186....	1553, 1740
Texas &c. R. Co. v. Johnson, (Tex. Civ. App.) 65 S. W. Rep. 388....	412
Texas &c. R. Co. v. Jones, 23 Tex. Civ. App. 551.....	229, 371
Texas &c. R. Co. v. Jumper, 24 Tex. Civ. App. 671.....	413, 1102, 1113
Texas &c. R. Co. v. Juneman, 71 Fed. Rep. 939.....	654
Texas &c. R. Co. v. Kelley, (Tex. Civ. App.) 47 S. W. Rep. 809.....	488
Texas &c. R. Co. v. Kenna, (Tex. Civ. App.) 52 S. W. Rep. 555.....	1679
Texas &c. R. Co. v. King, 14 Tex. Civ. App. 290.....	1408, 1585, 1687
Texas &c. R. Co. v. Kingston, 68 S. W. Rep. 518.....	412
Texas &c. R. Co. v. Kirk, 62 Tex. 227.....	1101, 1432
Texas &c. R. Co. v. Klepper, (Tex. Civ. App.) 69 S. W. Rep. 426....	320
Texas &c. R. Co. v. Lee, 21 Tex. Civ. App. 174.....	436
Texas &c. R. Co. v. Leightly, (Tex. Civ. App.) 32 S. W. Rep. 799....	1532
Texas &c. R. Co. v. Ludlaw, 57 Fed. Rep. 481.....	568
Texas &c. R. Co. v. Lyons, (Tex. Civ. App.) 34 S. W. 362.....	1405, 1696
Texas &c. R. Co. v. Lyons, (Tex. Civ. App.) 50 S. W. Rep. 161.....	30, 422
Texas &c. R. Co. v. McAtee, 61 Tex. 695.....	1547
Texas &c. R. Co. v. McCarty, (Tex. Civ. App.) 69 S. W. Rep. 229....	341, 342, 2144

## TABLE OF CASES.

cccx

	PAGE
Texas &c. R. Co. v. McCoy, 90 Tex. 264.....	1408
Texas &c. R. Co. v. McCoy, 17 Tex. Civ. App. 494.....	1689, 1707
Texas &c. R. Co. v. McLane, (Tex. Civ. App.) 32 S. W. Rep. 776.....	444
Texas &c. R. Co. v. McManus, 15 Tex. Civ. App. 122.....	740
Texas &c. R. Co. v. Magrill, 15 Tex. Civ. App. 353.....	1433, 1677, 1734
Texas &c. R. Co. v. Malone, 15 Tex. Civ. App. 56.....	871, 915
Texas &c. R. Co. v. Martin, (Tex. Civ. App.) 60 S. W. Rep. 803.....	885
Texas &c. R. Co. v. Mayes, 15 S. W. Rep. 13.....	833, 1054
Texas &c. R. Co. v. Mayfield, 23 Tex. Civ. App. 415.....	466, 657, 1095
Texas &c. R. Co. v. Moore, (Tex. Civ. App.) 56 S. W. Rep. 248.....	430, 777, 787, 1373
Texas &c. R. Co. v. Morin, 66 Tex. 225.....	870
Texas &c. R. Co. v. Morrison Faust Co., 20 Tex. Civ. App. 144.....	615, 612
Texas &c. R. Co. v. Mortensen, (Tex. Civ. App.) 66 S. W. Rep. 99.....	1217
Texas &c. R. Co. v. Moseley, (Tex. Civ. App.) 58 S. W. Rep. 48.....	740
Texas &c. R. Co. v. Neal, (Tex. Civ. App.) 33 S. W. Rep. 693.....	430
Texas &c. R. Co. v. Nunn, 98 Fed. Rep. 963.....	466
Texas &c. R. Co. v. O'Mahoney, (Tex. Civ. App.) 60 S. W. Rep. 902.....	2084
Texas &c. R. Co. v. Orr, 46 Ark. 182.... (898)	
Texas &c. R. Co. v. Oxerall, 82 Tex. 247.....	461
Texas &c. R. Co. v. Padgett, 14 Tex. Civ. App. 435.....	2090
Texas &c. R. Co. v. Parker, (Tex. Civ. App.) 68 S. W. Rep. 831.....	14
Texas &c. R. Co. v. Payne, (Tex. Civ. App.) 35 S. W. Rep. 297.... (941).....	278, 1113, 1127, 1138
Texas &c. R. Co. v. Phillips, 91 Tex. 278.....	707, 1199, 2144
Texas &c. R. Co. v. Powell, 13 Tex. Civ. App. 212.... (572)	
Texas &c. R. Co. v. Randle, 18 Tex. Civ. App. 348.....	339, 826
Texas &c. R. Co. v. Rea, (Tex. Civ. App.) 65 S. W. Rep. 1115.....	412, 831
Texas &c. R. Co. v. Reed, (Tex. Civ. App.) 32 S. W. Rep. 118.....	1660
Texas &c. R. Co. v. Reeder, 170 U. S. 530.....	266
Texas &c. R. Co. v. Reeder, 76 Fed. Rep. 550.....	517
Texas &c. R. Co. v. Reeves, 90 Tex. 499.... (240)	
Texas &c. R. Co. v. Reich, (Tex. Civ. App.) 32 S. W. Rep. 817.....	429
Texas &c. R. Co. v. Reiss, 183 U. S. 621.....	256
Texas &c. R. Co. v. Reiss, 98 Fed. Rep. 533.....	336
Texas &c. R. Co. v. Rhodes, 71 Fed. Rep. 145.....	1465, 1682
Texas &c. R. Co. v. Rice, (Tex. Civ. App.) 59 S. W. Rep. 833.....	890
Texas &c. R. Co. v. Richards, 68 Tex. 375.... (964)	
Texas &c. R. Co. v. Roberts, 14 Tex. Civ. App. 532.....	2143
Texas &c. R. Co. v. Robertson, 82 Tex. 657.... (953)	
Texas &c. R. Co. v. Rutherford, (Tex. Civ. App.) 68 S. W. Rep. 825.....	1135, 1262
Texas &c. R. Co. v. Scriviner, (Tex. Civ. App.) 49 S. W. Rep. 649.... (786) ..	1093
Texas &c. R. Co. v. Scruggs, (Tex. Civ. App.) 58 S. W. Rep. 186.....	1621
Texas &c. R. Co. v. Seay, 69 Tex. Civ. App. 177.... (1014)	
Texas &c. R. Co. v. Sherbert, (Tex. Civ. App.) 42 S. W. Rep. 639.... (923)	
Texas &c. R. Co. v. Short, (Tex. Civ. App.) 58 S. W. Rep. 56.....	777
Texas &c. R. Co. v. Slano Livestock Co., (Tex. Civ. App.) 33 S. W. Rep. 748..	1093
Texas &c. R. Co. v. Smith, (Tex. Civ. App.) 41 S. W. Rep. 83.... (1013) ..	1014
Texas &c. R. Co. v. Smith, 114 Fed. Rep. 728.....	1800
Texas &c. R. Co. v. Spence, (Tex. Civ. App.) 52 S. W. Rep. 562.....	926
Texas &c. R. Co. v. Staggs, 90 Tex. 458.....	2142, 2147
Texas &c. R. Co. v. Staggs, (Tex. Civ. App.) 37 S. W. Rep. 609.....	2148
Texas &c. R. Co. v. Storey, (Tex. Civ. App.) 68 S. W. Rep. 534.....	412
Texas &c. R. Co. v. Stribling, (Tex. Civ. App.) 34 S. W. Rep. 1002.....	227, 255
Texas &c. R. Co. v. Suggs, 62 Tex. 323.....	1101
Texas &c. R. Co. v. Syfan, 91 Tex. 562.....	767
Texas &c. R. Co. v. Tarkington, (Tex. Civ. App.) 66 S. W. Rep. 137.....	528
Texas &c. R. Co. v. Taylor, (Tex. Civ. App.) 44 S. W. 892.....	1127, 1404, 1548
Texas &c. R. Co. v. Taylor, (Tex. Civ. App.) 53 S. W. Rep. 362.....	1440
Texas &c. R. Co. v. Taylor, (Tex. Civ. App.) 58 S. W. Rep. 844.... (861)	
Texas &c. R. Co. v. Thedens, (Tex.) 21 S. W. Rep. 132.... (95)	
Texas &c. R. Co. v. Thompson, 70 Fed. Rep. 944.....	1616
Texas &c. R. Co. v. Tidwell, (Tex. Civ. App.) 49 S. W. Rep. 641.....	661, 736
Texas &c. R. Co. v. Tom Green &c. Co., 15 Tex. Civ. App. 147.....	1113
Texas &c. R. Co. v. Tribble, (Tex. Civ. App.) 67 S. W. Rep. 890.....	229

	PAGE
Texas &c. R. Co. v. Truesdale, 21 Tex. Civ. App. 125.....	824, 941
Texas &c. R. Co. v. Turner, (Tex. Civ. App.) 37 S. W. Rep. 643.....	227
Texas &c. R. Co. v. Utley, (Tex. Civ. App.) 66 S. W. Rep. 311.....	1503
Texas &c. R. Co. v. Walker, (Tex. Civ. App.) 49 S. W. Rep. 642.....	722, 2159
Texas &c. R. Co. v. Waller, (Tex. Civ. App.) 66 S. W. Rep. 466.....	1430
Texas &c. R. Co. v. Warren, (Tex. Civ. App.) 32 S. W. Rep. 578.....	819
Texas &c. R. Co. v. White, 101 Fed. Rep. 928.....	938
Texas &c. R. Co. v. Whitmore, 58 Tex. 276.....	1571, 1644
Texas &c. R. Co. v. Wilder, 92 Fed. Rep. 953.....	879
Texas &c. R. Co. v. Woods, 15 Tex. Civ. App. 612.....	445
Texas &c. R. Co. v. Marte, (Tex. Civ. App.) 69 S. W. Rep. 432.....	1178
Texas Transp. Co. v. Shelton, 12 Tex. Civ. App. 651.....	2166
Thain v. Old Colony R. Co., 161 Mass. 353.....	1492
Thal v. Metropolitan Street R. Co., 76 N. Y. Supp. 918.....	2330
Thamm v. Lahey, 59 Ill. App. 73.....	2047
Thane v. Douglass, 102 Tenn. 307.....	105
Thane v. Scranton Traction Co., 191 Pa. St. 249.....	511
Thayer v. Arnold, 4 Met. 589.... (1008)	
Thayer v. Boston, 19 Pick. 511.....	2907
Thayer v. St. Louis &c. R. Co., 22 Ind. 26.....	1614, 1620
The Aberfoyle, 1 Abb. Ad. Rep. 242.... (204)	
The A. Heaton, 43 Fed. Rep. 592.....	1625
The Aldborough, 106 Fed. Rep. 90.... (669)	
The Alvah, 59 Fed. Rep. 630.....	307
The Anaces, 93 Fed. Rep. 240.....	1521, 1604
The Anchoria, 77 Fed. Rep. 994.....	401
The Anchoria, 113 Fed. Rep. 982.....	921, 1673, 1499
The Antonio Zambrana, 89 Fed. Rep. 60.....	1726
The Boskenna Bay, 40 Fed. Rep. 91.....	335
The Bronx, 86 Fed. Rep. 808.....	829
The Burgundia, 29 Fed. Rep. 364.....	517
The Caledonia, 43 Fed. Rep. 681.....	256
The Calliope, 14 Prob. Div. Law Rep. 64.....	2117
The City of Naples, 69 Fed. Rep. 794.....	2126
The Coleridge, 72 Fed. Rep. 676.....	1603
The Earnwood, 83 Fed. Rep. 315.....	826
The Ed. Roberts, 93 Fed. Rep. 988.....	897
The Edwin, 87 Fed. Rep. 540.....	1148
The Edwin I. Morrison, 153 U. S. 199.....	233
The Ethelred, 96 Fed. Rep. 446.....	1486, 1676
The Flintshire, 69 Fed. Rep. 471.....	1091
The Fred Schlesinger, 71 Fed. Rep. 747.... (1091)	
The Gladiolas, 21 Fed. Rep. 417.....	1106
The Glencairn, 78 Fed. Rep. 379.....	829
The H. F. Dimock, 77 Fed. Rep. 226.....	891
The Henry B. Hyde, 82 Fed. Rep. 681.....	291
The Homer, 99 Fed. Rep. 795.....	919
The Humboldt, 97 Fed. Rep. 656.....	609
The Ionic, 6 Blatchf. (U. S.) 538.... (616)	
The Iroquois, 113 Fed. Rep. 964.....	913
The Job T. Wilson, 84 Fed. Rep. 304.....	875
The Joseph B. Thomas, 86 Fed. Rep. 658.....	914, 1539
The Kansas, 87 Fed. Rep. 766.....	302
The Kellyville Coal Co. v. Humble, 87 Ill. App. 437.....	1639
The Kensington, 183 U. S. 263.....	297, 1668
The Kingston Bank v. Eltinge &c., 40 N. Y. 391.... (1079)	
The Livingston, 104 Fed. Rep. 918.....	1308
The Lydia M. Deering, 97 Fed. Rep. 971.....	1108
The Majestic, 166 U. S. 375.....	1112
The Manhasset, 19 Fed. Rep. 430.....	606
The Merrimac, 2 Saw. (U. S.) 586.....	204
The Miami, 87 Fed. Rep. 757.....	1148, 1625
The Moorecock, 14 Prob. Div. Law Rep. 64.....	2117
The Nith, 36 Fed. Rep. 86.... (823)	

# TABLE OF CASES.

cccxix

	PAGE
The Nutmeg State, 103 Fed. Rep. 797.....	257
The Oriental v. Barclay, 16 Tex. Civ. App. 193.....	1135, 1371, 1398, 1407
The Pennsylvania, 19 Wall. 136.....	1171
The Pioneer, 78 Fed. Rep. 600.....	914, 1511
The Privateer, 14 Fed. Rep. 872.....	1719
The Prussia, 93 Fed. Rep. 837.....	257
The Queen, 40 Fed. Rep. 694.....	867
The Queen, 78 Fed. Rep. 155.....	826
The Queen v. Bucknall, 3 D. & E. 766.... (996)	
The R. E. Lee, 2 Abb. U. S. C. I. R. & Dist. Ct. Rep.... (609)	
The Robert Graham Dun, 70 Fed. Rep. 270.....	923
The Robert Hadden, 68 Fed. Rep. 1017.....	829
The Saratoga, 87 Fed. Rep. 349.....	1463, 1682, 1745
The Schooner Robert Lewers Co. v. Kekauoha, 114 Fed. Rep. 849.....	944
The Ship Chancellor, 4 Benedict, 158.....	1171
The Steamer Webb, 14 Wall. 406.... (203).....	202
The Sultana v. Chapman, 5 Wis. 454.... (288)	
The Terrier, 73 Fed. Rep. 265.....	1604
The Tonawanda Railroad Co. v. Munger, 5 Denio, 255.....	983
The Valencia, 110 Fed. Rep. 221.....	297
The Victoria, 69 Fed. Rep. 160.....	1604
The Warren Adams, 74 Fed. Rep. 413.....	1099
The Willamette Valley, 71 Fed. Rep. 712.....	366
Theleman v. Moeller, 73 Iowa, 108.....	1614
Thelen v. Railway Co., 10 Misc. 283.....	2229
Theobald v. Chicago &c. R. Co., 75 Ill. App. 208.....	742, 751, 779, 808
Thickston v. Howard, 8 Blackf. 535.... (137)	
Thiebault v. Blohm, 16 Rap. Jud. Que. C. S. 98.....	2025
Thiel v. Kennedy, 82 Minn. 142.....	1216
Thieme v. Gillen, 41 Hun, 443.....	2230, 2251
Thies v. Thomas, 77 N. Y. Supp. 276.....	657, 671, 2354, 2358, 2368
Third Ave. R. Co. v. Kransz, 112 Fed. Rep. 379.....	2284
Tholen v. Brooklyn City R. Co., 10 Misc. 283.....	2230, 2304
Thomas v. Altoona &c. R. Co., 191 Pa. St. 361.....	652
Thomas v. Ann Arbor R. Co., 114 Mich. 59.....	1637, 1683
Thomas v. Bellamy, 126 Ala. 253.....	1541, 1581
Thomas v. Brooklyn, 58 Iowa, 438.....	848
Thomas v. Central R. Co. &c., 194 Pa. St. 511.....	2207
Thomas v. Chicago &c. R. Co., 103 Iowa, 649.....	2163, 2165
Thomas v. Chicago &c. R. Co., 72 Mich. 355.....	579
Thomas v. Cincinnati &c. R. Co., 91 Fed. Rep. 206.....	1103, 1112
Thomas v. Cincinnati &c. R. Co., 97 Fed. Rep. 245.....	1511, 1656
Thomas v. Consolidated Traction Co., 62 N. J. L. 36.....	929
Thomas v. Delaware &c. R. Co., 19 Blatchf. 533.....	764, 815
Thomas v. Flint, 123 Mich. 10.....	1837
Thomas v. Gates, 126 Cal. 1.....	854
Thomas v. Grand Lodge &c., 12 Wash. 500.....	1311
Thomas v. Hannibal &c. R. Co., 82 Mo. 538.....	1046
Thomas v. Henges, 131 N. Y. 453.....	1338
Thomas v. Lancaster Mills, 71 Fed. Rep. 481.....	307
Thomas v. Mayor, 28 Hun, 110.....	696, 1897
Thomas v. Mayville Gas Co., (Ky.) 56 S. W. Rep. 153.....	1062
Thomas v. Morgan, 2 C. M. & R. 496.... (977)	
Thomas v. New York &c. R. Co., 182 Pa. St. 538.....	1134
Thomas v. Northern P. Ex. Co., 73 Minn. 185.....	317
Thomas v. Pocatello Power &c. Co., (Id.) 63 Pac. Rep. 595.....	2133
Thomas v. R. Co., 109 Mo. 187.....	1474
Thomas v. R. Co., 101 U. S. 71.....	1334
Thomas v. Raleigh &c. R. Co., 129 N. C. 392.....	1696, 1777
Thomas v. Ross, 75 Fed. Rep. 552.....	1452
Thomas v. Royster, 98 Ky. 206.....	951, 2351
Thomas v. Southern R. Co., 122 N. C. 1005.....	371, 903
Thomas v. Union R. Co., 18 App. Div. 185.....	451, 916
Thomas v. Winchester, 6 N. Y. 397.....	607, 1376, 2185

	PAGE
Thomason v. Southern R. Co., 113 Fed. Rep. 80.....	678, 1092, 2135
Thompson v. N. Y. C. & H. R. R. Co., 110 N. Y. 636.....	795
Thompson v. Alabama Midland R. Co., 123 Ala. 378.....	213
Thompson v. Austin, 2 Daw. & Ry. 358.....	1161
Thompson v. Bartlett, (N. H.) 51 Atl. Rep. 633.....	1702
Thompson v. Blanchard, 4 N. Y. 303.... (1197).....	1199
Thompson v. Buffalo R. Co., 145 N. Y. 196.... (710).....	674, 2270, 2343
Thompson v. Chicago & C. R. Co., 64 Minn. 159.....	2137
Thompson v. Chicago & C. R. Co., 18 Fed. Rep. 239.....	1614, 1620
Thompson v. Citizens' Street R. Co., 152 Ind. 461.....	1590, 1776
Thompson v. Chicago & C. R. Co., 104 Fed. Rep. 845.....	879
Thompson v. Corpus Christi, (Tex. Civ. App.) 38 S. W. Rep. 373.....	1992, 2006
Thompson v. Dickinson, (Mass.) 34 N. E. Rep. 262.....	2182
Thompson v. Great Northern R. Co., 79 Minn. 291.....	913, 1478
Thompson v. Gwyn, 46 Miss. 522.....	134
Thompson v. Hall, 45 Barb. 214.... (177).....	
Thompson v. Harlow, 31 Ga. 348.....	112
Thompson v. Hicks, 1 App. Div. 275.....	66
Thompson v. Ish, 99 Mo. 160.....	1189
Thompson v. Johnston Bros. Co., 86 Wis. 576.....	881
Thompson v. Keokuk & C. R. Co., (Iowa) 89 N. W. Rep. 975.... (1258).....	889
Thompson v. Louisville & C. R. Co., 91 Ala. 496.....	894, 900
Thompson v. Lowell & C. Street R. Co., 170 Mass. 577.....	650
Thompson v. Missouri & C. R. Co., (Mo.) 67 S. W. Rep. 693.....	770
Thompson v. Missouri R. Co., 93 Mo. App. 548.....	2139
Thompson v. Missouri P. R. Co., 51 Neb. 527.....	1547, 1588, 1776
Thompson v. Missouri & C. R. Co., 11 Tex. Civ. App. 307.....	2146, 2153
Thompson v. New Orleans & C. R. Co., 108 La. 52.....	1598, 1678
Thompson v. New York & C. R. Co., 41 App. Div. 78.....	2115, 2167, 2252
Thompson v. Norman Paper Co., 169 Mass. 416.....	1495
Thompson v. Northern P. R. Co., 93 Fed. Rep. 384.....	2165
Thompson v. Ocean City R. Co., 60 N. J. L. 74.....	2002
Thompson v. Plath, 44 App. Div. 291.....	2362
Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281....	661, 2280, 2284, 2318
Thompson v. Saratoga Springs, 22 App. Div. 186.....	1890
Thompson v. Thompson, (Ky.) 65 S. W. Rep. 457.....	56
Thompson v. Western U. T. Co., 64 Wis. 531.....	2397, 2399
Thompson v. W. U. T. Co., 106 N. C. 549.....	2412
Thompson v. Western U. T. Co., 107 N. C. 449.....	2417, 2430
Thompson v. Winston, 118 N. C. 662.....	1876
Thompson Nav. Co. v. Chicago, 79 Fed. Rep. 984.....	1989
Thomson v. Manhattan Ry. Co., 75 Hun, 548.....	364, 530
Thomssen v. Hall County, (Neb.) 89 N. W. Rep. 389.....	86
Thoresen v. La Crosse City R. Co., 94 Wis. 129.....	1095, 2321
Thorn v. N. Y. Ice Co., 46 Hun, 497.....	1423, 1555
Thornton v. Lennon, 29 App. Div. 628.....	2077
Thorntown v. Fugate, 21 Ind. App. 537.....	2006
Thorogood v. Bryan, 8 C. B. 113.... (730).....	834, 2028
Thorogood v. Marsh, (Niel Gower, 105).... (268).....	
Thorp v. Brookfield, 36 Conn. 320.... (704).....	
Thorp v. Liebrecht, 56 N. J. Eq. 499.... (1199).....	
Thorp v. Minor, 109 N. C. 152.....	2365
Thorp v. Western U. T. Co., 84 Iowa, 190.....	2419
Thorpe v. N. Y. C. & H. R. R. Co., 76 N. Y. 402.....	522, 596, 597, 598
Thorpe v. Union P. R. Co., 24 Utah, 475.....	965
Thorsell v. Chicago City R. Co., 82 Ill. App. 375.....	2314
Threlkeld v. Wabash R. Co., 68 Mo. App. 127.....	671, 1238
Throckmorton v. Missouri & C. R. Co., 14 Tex. Civ. App. 222.....	1413, 1416
Throne v. Mead, 122 Mich. 273.....	990
Throop v. Griffen, 77 Ill. App. 505.....	2084
Thum v. Rhodes, 12 Colo. App. 245.....	1328, 1329
Thurber v. Harlem & C. R. Co., 60 N. Y. 331.....	673, 705, 710
Thuringer v. N. Y. C. & C. R. R. Co., 71 Hun, 526.....	847
Thuringer v. N. Y. C. & H. R. R. R. Co., 72 Hun, 33.....	1890



## TABLE OF CASES.

cccxiii

	PAGE
Thurn v. Alta. Tel. Co., 15 Cal. 472, 476.....	2396, 2437, 2440
Thurston v. Hancock, 12 Mass. 220.....	2070, 2101
Thurston v. Union Pac. R. Co., 4 Dillon, 321.... (363)	
Thyng v. Railroad Co., 156 Mass. 12.....	1615
Tibbitts v. Phipps, 30 App. Div. 274.....	1213, 1234
Tibbs v. Alabama &c. R. Co., 111 Ala. 449.....	1706
Tibby v. Missouri &c. R. Co., 82 Mo. 292.....	374
Tice v. Munn, 94 N. Y. 621.....	891
Tiehr v. Consolidated Gas Co., 51 App. Div. 446.....	1381
Tien v. Louisville &c. R. Co., 15 Ind. App. 304.....	1245
Tierney v. N. Y. C. & H. R. R. R. Co., 10 Hun, 568.....	230
Tierney v. Minneapolis &c. R. Co., 31 Minn. 234.....	2049
Tierney v. Minn. &c. R. Co., 33 Minn. 311.....	1800
Tierney v. Troy, 41 Hun, 120.....	1832, 1920
Tiers v. New York, 74 Hun, 452.....	1927
Tiesler v. Norwich, 73 Conn. 199.....	1867, 2013
Tiffin v. McCormack, 34 Ohio St. 644.....	2073
Tift v. Tift, 4 Den. 175.... (989)	2024
Tillett v. Norfolk &c. R. Co., 118 N. C. 1031.....	371, 399, 414, 476, 1336
Tillett v. Ward, Q. B. Div. 22 Am. L. Reg. 245.... (1011)	
Tilley v. Hudson R. R. Co., 29 N. Y. 252.....	857, 882
Tillinghast v. Merrill, 151 N. Y. 135.....	81
Tillis v. Austin, 117 Ala. 262.....	1082
Tilson v. Terwilliger, 56 N. Y. 273.....	1148, 1938
Tilton v. Boston &c. R. Co., 169 Mass. 253.... (761)	
Times Pub. Co. v. Carlisle, 94 Fed. Rep. 762.....	1200
Timlin v. Standard Oil Co., 126 N. Y. 514.....	1318
Timlin v. Standard Oil Co., 54 Hun, 44.....	1316, 1359
Timony v. Brooklyn City & Newtown R. Co., 10 Misc. 263. 2229, 2230, 2231,	2295
Timpson v. Manhattan R. Co., 52 Hun, 489.....	435
Tindoll v. McCarthy, 44 S. C. 487.... (104)	
Tinker v. New York &c. R. Co., 157 N. Y. 312.....	2240
Tinker v. N. Y., O. & W. R. Co., 71 Hun, 431.....	8, 2236
Tinney v. N. J. S. Co., 5 Lansing, 507.....	1213
Tinney v. Boston & A. R. Co., 52 N. Y. 632.....	1514
Tinney v. Central &c. R. Co., 129 Ala. 523.....	1260
Tirrell v. New York &c. R. Co., 180 Mass. 490.....	1709
Tisch v. Hirsch, 32 App. Div. 635.....	1460, 1703
Tisdale v. Bridgewater, 167 Mass. 248.....	1956
Tisdale v. Norton, 8 Mete. 388.... (820)	1842
Tish v. Welker, 7 Oh. N. P. 472.....	2030, 2191, 2197, 2198
Titman v. Mayor, 57 Hun, 469.....	1368
Titsworth v. Winnegar, 51 Barb. 148.....	107
Titts v. McGhee, 172 U. S. 516.....	2224
Titus v. New Scotland, 90 Hun, 468.....	1840
Titus v. New Scotland, 11 App. Div. 266.....	1952
Tobey v. Hudson, 49 Hun, 318.....	1884
Tobin v. Portland &c. Mills Co., (Or.) 68 Pac. Rep. 743.....	101
Tobin v. Portland &c. R. Co., 59 Me. 183.... (384)	814
Tobin v. Western U. T. Co., 146 Penn. 375.....	2412, 2426, 2452
Tocci v. Powell, 9 App. Div. 283.....	1090
Todd v. Danner, 17 Ind. App. 268.....	1091
Todd v. Hardie, 5 Ala. 698.....	1165
Todd v. Meding, 56 N. J. Eq. 83.....	94
Todd v. Old Colony &c. R. Co., 3 Allen, 18.....	537, 541, 700
Todd v. Philadelphia &c. R. Co., 201 Pa. St. 558.....	743
Todd v. Troy, 61 N. Y. 506.....	1888, 1893
Toledo v. Center, 16 Oh. C. C. 308.....	1878
Toledo v. Duffy, 13 Oh. C. C. 482.....	844
Toledo v. Grasser, 12 Oh. C. C. 520.....	941
Toledo v. Higgins, 12 Oh. C. C. 541.....	910, 1865
Toledo v. Lewis, 17 Oh. C. C. 588.....	1966
Toledo v. Merriam, 52 Ill. 123.... (349)	
Toledo v. Nitz, 23 Oh. C. C. 350.....	1827, 1941

	PAGE
Toledo Brew. &c. Co. v. Bosch, 101 Fed. Rep. 530.....	1490
Toledo Real Estate &c. Co. v. Putney, 44 Oh. C. C. R. 486.....	2135
Toledo &c. Inv. Co. v. Putney, 10 Oh. C. D. 698.....	708
Toledo &c. R. Co. v. Amboch, 10 Oh. C. C. 490..... (1112)	
Toledo &c. R. Co. v. Baddasley, 54 Ill. 19..... (472)	
Toledo &c. R. Co. v. Barlow, 71 Ill. App. 640.....	1016, 1025
Toledo &c. R. Co. v. Beard, 20 Oh. C. C. 681.....	1147, 1419, 1686, 1777
Toledo &c. R. Co. v. Block, 88 Ill. 112.....	1565
Toledo &c. R. Co. v. Bowler &c. Co., 63 Oh. St. 274.....	617
Toledo &c. R. Co. v. Bramagan, 75 Ind. 490.....	657
Toledo &c. R. Co. v. Chisholm, 83 Fed. Rep. 652.....	2140, 2170, 2342
Toledo &c. R. Co. v. Conroy, 39 Ill. App. 351.....	1603
Toledo &c. R. Co. v. Cory, 139 Ind. 218..... (1034)	
Toledo &c. R. Co. v. Dages, 57 Oh. St. 38.....	614
Toledo &c. R. Co. v. Eddy, 72 Ill. 138.....	1543
Toledo &c. R. Co. v. Eder, 45 Mich. 329..... (1036)	
Toledo &c. R. Co. v. Estherton, 22 Oh. C. C. 297..... (753)	
Toledo &c. R. Co. v. Franklin, 159 Ill. 99.....	1052
Toledo &c. R. Co. v. Fredericks, 71 Ill. 294.....	1404, 1429, 1685
Toledo &c. R. Co. v. Frick, 14 Oh. C. C. 453.....	1432, 1708
Toledo &c. R. Co. v. Fuller, 17 Oh. C. C. 562.....	387
Toledo &c. R. Co. v. Goddard, 25 Ind. 18..... (1)	
Toledo &c. R. Co. v. Grable, 88 Ill. 441..... (659)	705
Toledo &c. R. Co. v. Hammond, 33 Ind. 379.....	614
Toledo &c. R. Co. v. Harmon, 47 Ill. 298.....	11, 740, 809
Toledo &c. R. Co. v. Jones, 76 Ill. 311..... (785)	741
Toledo &c. R. Co. v. Loben, 71 Ill. 191..... (1034)	
Toledo &c. R. Co. v. Lutterbeck, 11 Oh. C. C. 279.....	453
Toledo &c. R. Co. v. Marsh, 17 Oh. C. C. 379.....	421
Toledo &c. R. Co. v. Mathersbaugh, 71 Ill. 572.....	1267, 1268
Toledo &c. R. Co. v. Maxfield, 72 Ill. 95.....	1259, 1264, 1269
Toledo &c. R. Co. v. Merriam, 52 Ill. 123..... (341)	338
Toledo &c. R. Co. v. Milligan, 52 Ind. 512.....	1048
Toledo &c. R. Co. v. Nelson, 77 Ill. 160..... (1035)	
Toledo &c. R. Co. v. O'Connor, 77 Ill. &c. 391..... (687)	
Toledo &c. R. Co. v. Patterson, 63 Ill. 304.....	581
Toledo &c. R. Co. v. Pense, 71 Ill. 174..... (1046)	
Toledo &c. R. Co. v. Riley, 47 Ill. 514..... (704)	
Toledo &c. R. Co. v. Rohner, 9 Oh. C. C. 702.....	910
Toledo &c. R. Co. v. Rumbold, 40 Ill. 143.....	1335
Toledo &c. R. Co. v. Schuckman, 50 Ind. 42..... (768)	
Toledo &c. R. Co. v. Tapp, 33 N. E. (Ind.) 462.....	620
Toledo &c. R. Co. v. Thomas, 18 Ind. 215..... (1041)	
Toledo &c. R. Co. v. Wand, 48 Ind. 476.....	1251
Toledo &c. R. Co. v. Wickenden, 11 Oh. C. C. 378.....	1251
Toledo &c. R. Co. v. Wickey, 44 Ill. 76..... (1013)	1034
Toledo &c. R. Co. v. Williams, 77 Ill. 354.....	596
Toledo &c. R. Co. v. Wingate, 143 Ind. 125.....	491
Toler v Yazoo &c. R. Co., (Miss.) 31 South. Rep. 788.....	487
Tolland v. Paine Furniture Co., 175 Mass. 476.....	2127
Tolman v. S. B. & C. R. R. Co., 98 N. Y. 198.....	747
Tolman v. S. & B. & N. Y. R. Co., 27 Hun, 326.....	1164
Tolman v. Abbot, 78 Wis. 192..... (351)	352
Tolman v. American Nat. Bank, 22 R. I. 462.....	165
Tolman v. Syracuse &c. R. Co., 98 N. Y. 203.....	1116
Tomka v. Central R. Co., 1 App. Div. 289.....	1655
Tomle v. Hampton, 129 Ill. 379.....	2122, 2125
Tomlin v. Hildreth, 65 N. J. L. 438.....	1997, 2007
Tomlin v. Thornton, 99 Ga. 585.....	178
Tomlinson v. Chicago &c. R. Co., 97 Fed. Rep. 252.....	1618
Tomlinson v. Polsley, 31 W. Va. 108.....	2180
Tomlinson v. Wilmington R. Co., 107 N. C. 327.....	903
Tompert v. Hastings Pavement Co., 35 App. Div. 578.....	1953
Tompkins v. Augusta &c. R. Co., 102 Ga. 436.....	571

# TABLE OF CASES.

cccxv

	PAGE
<b>Tompkins v. Oswego</b> , 15 N. Y. Supp. 371.... (704)	
<b>Tompkins v. R. Co.</b> , 66 Cal. 163.... (730)	
<b>Tompkins v. Scranton T. Co.</b> , 3 Pa. Super. Ct. 576.....	2284, 2321
<b>Tompkins v. Sheehan</b> , 6 App. Div. 76.....	92
<b>Tompsett v. Glade</b> , 198 Pa. St. 376.....	1863
<b>Toms v. Buffalo Creek R. Co.</b> , 70 Hun, 84.....	1607
<b>Tomsaelli v. Griffiths &amp;c. Corp.</b> 9 App. Div. 127.....	1628
<b>Tonawanda R. Co. v. Munger</b> , 49 Am. Dec. note, page 267.....	1005, 1023
<b>Tonawanda R. Co. v. Munger</b> , 5 Denio, 255.... (1007).....	1008
<b>Tonawanda R. Co. v. Munger</b> , 4 N. Y. 349.....	1012
<b>Tone v. Mayor</b> , 70 N. Y. 158.....	1989
<b>Toner v. Meussdorffer</b> , 123 Cal. 462.....	1328
<b>Toner v. Railroad Co.</b> , 69 Wis. 188.....	1616
<b>Toner v. South Covington &amp;c. R. Co.</b> , (Ky.) 58 S. W. Rep. 439.....	717
<b>Tonkins v. N. Y. Ferry Co.</b> , 47 Hun, 562.....	455
<b>Tonneson v. Ross</b> , 58 Hun. 415.....	1517
<b>Toobey v. Equitable Gas Co.</b> , 179 Pa. St. 437.....	1414
<b>Tooker v. Security Trust Co.</b> , 26 App. Div. 372.....	1310
<b>Toomey v. Avery Stamping Co.</b> , 20 Oh. C. C. 183.....	1639
<b>Toomey v. Turner</b> , 24 Hun, 599.....	1709
<b>Topeka v. Bradshaw</b> , 5 Kan. App. 879.....	1240
<b>Topeka v. Noble</b> , 9 Kan. App. 171.....	1870
<b>Topeka City R. v. Higgins</b> , 38 Kan. 375.....	539
<b>Topeka Water Co. v. Whittings</b> , 58 Kan. 639.....	1875, 1876, 1915, 2246
<b>Torney v. Mayor</b> , 12 Hun, 542.....	1996
<b>Torrey v. Boston &amp;c. R. Co.</b> , 147 Mass. 412.....	509, 537
<b>Torske v. Commonwealth &amp;c. Co.</b> , (Minn.) 96 N. W. Rep. 532.....	929
<b>Totarella v. New York &amp;c. R. Co.</b> , 53 App. Div. 413.....	2293
<b>Totten v. Nighbert</b> , 41 W. Va. 800.....	2225
<b>Totten v. Phipps</b> , 52 N. Y. 354.....	1317
<b>Toub v. Schmidt</b> , 60 Hun, 409.....	147
<b>Tourtlot v. Reed</b> , 62 Minn. 384.....	191
<b>Tousey v. Roberts</b> , 114 N. Y. 312.....	2, 1068
<b>Tousey v. Roberts</b> , 21 J. & S. 446, 447.....	523
<b>Tousley v. Tousley</b> , 5 Oh. St. 78.... (82)	
<b>Toutloff v. Green Bay</b> , 91 Wis. 480.....	2262
<b>Towanda Coal Co. v. Neeman</b> , 86 Pa. St. 418.... (421)	
<b>Town v. Horley</b> , 56 Fed. Rep. 874.....	1570
<b>Tower v. Providence &amp;c. R. Co.</b> , 2 R. I. 404.....	1002, 1008, 1019, 1046
<b>Towers v. Lake Erie &amp;c. R. Co.</b> , 18 Ind. App. 684.....	767
<b>Towle v. Blake</b> , 48 N. Y. 92.... (1179)	
<b>Towles v. Briggs</b> , 116 Mich. 425.....	2129
<b>Towles v. Southern R. Co.</b> , 103 Fed. Rep. 405.....	2148
<b>Town v. Armstrong</b> , 75 Mich. 580.....	1318, 1328
<b>Town v. Missouri P. R. Co.</b> , 50 Neb. 768.....	2083, 2089
<b>Towne v. Thompson</b> , 68 N. H. 317.....	1356
<b>Towner v. Brooklyn Heights R. Co.</b> , 44 App. Div. 628.....	2272, 2285
<b>Townley v. Chicago &amp;c. R. Co.</b> , 53 Wis. 626.....	1122, 2152
<b>Towns v. Cheshire R. Co.</b> , 21 N. H. 363.... (1004)	
<b>Towns v. Vicksburg &amp;c. R. Co.</b> , 37 La. Ann. 630.....	1405, 1429
<b>Townsend v. N. Y. C. R. Co.</b> , 53 N. Y. 25.... (899)	
<b>Townsend v. N. Y. C. &amp; H. R. R. Co.</b> , 56 N. Y. 295.....	569, 899
<b>Townsend v. Binghamton R. Co.</b> , 57 App. Div. 234.....	507
<b>Townsend v. Irasburg 47 Vt. 28.....</b>	2376
<b>Townsend v. Langles</b> , 41 Fed. Rep. 919.....	1448, 1698
<b>Townson v. Havre de Grace Bank</b> , 6 Harr. & Johns. 47.... (137)	
<b>Toy v. Long Island R. Co.</b> , 26 Misc. 792.....	243, 270
<b>Tozer v. N. Y. C. &amp;c. R. Co.</b> , 105 N. Y. 617.....	1224, 1225
<b>Tozer v. N. Y. C. &amp; H. R. Co.</b> , 38 Hun, 100.....	1226
<b>Trabing v. California Nav. &amp;c. Co.</b> , 121 Cal. 137.....	525, 1199, 1200
<b>Tracey v. Metropolitan Street R. Co.</b> , 49 App. Div. 197.....	1221
<b>Tracey v. Troy &amp;c. R. Co.</b> , 38 N. Y. 433.... (1043)	
<b>Tracey v. Baltimore &amp;c. R. Co.</b> , 98 Fed. Rep. 633.....	1034, 1036, 1045, 1059
	1239

	PAGE
Tracy v. Chicago &c. R. Co., 80 Mo. App. 389.....	226
Tracy v. Poughkeepsie, 46 Hun, 569.....	1895
Tracy v. Wood, 3 Mason, 132.....	124, 417
Traders' Nat. Bank v. Looney, 99 Tenn. 278.....	194
Traders' Nat. Bank v. Rogers, 167 Mass. 315.....	165
Tradewater Coal Co. v. Head, (Ky.) 66 S. W. Rep. 721.....	1711
Trafford v. Adams Ex. Co., 8 Lea, 96.... (945)	
Trambly v. Ricard, 130 Mass. 261.....	629
Tramwell v. Russellville, 34 Ark. 155.....	2002
Transfer Co. v. Kelly, 36 Oh. St. 86.... (730)	
Transit Co. v. Venable, 105 Tenn. 460.....	376
Transportation Co. v. Chicago, 99 U. S. 635.....	1959, 2061, 2073, 2098, 2101
Trapp v. McClellan, 68 App. Div. 362.... (659)	
Trask v. California &c. R. Co., 63 Cal. 96.....	1432
Travelers' Ins. Co. v. Clark, (Ky.) 59 S. W. Rep. 7.....	1309
Traveller's Ins. Co. v. Mitchell, 78 Fed. Rep. 754.....	1308
Travelers' Ins. Co. v. Nicklas, 88 Md. 470.....	1110
Traverell v. Bannerman, 75 N. Y. Supp. 866.....	2115
Treadwell v. Whittier, 80 Cal. 574.....	1074
Treanor v. M. R. Co., 41 N. Y. St. Repr. 614.....	1193
Treat v. Boston &c. R. Co., 131 Mass. 371.....	487, 509
Trecothlic v. Austin, 4 Mason, 16, 29.... (158)	
Trcka v. Burlington &c. R. Co., 100 Iowa, 205.....	1606, 1628
Tremain v. Cohoes Co., 2 N. Y. 163.....	2069
Tremblay v. Mapes-Reeve Const. Co., 169 Mass. 284.....	1216
Trenton &c. R. Co. v. Cooper, 60 N. J. L. 219.....	1063, 1105, 1137, 1156
Treschman v. Treschman, 28 Ind. App. 206.... (1178)	
Trevett v. Prison Asso., 98 Va. 332.....	2097
Trezona v. Chicago &c. R. Co., 107 Iowa, 22.....	571
Trieber v. Burrows, 27 Md. 130.....	142
Trimble v. New York &c. R. Co., 162 N. Y. 84.....	613, 623, 625
Trimble v. Reid, (Ky.) 41 S. W. Rep. 319.... (72)	
Trimble v. Thorson, 80 Iowa, 246.... (172)	
Trimmer v. Trimmer, 13 Hun, 182.....	1140
Trinity &c. R. Co. v. O'Brien, 18 Tex. Civ. App. 690.....	430, 973
Trinity &c. R. Co. v. Brown, (Tex. Civ. App.) 46 S. W. Rep. 926.....	1673
Triolo v. Foster, (Tex. Civ. App.) 57 S. W. Rep. 698.....	852, 979, 983
Troho v. City of Dubuque, 109 Iowa, 219.....	1169
Trolan v. New York &c. R. Co., 31 App. Div. 320.....	545
Trompen v. Verhage, 54 Mich. 304.... (988)	
Trost v. Casselton, 8 N. D. 534.....	2013, 2018
Trotchy v. Forty-second Street &c. R. Co., 73 Hun, 26.....	1202
Troth v. Willis, 8 Pa. Super. Ct. 1.....	1002
Trollinger v. R. Co., 11 Lea, (Tenn.) 533.....	568
Trotter v. Furniture Co., 101 Tenn. 257.....	1573
Troughear v. Lower Vein Coal Co., 62 Iowa, 576.....	1614, 1620, 2045
Trout v. Altoona &c. Electric R. Co., 13 Pa. Super. Ct. 17.....	2274, 2318
Trow v. C. R. Co., 24 Vt. 187.... (674)	
Trow v. Thomas, 70 Vt. 580.....	862, 2354
Trowbridge v. Chapin, 23 Conn. 595.... (208)	
Trowbridge v. Schriever, 5 Daly, 11.....	2124
Trower v. Wehner, 75 Ill. App. 655.....	1323
Troxell v. Malin, 9 Pa. Super. Ct. 483.....	193
Troxler v. Richmond & Danville T. Co., 74 N. C. 377.....	1256, 1269
Troxler v. Southern R. Co., 122 N. C. 902.....	1479
Troxler v. Southern R. Co., 124 N. C. 189.....	1755
Troy v. R. Co., 49 N. Y. 657.... (1296)	
Trudell v. Grand Trunk R. Co., 126 Mich. 73.....	743, 770, 2138
True v. Int. Tel. Co., 60 Me. 9.....	2390, 2395, 2397, 2430, 2441, 2448
True v. Lehigh Valley R. Co., 22 App. Div. 588.....	1436, 1548, 1631
True v. Niagara &c. R. Co., 70 App. Div. 383.....	1432, 1588
Truex v. Erie R. Co., 4 Lansing, 198.....	368
Trumball v. Coulson, 12 Colo. App. 102.....	342

## TABLE OF CASES.

cccxvii

	PAGE
Trumble v. Happy, 114 Iowa, 624.....	860, 986
Trumbull v. Chesapeake &c. R. Co., 18 Misc. 732.....	1142
Trumbull v. Erickson, 97 Fed. Rep. 891.....	401, 503, 517, 669
Truntle v. North Star &c. Co., 57 Minn. 52.....	1495
Trussel v. United Traction Co., 31 Pittsb Leg J. (N. S.) (Pa.) 15.....	2326
Trustees &c. v. Brush Electric Co., 50 Hun. 581.....	2236, 2261
Trustees v. Foster, 156 N. Y. 354.....	1338
Trustees &c. v. Foster, 81 Hun. 147.....	1859
Trustees &c. v. Wheeler, 61 N. Y. 88, 105.... (313)	
Tubbs v. Michigan C. R. Co., 107 Mich. 108.....	2139, 2161
Tubasing v. Buffalo, 51 App. Div. 14.....	1865
Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308.....	706, 707, 716, 770, 1111
Tucker v. Buffalo R. Co., 53 App. Div. 571.....	539
Tucker v. Chicago &c. R. Co., 122 Mich. 149.....	752, 755
Tucker v. International &c. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 914.....	1109
Tucker v. Norfolk &c. R. Co., 92 Va. 549.....	2147, 2148
Tucker v. Northern P. Co., (Ore.) 68 Pac. Rep. 426.....	1588
Tucker v. Pennsylvania Railroad Co., 10 Misc. 35.....	236
Tucker v. Rochester, 7 Wend. 254.....	1998
Tucker v. Tellette, 22 Oh. C. C. 664.....	2196
Tuffre v. State Centre, 57 Iowa, 538.....	2246
Tulley v. Chicago &c. R. Co., 41 Mo. App. 432.....	512
Tullis v. Hassell, 54 N. Y. Supr. Ct. 391.....	1731
Tullis v. Lake Erie &c. R. Co., 105 Fed. Rep. 554.....	1533, 1734
Tully v. Fitchburg R. Co., 134 Mass. 40.... (751)	
Tully v. New York &c. R. Co., 10 App. Div. 463.....	929, 1413
Tully v. Philadelphia &c. R. Co., 2 Penn. (Del.) 537.....	711, 2145, 2162
Tully v. Philadelphia &c. R. Co., (Del. Super.) 50 Atl. Rep. 95.....	661, 872, 1117, 2152
Tumalty v. New York &c. R. Co., 170 Mass. 164.....	1696, 1716
Tunison v. Weadock, (Mich.) 89 N. W. Rep. 703.....	2332
Tunney v. Midland Ry. Co., L. R., 1 C. P. 291.... (375)	
Tuomey v. O'Reilly, Skelly & Fogarty Co., 3 Misc. 302.....	1110
Tupper v. Metropolitan Street R. Co., 36 Misc. 819.....	2282
Turley v. Boston &c. R. Co., 70 N. H. 348.....	21
Turner v. Bank &c., 4 Abb. (C. A. D.) 434.... (35)	
Turner v. Buchanan, 82 Ind. 147.....	697, 767
Turner v. Cross, (Tex.) 18 S. W. Rep. 578.... (95)	
Turner v. Goldsboro Lumber Co., 119 N. C. 387.... 1134, 1498, 1505, 1639, 1645	
Turner v. Great Northern R. Co., 15 Wash. 213.....	563, 566, 856
Turner v. Grobe, (Tex. Civ. App.) 44 S. W. Rep. 898.....	195
Turner v. Hawkeye T. Co., 41 Iowa, 458.....	2396, 2431
Turner v. Hitchcock, 20 Iowa, 331.....	2202, 2205
Turner v. Kansas &c. R. Co., 78 Mo. 578.... (1013)	
Turner v. McCook, 77 Mo. App. 196.....	567
Turner v. Newburgh, 109 N. Y. 301.....	1224, 1919
Turner v. New Farmers' Bank, (Ky.) 39 S. W. Rep. 425.....	179
Turner v. R. Co., 74 Mo. 602.... (753)	
Turner v. Railroad Co., 78 Mo. 578.... (793)	
Turner v. R. Co., 20 Mo. App. 632.... (338)	
Turner v. St. Clair Tunnel Co., 121 Mich. 616.....	1773
Turner v. St. Louis &c. R. Co., 76 Mo. App. 281.... (1015)	
Turner v. Tel. Co., 41 Iowa, 458.....	2451
Turner v. Toledo, 15 Oh. C. C. 627.....	1988
Turner v. Thomas, 71 Mo. 596.....	1030, 2108
Turner v. Whitaker, 9 Pa. Super. Ct. 83.....	154
Turnpike Co. v. Jackson, 86 Ind. 111.... (697)	
Turnpike Co. v. News Co., 43 N. J. L. 381.....	2390
Turrentine v. Wilmington &c. R. Co., 100 N. C. 375.....	335
Turton v. Powelton Electric Co., 185 Pa. St. 406.....	1066
Tuscaloosa Waterworks Co. v. Herren, 131 Ala. 81.....	1703
Tuteur v. Chicago &c. R. Co., 77 Wis. 505.....	886, 954
Tutt v. Illinois C. R. Co., 104 Fed. Rep. 741.....	2165
Tuttill v. Farington, 58 N. H. 13.....	2365

Tuttle v. Chicago &c. R. Co., 42 Iowa, 518.... (848)	
Tuttle v. Detroit R. Co., 122 U. S. 195.....	1406, 1474, 1492, 1548, 1698
Tuttle v. Farmington, 58 N. H. 13..... (898)	
Tuttle v. Holyoke, 6 Gray, 447.... (898)	
Tutwiler Coal &c. Co. v. Enslen, 129 Ala. 336.....	872
Tvedt v. Wheeler, 70 Minn. 161.....	1077, 1122
Twigg v. Ryland, 62 Md. 380.....	883, 979
Twist v. Rochester, 37 App. Div. 307.....	924, 1059
Twist v. Wynona &c. R. Co., 39 Minn. 164.....	721
Twogood v. Mayor, 102 N. Y. 216.....	1948
Twoksbury v. Bucklin, 7 N. H. 518.....	996, 1045
Twomley v. Central Park &c. R. Co., 69 N. Y. 158.....	685, 686
Tyler v. W. U. T. Co., 60 Ill. 421.....	2390, 2391, 2397, 2398, 2415, 2429
Tyler v. Chicago &c. R. Co., 102 Iowa, 632.... (1257)	
Tyler v. Nelson, 109 Mich. 37.... (660)	
Tyler &c. R. Co. v. McMahon, (Tex. Civ. App.) 34 S. W. Rep. 796.....	926
Tyler &c. R. Co. v. Rasberry, 13 Tex. Civ. App. 185.....	885, 926, 939, 1686
Tynor v. Cary, 5 Ind. 216.... (989)	
Tyson v. Booth, 100 Mass. 258.....	864
Tyson v. Railroad Co., 61 Ala. 554.....	1664
U. P. R. W. Co. &c. v. Rollins, 5 Kan. 167.... (659)	
U. P. R. Co. v. Henry, 36 Kan. 565.... (659)	
Uhlein v. Cromack, 107 Mass. 273.....	990
Uhlein v. Cromack, 107 Mass. 273.....	990
Uhlman v. Chicago &c. R. Co., 112 id. 108.....	258
Uline v. N. Y. C. R. Co., 101 N. Y. 98.....	1250, 1960
Ullman v. Chicago &c. R. Co., 112 Wis. 150, 168.....	258
Ulrich v. Cleveland &c. R. Co., 151 Ind. 358.....	2145
Ulrich v. N. Y. C. & H. R. R. Co., 108 N. Y. 80.....	259, 597
Ulrich v. Toledo &c. Street R. Co., 10 Oh. C. C. 635.....	729, 731, 1170, 2298
Umbach v. Lake Shore &c. R. Co., 83 Ind. 191.....	1750
Underwood v. Vail, 69 Ill. App. 679.....	922
Underzook v. Commonwealth, 76 Pa. St. 340.....	1238
Undlejen v. Hastings, 38 Minn. 485.....	2365
Unger v. Forty-second Street R. Co., 51 N. Y. 500.....	2228, 2230, 2275, 2363
Union v. Hester, 8 Kan. App. 725.....	2054
Union Compress Co. v. Nunnally, 67 Ark. 284.....	100, 103
Union Ex. Co. v. Graham, 26 Oh. St. 595.....	252
Union M. L. &c. Co. v. McMillen, 24 Oh. St. 67.....	2199
Union Mill &c. Co. v. Danberg, 81 Fed. Rep. 73.....	2085
Union National Bank v. Hill, 148 Mo. 380.....	73
Union National Bank v. Post, 64 Ill. App. 404, 407.....	118
Union National Bank v. Sixth National Bank &c., 43 N. Y. 452.....	1079
Union Nut & Bolt Co. v. Doherty, 32 Misc. Rep. 247.....	188
Union R. Co. v. Hacklet, 119 Ill. 232.....	2053
Union &c. R. Co. v. Moyer, 40 Kan. 184.....	331
Union &c. Co. v. Westcott, 47 Neb. 300.....	318
Union P. R. Co. v. Adams, 33 Kan. 427.... (753)	
Union P. R. Co. v. Bottsford, 141 U. S. 250.....	2032
Union P. R. Co. v. Clark, 51 Neb. 220.....	1709
Union P. R. Co. v. Doyle, 50 Neb. 555.....	1639, 1645, 1712
Union P. R. Co. v. Dunden, 37 Kan. 1.....	720, 966
Union P. R. Co. v. Eddy, 2 Kan. App. 291.....	1267
Union P. R. Co. v. Elliot, 54 Neb. 299.....	1156, 1444
Union P. R. Co. v. Evans, 52 Neb. 50.....	429
Union P. R. Co. v. Harwood, 31 Kan. 388.....	2126
Union P. R. Co. v. Henry, 36 Kan. 565.....	809
Union P. R. Co. v. High, 14 Neb. 14.... (1034)	
Union P. R. Co. v. James, 56 Fed. Rep. 100.....	1470, 1478
Union P. R. Co. v. Langan, 52 Neb. 105.....	226
Union P. R. Co. v. McCollum, 2 Kan. App. 319.....	1263
Union P. R. Co. v. Mitchell, 56 Kan. 324.....	419

# TABLE OF CASES.

cccxix

	PAGE
Union P. R. Co. v. Mohaffy, 4 Kan. App. 88.....	1798
Union P. R. Co. v. Motzner, 2 Kan. App. 342.... (1251)	
Union P. R. Co. v. Nichols, 8 Kan. 505.... (376)	
Union P. R. Co. v. O'Brien, 161 U. S. 451.....	1434, 1680, 1689
Union P. R. Co. v. Rey, 46 Neb. 750.....	941, 1263
Union P. R. Co. v. Shacklet, 119 Ill. 232.....	965
Union P. R. Co. v. Shook, 3 Kan. App. 710.....	825
Union P. R. Co. v. Springsteen, 41 Kan. 724.....	1532
Union P. R. Co. v. Sue, 25 Neb. 772.....	453
Union P. R. Co. v. Ure, 56 Kan. 473.....	2145
Union P. R. Co. v. Vincent, 58 Neb. 171.....	2046
Union P. R. Co. v. Yates, 40 L. R. A. 553.... (852)	
Union P. R. Co. v. Young, 57 Kan. 168.... (714)	
Union P. R. &c. Co. v. Williams, 3 Colo. App. 526.....	827
Union Show-Case Co. v. Blindauer, 175 Ill. 325.....	1567
Union Show Case Co. v. Blindauer, 75 Ill. App. 358.....	917, 1215, 1477
Union Stock Yards &c. Co. v. Goodman, 91 Ill. App. 426.....	2141
Union Stockyards v. Goodwin, 57 Neb. 138.....	1196, 1585, 1586, 1676, 1683
Union Stockyard &c. Co. v. Mallory Co., 157 Ill. 554.....	112
Union Traction Co. v. Fetters, 99 Fed. Rep. 214.....	2125
Union Warehouse Co. v. Prewitt, (Ky.) 50 S. W. Rep. 964.....	660, 925, 2126
United Casualty &c. Co. v. Harroll, 98 Tenn. 591.....	1310
United R. &c. Co. v. Fletcher, 95 Md. 533.....	2323
United R. &c. Co. v. Hardesty, (Md.) 51 Atl. Rep. 406.....	574
United States v. Devereaux, 90 Fed. Rep. 182.....	1373
United States Laundry Co. v. Schilling, (Ky.) 56 S. W. Rep. 425.....	1497
United States Mail Line Co. v. Carrollton &c. Man. Co., 101 Ky. 658.....	342
United States Nat. Bank v. First National Bank, 79 Fed. Rep. 296.....	195
United States Nat. Bank v. Forstedt, (Neb.) 90 N. W. Rep. 919.....	41
United States Nat. Bank v. Floss, 38 Ore. 68.....	193
United States Nat. Bank v. Geer, 55 Neb. 462.....	100
United States Watch Co. v. Southern Ex. Co., 120 N. C. 351.... (240)	
United States &c. Co. v. Chadwick, 35 Ill. App. 474.....	1556
United States &c. Co. v. Gallegos, 89 Fed. Rep. 769.....	2085
Unity v. Pike, N. H. 71.....	2030
Upham v. Detroit &c. R. Co., 85 Mich. 12.....	509
Uppington v. New York, 165 N. Y. 222.....	637, 1811, 2008
Uppington v. New York, 41 App. Div. 370.....	1904
Uptegrove v. Central R. Co., 16 Misc. 14.....	300
Uransky v. Dry Dock, E. B. & R. Co., 188 N. Y. 304.....	843
Urbanck v. Chicago &c. R. Co., 47 Wis. 59.... (755)	
Uren v. Walsh, 57 Wis. 98.....	89
Urquhart v. Ogdensburg, 91 N. Y. 67.....	1809, 1810, 1812, 1914
Urtel v. Flint, 122 Mich. 65.....	1862, 1872, 1877
Urton v. Price, 57 Cal. 270.....	2208
U. S. Ex. Co. v. Bochman, 28 Oh. St. 144.... (285)	
U. S. Ex. Co. v. Coffman, 84 Ill. App. 491.....	223, 246
U. S. Ex. v. Harris, 67 Ill. 137.... (349)	
U. S. Ex. Co. v. McCluskey, 77 Ill. App. 56.....	699
U. S. Fidelity &c. Co. v. Muir, 115 Fed. Rep. 264.....	19
U. S. I. Co. v. Grant, 55 Hun, 222.... (1058)	
U. S. T. Co. v. Gildersleve, 29 Md. 232.....	
..... 2393, 2398, 2399, 2413, 2415, 2425, 2428, 2430, 2441, 2448	
U. S. Tel. Co. v. Wenger, 55 Pa. St. 268.....	2448
Usher v. Van Yranker, 48 App. Div. 413.....	2027
Uther v. Rich, 10 Adol. & Ell. 784.... (184)	
Uthermohlen v. Bogg's Run. Min. Co., 50 W. Va. 457.....	2110
Utley v. Hill, 155 Mo. 232.....	73
V. & M. R. Co. v. Wilkins, 47 Miss. 404.....	700
Va. &c. R. Co. v. Sayers, 26 Gratt. 328.....	257
Vadderverter v. Chicago City R. Co., 26 Fed. Rep. 32.... (476)	
Vahue v. New York &c. R. Co., 18 App. Div. 452.....	760
Vail v. Broadway R. Co., 17 N. Y. 377.....	505

	PAGE
Vail v. Cincinnati &c. R. Co., 7 Oh. Dec. 28.....	668
Vail v. Bliss, 60 Barb. 358.....	2133
Valley v. Concord &c. R. Co., 68 N. H. 546.....	2058, 2368
Valley R. Co. v. Keagan, 87 Fed. Rep. 849.....	1689
Valley Turnpike &c. Co. v. Lyons, (Ky.) 58 S. W. Rep. 502.....	2246
Valparaiso City Water Co. v. Dickover, 17 Ind. App. 233.....	1369, 2684
Van Antwerp v. Linton, 89 Hun, 417.....	2119
Vanarsdell v. Louisville &c. R. Co., (Ky.) 65 S. W. Rep. 858.....	1206
Vanasoe v. Reid, 111 Wis. 303.....	2179
Van Bergen v. Eulberg, 111 Iowa, 139.....	987
Van Camp Hardware &c. Co. v. O'Brien, 28 Ind. App. 152.....	914, 2355
Van Campen v. Bruns, 54 App. Div. 86.....	2181
Vance v. Throckmorton, 5 Bush. 41.....	135, 145
Vandenburg v. Truax, 4 Denio, 464..... (893).....	1288
Vanderbeck v. Henry, 34 N. J. L. 467.....	2106
Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479.....	23
Vandercok v. Detroit &c. R. Co., 125 Mich. 459.....	544
Vandergrift v. Rediker, 22 N. J. L. 185.....	1001, 1012, 1018
Vanderkar v. R. & S. R. R. Co., 13 Barb. 390..... (69)	
Vanderpool v. Lexington &c. R. Co., (Ky.) 46 S. W. Rep. 699.....	2153
Vanderwater v. N. Y. C. & H. R. R. Co., 135 N. Y. 583.....	781, 795
Van Deusen v. Young, 29 N. Y. 36..... (888)	
Vandewater v. N. Y. &c. R. Co., 74 Hun, 32.....	738, 783, 814
Vandewater v. Wappinger, 69 App. Div. 325.....	1161, 1833
Van Doran v. Marden, 48 Iowa, 188..... (849)	
Van Dusen v. Letellier, 78 Mich. 492.....	1466, 1470, 1473, 1490, 1621
Van Duzer v. Howe, 21 N. Y. 531.....	175, 176
Van Dyck v. Hewitt, 1 East. 96.....	2378
Van Dyck v. McQuade, 86 N. Y. 38.....	68
Van Etten v. Newton, 134 N. Y. 143.....	274, 280
Van Every v. Ogg, 59 Cal. 566.....	1355
Van Gaasbeck v. Saugerties, 82 Hun, 415.....	1844
Vanhoozer v. Berghoff, 90 Mo. 487.....	2191
Van Horn v. Burlington R. Co., 59 Iowa, 33.....	1044, 1206
Van Horn v. Burlington &c. R. Co., 63 Iowa, 67.....	1013, 1017
Van Horn v. Kermit, 4 E. D. Smith, (N. Y.) 453.....	614, 620
Van Houten v. Fleischman, 1 Misc. 130.....	2230, 2365
Van Inwegen v. N. Y., L. E. & W. R. Co., 76 Hun, 53.....	1203, 1284
Van Leuven v. First National Bank, 54 N. Y. 671..... (120)	
Van Leuven v. Lyke, 1 Com. 515.....	980, 1001, 1004, 2359
Van Nostrand v. New York, Lake Erie & Western R. Co., 78 Hun, 549.....	1287
Van Note v. Hannibal &c. R. Co., 70 Mo. 641..... (793)	
Van Orden v. Acken, 28 App. Div. 160.....	1107
Van Ostran v. N. Y. C. & H. R. R. R. Co., 35 Hun, 590.....	448
Van Patten v. Schenectady Street R. Co., 80 Hun, 494..... 2228, 2231, 2273, 2276, 2310	
Van Pelt v. Clarksburg, 42 W. Va. 218.....	1819, 1898
Van Santford v. St. John, 6 Hill R. 157..... (341).....	345, 346, 352
Van Schaick v. H. R. R. Co., 43 N. Y. 527.....	446, 674, 1709
Van Sickel v. Ilaley, 75 Hun, 537.....	1446
Van Siclan v. New York, 32 Misc. 403.....	1964
Van Siclen v. Jamaica Electric Light Co., 45 App. 1.....	9
Van Skike v. Potter, 53 Neb. 28.....	2189, 2193
Van Slyck v. Snell, 6 Ians. 299..... (1008)	
Van Steenburgh v. Thornton, 58 N. J. L. 160.....	1407, 1629
Van Steenburgh v. Tobias, 17 Wend. 562.....	633, 997
Van Stone v. Burlington R. Co., 63 Iowa, 67..... (1014)	
Vansyoc v. Freewater &c. Asso., (Neb.) 88 N. W. Rep. 162.....	1248
Vant v. Chicago &c. R. Co., 101 Wis. 363..... (779)	
Van Tassel v. New York &c. R. Co., 1 Misc. 299.....	1467, 1477
Van Tassel v. Read, 36 App. Div. 529.....	1327
Van Wart v. Woolley, 5 Dowl. & Ryl. 374..... (36)	
Van Wie v. Mt. Vernon, 26 App. Div. 330.....	1814
Van Wickle v. Man. R. Co., 32 Fed. Rep. 278.....	1614
Van Winkle v. American Steam Ins. Co., 41 A. L. J. 579.....	1380



## TABLE OF CASES.

cccxix

	PAGE
Van Wyck v. Allen, 69 N. Y. 62.... (607)	
Van Wyck v. Howard, 12 How. Pr. 147.....	153
Van Wycklen v. Brooklyn, 118 N. Y. 424.... (1213)	
Varnum v. Martin, 15 Pick. 440.....	2178
Vasele v. Grant &c. Electric R. Co., 16 Wash. 802.....	459
Vassau v. Madison Electric R. Co., 106 Wis. 301.....	594, 907
Vaughn v. Wabash R. Co., 62 Mo. App. 461.....	251, 288, 825
Vaughn Mach. Co. v. Quintard, 37 App. Div. 368.....	1199
Vaughtman v. Waterloo, 14 Ind. App. 649.....	1986
Vedder v. Fellows, 20 N. Y. 126.....	545, 1731
Veeder v. Village of Little Falls, 100 N. Y. 343.....	1831, 2378
Veerhusen v. Chicago &c. R. Co., 53 Wis. 689.... (1046)	1034
Vega S. Co. v. Consol. Elevator Co., 75 Minn. 308.....	1308
Veith v. Hope Salt &c. Co., 51 W. Va. 96.....	2068
Velas v. Patton Coal Co., 197 Pa. St. 380.....	1671
Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517.....	1506, 1634
Verdin v. Robertson, 10 Ct. Sess. Cas. 3, sec. 35.....	2424
Vergin v. Saginaw, 125 Mich. 499.....	860, 1202, 1898
Verner v. Sweitzer, 32 Pa. St. 208.... (291)	285, 289
Vicars v. Cumberland Teleph. &c. Co., 52 La. Ann. 2153.....	1644
Vick v. N. Y. C. & H. R. R. Co., 95 N. Y. 267.....	375, 1614, 1617
Vickers v. Chicago &c. R. Co., 71 Fed. Rep. 139.....	2208
Vickers v. Cloud County, 59 Kan. 86.....	1830
Vickey v. Missouri &c. R. Co., 7 Mo. App. 150.... (758)	
Vicksburg &c. R. Co. v. Alexander, 62 Miss. 496.....	818
Vicksburg &c. R. Co. v. Lawrence, 78 Miss. 86.....	936
Vicksburg &c. R. Co. v. McGowan, 62 Miss. 682.....	2155
Vicksburg v. McLain, 67 Miss. 4.....	880
Vicksburg &c. R. Co. v. Patton, 31 Miss. 156.... (1001)	1004
Vicksburg Man. Co. v. Vaughn, (Miss.) 27 South. Rep. 599.....	1721
Victorian Railway Comrs. v. Coutlas, 13 App. Cas. 222.....	2307
Victory v. Baker, 67 N. Y. 366.....	2116
Vidalat v. New Orleans, 43 La. Ann. 1125.....	2238
Vigeant v. Marlboro, 175 Mass. 450.....	1963
Vilas v. Vanderbilt, 20 Misc. 51.....	1492, 1592
Viles v. Stantes, 83 Ill. App. 398.....	1108
Village of Port Jervis v. First Nat. Bank of Port Jervis, 96 N. Y. 550.... 1295, 1301	
Vincennes v. Richards, 23 Ind. 381.....	1966
Vincennes v. Thuis, 28 Ind. App. 523.....	730, 1926, 1954, 1957
Vincennes &c. R. Co. v. White, 124 Ind. 376.....	1543
Vincent v. Alden, 45 App. Div. 627.....	1742
Vincent v. Brooklyn, 31 Hun, 122.....	1992, 1998
Vincent v. Chicago &c. R. Co., 29 Iowa, 592.... (1023)	
Vincent v. Morgan's L. R. &c. Co., 48 La. Ann. 933.....	752, 775
Vincent v. Norton &c. R. Co., 180 Mass. 104.....	2325, 2333
Vineberg v. R. Co., 13 Ont. App. 91.... (622)	
Viner v. N. Y., A. G. & M. S. R. Co., 50 N. Y. 23.....	309
Vineyard v. St. Louis &c. R. Co., 80 Mo. 92.... (1036)	
Vining v. Detroit &c. R. Co., 122 Mich. 248.....	562
Vining v. New York &c. R. Co., 167 Mass. 539.....	1685
Vinson v. Flynn, 64 Ark. 453.....	1328
Vinton v. Middlesex R., 11 Allen, 304.....	365, 532
Virginia-Carolina Chem. Co. v. Kerien, 57 S. C. 445.....	1239
Virginia &c. R. Co. v. Roach, 83 Va. 375.... (381)	
Virginia &c. Wheel Co. v. Chalkley, 98 Va. 62.....	1398, 1580
Vitto v. Farley, 15 Misc. 153.....	1502, 1596
Vizelich v. Southern P. Co., 126 Cal. 587.....	1606
Voak v. N. Y. C. & H. R. R. Co., 75 N. Y. 320.....	780, 2361
Vogel v. West Plains, 73 Mo. App. 588.....	1954
Vogelgesang v. St. Louis, 139 Mo. 127.....	1821, 1829, 1924, 2044
Vogg v. Missouri P. R. Co., 138 Mo. 172.... (761)	
Voghts v. Metropolitan Street R. Co., 36 Misc. 799.....	2331
Vogt v. Honstain, 81 Minn. 174.....	1572
Vought v. Michigan Peninsular Car Co., 11 Mich. 504.....	2068

	PAGE
Volk v. Sturtevant Co., 104 Fed. Rep. 276.....	1596
Volkmar v. Manhattan Co., 134 N. Y. 418.....	1098, 1105, 2262
Von Ritzinger v. The N. Y. C. & H. R. R. Co., 83 Hun, 120.....	751
Von Wallhoffen v. Newcombe, 10 Hun, 236.....	2172
Voorhees v. Kings Co. El. R. Co., 3 Misc. (N. Y.) 18.....	531
Voorhees v. Lake Shore &c. R. Co., 193 Pa. St. 115.....	1434
Vorbich v. Geuder &c Co. 96 Wis. 277.....	1113
Vorrath v. Burke, 63 N. J. L. 188.....	718, 1330
Vorst v. Sharron 24 App. Div. 599.....	2020
Vosbeck v. Kellogg, 78 Minn. 176.....	651
Vosburg v. Putney, 86 Wis. 278.....	897
Vosburgh v. Lake Shore & M. S. R. Co., 94 N. Y. 374.....	1227, 1466
Voshefskey v. Hillsdale Coal &c. Co., 21 App. Div. 168.....	1735
Vosper v. New York, 49 Supr. Ct. 296.....	1927
Voss v. Delaware &c. R. Co., 62 N. J. L. 59.....	1513, 1525
Vreeland v. Cincinnati &c. R. Co., 69 Mich. 585.... (755)	
Vrench v. Brunswick, 21 Me. 29.....	1938
Vroman v. Am. Merchants' Union Ex. Co., 2 Hun, 512.....	242
Vroman v. Houston &c. R. Co., (City Ct. N. Y.) 7 Misc. 234.....	537
Vroman v. Rogers, 132 N. Y. 167.....	1318, 1320, 2117
Vroman v. Turner, 69 N. Y. 280.....	637
Vrooman v. Lawyer, 13 Johns. 339.... (977)	
Vross v. Wagner Palace Car Co., 16 Ind. App. 271.....	599
W., S. L. & P. R. Co. v. Locke, 2 Am. St. Rep. 193.... (1097)	
W. & N. O. T. Co. v. Hobson, 15 Gratt, 122.....	2453
Wabash Nav. Co. 15 Ill. 72.....	1335
Wabash Paper Co. v. Webb, 146 Ind. 303.....	1448, 1743
Wabash R. Co. v. Arvig, 66 Ill. App. 146.....	1028
Wabash R. Co. v. Coker, 81 Ill. App. 660.....	743
Wabash R. Co. v. Cregan, 23 Ind. App. 1.....	873
Wabash R. Co. v. Crews, 65 Ill. App. 442.....	1056
Wabash R. Co. v. Defiance, 167 U. S. 88.....	2013
Wabash R. Co. v. Elliott, 98 Ill. 481.....	1613
Wabash R. Co. v. Farrell, 79 Ill. App. 508.... 1108, 1158, 1215, 1406, 1428,	1477
Wabash R. Co. v. Heeter, 14 Oh. C. C. 257.....	1712
Wabash R. Co. v. Heeter, 7 Oh. Dec. 485.....	1707
Wabash R. Co. v. Jenkins, 84 Ill. App. 511.... (1237).....	751
Wabash R. Co. v. Jones, 163 Ill. 167.....	2162
Wabash R. Co. v. Kelley, 153 Ind. 119.....	1143, 1771, 2193
Wabash R. Co. v. Kingsley, 177 Ill. 558.....	418
Wabash R. Co. v. Lannum, 71 Ill. App. 84.....	282
Wabash R. Co. v. McDaniels, 107 U. S. 452.....	1529
Wabash R. Co. v. Miller, 18 Ind. App. 549.....	1093, 2055
Wabash R. Co. v. Pickrell, 72 Ill. App. 601.....	1032
Wabash R. Co. v. Randol, 69 Ill. App. 432.....	1056
Wabash R. Co. v. Ray, 152 Ind. 392.....	1689
Wabash R. Co. v. Schultz, (Ind. App.) 64 N. E. Rep. 481.....	1254, 2048
Wabash R. Co. v. Smillie, 97 Ill. App. 7.....	751, 810
Wabash R. Co. v. Zerwick, 74 Ill. App. 670.....	774, 1728, 1754
Wabash &c. R. Co. v. Central Trust Co., 23 Fed. Rep. 738.....	764
Wabash &c. R. Co. v. Ferris, 6 Ind. App. 30.....	1056
Wabash &c. R. Co. v. Fox, 20 Oh. C. C. 440.....	963
Wabash &c. R. Co. v. Henks, 91 Ill. 406.... (775)	
Wabash &c. R. Co. v. Hicks, 13 Ill. App. 407.... (776)	
Wabash &c. R. Co. v. Jensen, 99 Ill. App. 312.....	657, 666, 763, 1091
Wabash &c. R. Co. v. Kastner, 80 Ill. App. 572.....	1546, 1711
Wabash &c. R. Co. v. Koenigsaw, 13 Ill. App. 505.....	409
Wabash &c. R. Co. v. Moran, 13 Ill. App. 72.....	1403
Wabash &c. R. Co. v. Morgan, 132 Ind. 430.....	1730
Wabash &c. R. Co. v. Shacket, 105 Ill. 364.....	511, 730, 2028
Wabash &c. R. Co. v. Thompson, 15 Ill. App. 117.....	1717
Wabash &c. R. Co. v. Weisbeck, 14 Ill. App. 525.....	737
Wabash &c. R. Co. v. Williamson, 104 Ind. 154.....	1048
Wabash &c. R. Co. v. Wolff, 13 Ill. App. 437.....	2028

## TABLE OF CASES.

cccxiii

	PAGE
Wabaska E. Co. v. Wymore, 60 Neb. 199.....	2007
Wacholz v. Griesgraber, 70 Minn. 220.....	1323
Wachman v. The Columbia Bank of the City of New York, 8 Misc. 280.....	1080
Wachsmuth v. Shaw Electric Crane Co., 118 Mich. 275.....	1469
Wachtel v. East St. Louis &c. R. Co., 77 Ill. App. 465.....	1118, 2288
Wachter v. Second Ave. T. Co., 198 Pa. St. 129.....	2290
Waddele v. New York &c. R. Co., 4 App. Div. 549.... (773).....	809
Wade v. Wheeler, 3 Lana. 201.... (207)	
Wade v. LeRoy, 20 How. (U. S.) 343.... (836).....	2052
Wade v. Thayer, 40 Cal. 578.....	900
Wadsworth v. Marshall, 88 Me. 263.....	2073
Wadsworth v. W. U. T. Co., 86 Tenn. 695.....	858, 2428
Wadsworth Howland Co. v. Foster, 50 Ill. App. 513.....	638
Wagen v. Minneapolis &c. Street R. Co., (Minn.) 82 N. W. Rep. 1107.....	1396
Waggner v. Point Pleasant, 42 W. Va. 798.....	1857, 2044
Waggner v. Finch, 1 Hilt. 213; 1 N. Y. 145.... (311)	
Wagner v. Aulenbach, 170 Pa. St. 495.....	1365
Wagner v. Brooklyn &c. R. Co., 69 App. Div. 349.....	1059
Wagner v. Goldsmith, 78 Ind. 517.....	2363
Wagner v. Missouri Pac. R. Co., 97 Mo. 512.....	403
Wagner v. New York Condensed Milk Co., 21 Misc. 62.....	2362
Wagner v. Portland, 40 Or. 389.....	1525, 1705, 1815, 1983
Wahl v. Chattellon, 56 App. Div. 554.....	1749
Wahl v. Shoulder, 14 Ind. App. 665.....	2045
Wahlgren v. Market Street R. Co., 132 Cal. 656.....	681, 910
Wahlquist v. Maple Grove Coal &c. Co., (Iowa) 89 N. W. Rep. 98.....	1585, 1739
Wait v. Burlington &c. R. Co., 61 Vt. 268.... (1036)	
Wait v. Omaha &c. R. Co., 165 Mo. 612.....	404
Waite v. Leggett, 7 Cow. 195.... (1079)	
Waixel v. Harrison, 37 Ill. App. 323.....	1292
Wake v. Price, (Ky.) 58 S. W. Rep. 519.....	1739
Wakefield v. C. & P. &c. R. Co., 37 Vt. 330.... (785)	
Wakeman v. Wheeler & Wilson Man. Co., 101 N. Y. 217.....	1209
Wakley v. Boswell, 149 Ind. 64.....	1992
Walbridge v. Schuykill &c. R. Co., 190 Pa. St. 274.....	708
Walcott v. Swampscott, 1 Allen, 101.....	1909, 1990
Wald v. Pittsburg &c. R. Co., 162 Ill. 545.....	610, 611
Waldele v. N. Y. C. & H. R. R. Co., 95 N. Y. 274.....	1148, 1149, 1938
Waldele v. N. Y. C. & H. R. Co., 19 Hun. 69.....	703, 1140
Waldele v. N. Y. C. & H. R. R. Co., 29 Hun. 35.....	1141, 1180
Waldele v. New York &c. R. Co., 4 App. Div. 549.....	808
Walden v. Finch, 70 Pa. St. 460.....	1380, 2129
Walden v. Firemen's Ins. Co., 12 John. 128-134.... (202)	
Walden v. Western Union Teleg. Co., 105 Ga. 275.....	2460
Waldron v. Boston &c. R. Co., (N. H.) 52 Atl. 433.... (751)	
Waldron v. Canadian P. R. Co., 22 Wash. 253.....	227
Waldron v. Price, 22 N. Y. 368.... (272)	
Waldron v. Rensselaer &c. R. Co., 8 Barb. 390.... (1043)	
Waldron v. Willard, 17 N. Y. 466.....	632
Wales v. Ford, 3 Holst. 267.... (995)	
Wales v. Pacific &c. Motor Co., 130 Cal. 521.....	881, 1060
Walker v. Ann Arbor, 111 Mich. 1.....	1920
Walker v. Atlanta &c. R. Co., 103 Ga. 820.....	1434, 1689, 1742, 1801
Walker v. Babcock, 16 Hun. 313.... (200)	
Walker v. Bank of State of New York, 9 N. Y. 582.....	33
Walker v. Boston &c. R. Co., (N. H.) 51 Atl. Rep. 918.....	855
Walker v. Brautner, 59 Kan. 117.....	1161
Walker v. C. R. I. & P. R. Co., 71 Iowa, 658.....	1108
Walker v. Columbus &c. R. Co., 25 S. C. 141.....	1019
Walker v. Conant, 65 Mich. 195.....	628
Walker v. Curtis, 116 Mass. 98.....	1238
Walker v. Davis, 83 Mo. App. 374.....	1216
Walker v. Decatur, 67 Iowa, 307.....	657
Walker v. Ebert, 29 Wis. 194.... (172)	
Walker v. Eikleberry, 7 Okla. 599.....	134

	PAGE
Walker v. Erie R. Co., 63 Bail. 260.... (836)	
Walker v. Gillett, 59 Kan. 214.....	1647
Walker v. Grand Forks Lumber Co., (Minn.) 90 N. W. Rep. 573.....	1779
Walker v. Green, 60 Kan. 289.....	515
Walker v. Harrison, 75 Miss. 665.....	1323
Walker v. Herron, 22 Tex. 55.... (1004)	
Walker v. Kinnare, 76 Fed. Rep. 101.....	805
Walker v. Lake Shore &c. R. Co., 111 Mich. 518.....	884
Walker v. McNeill, 17 Wash. 582.... (885).....	935
Walker v. Mercer, 61 Kan. 736.... (791)	
Walker v. Missouri &c. R. Co., 68 Mo. App. 465.....	1263
Walker v. New Mexico &c. R. Co., 165 U. S. 593.....	2090
Walker v. O'Connell, 59 Kan. 306.....	1159
Walker v. R. Co., 41 La. Ann. 795.....	492
Walker v. R. Co., 128 Mass. 8.....	1610
Walker v. R. Co., 63 Barr. 260.....	1101
Walker v. St. Paul City Ry. Co., 81 Minn. 404.....	2283
Walker v. Shelton, 59 Kan. 774.....	1714
Walker v. Stevens, 79 Ill. 193.....	2180
Walker v. Winstanley, 155 Mass. 301.....	2108
Walkowski v. Penokee &c. Mines, 115 Mich. 629.....	1513, 1520, 1602
Wall v. D., L. & W. R. Co., 54 Hun. 454.....	1517
Wall v. Buffalo Water Works Co., 18 N. Y. 119.....	2040
Wall v. Emigrant Industrial Savings Bank, 64 Hun. 249.....	156, 162
Wall v. Gallin Printing Co., 21 Misc. 649.....	1099
Wall v. Livezey, 6 Col. 465.....	1101
Wall v. New York &c. R. Co., 56 App. Div. 599.....	763
Wall v. Platt, 169 Mass. 398.....	889
Wallace v. Cent. Vt. R. Co., 138 N. Y. 302.....	1120, 1715
Wallace v. Cent. Vt. R. Co., 63 Hun. 632.....	1715
Wallace v. Long Island R. Co., 12 Hun. 460.....	1334
Wallace v. Matthews, 39 Ga. 633.....	281, 285
Wallace v. Menasha, 48 Wis. 79.....	89
Wallace v. Merrimac &c. Co., 134 Mass. 95.....	2375
Wallace v. New York &c. R. Co., 165 Mass. 236.....	770
Wallace v. Norman, 9 Okla. 339.....	1910
Wallace v. Pennsylvania R. Co., 195 Pa. St. 127.....	840
Wallace v. St. Louis &c. R. Co., 74 Mo. 594.... (1026).....	1022
Wallace v. Small, 1 Moosly & M. 446.....	1161
Wallace v. Southern Cotton-Oil Co., 91 Tex. 18.....	653
Wallace v. Third Ave. R. Co., 36 App. Div. 57.....	478, 924
Wallace v. Western &c. R. Co., 98 N. C. 494.....	404
Wallen v. North Chicago Street R. Co., 82 Ill. App. 103.....	2277, 2320
Waller v. Hebron, 5 App. Div. 577.....	1847
Waller v. Parker, 5 Cald. 476.... (129)	
Walling v. Potter, 35 Conn. 183.....	146, 147
Walling v. R. Co., 12 Phila. 309.....	511
Wallingford v. Columbia &c. R. Co., 26 S. C. 258.....	353
Wallis v. Westport, 82 Mo. App. 522.....	1857
Walpole v. Carlisle, 32 Ind. 415.....	2177
Walrod v. Ball, 9 Barb. 271.....	77
Walrod v. Webster County, 110 Iowa. 349.....	1143, 1841
Walls v. Rochester R. Co., 92 Hun. 581.....	923, 2310
Walsh v. Adams Ex. Co., 15 Pa. Super. Ct. 292.....	319
Walsh v. Atlantic Ave. R. Co., 23 App. Div. 19.....	2328
Walsh v. Boston &c. R. Co., 171 Mass. 52.... (751)	
Walsh v. Buffalo, 92 Hun. 438.....	2010, 2021
Walsh v. Buffalo, 17 App. Div. 112.....	1886
Walsh v. Ch. &c. R. Co., 42 Wis. 23.....	366
Walsh v. Commercial Steam Laundry Co., 11 Misc. 8.....	1468, 1746
Walsh v. Fitchburg R. Co., 67 Hun. 604.....	2132
Walsh v. Fitchburg R. Co., 78 Hun. 1.....	2133
Walsh v. Hayes, 72 Conn. 397.....	2136
Walsh v. Hestonville &c. R. Co., 194 Pa. St. 570.....	2313

## TABLE OF CASES.

CCCCXV

	PAGE
Walsh v. Hunt, 120 Cal. 46....(174)	
Walsh v. Manhattan R. Co., 8 Misc. 1 (N. Y. Supr. Ct.).....	2108
Walsh v. Mayor &c., 107 N. Y. 220; 41 Hun, 299.....	81
Walsh v. Mead, 8 Hun, 387.....	2258
Walsh v. Oregon R. Co., 10 Ore. 250.....	1438
Walsh v. Peet Valve Co., 110 Mass. 23.....	1498
Walsh v. Porterfield, 87 Pa. St. 376....(142)	
Walsh v. Sayre, 52 How. Pr. 334.....	2032
Walsh v. Trustees &c. N. Y. & B. Bridge, 96 N. Y. 427.....	76, 81
Walsh v. Virginia &c. R. Co., 8 Nev. 110....(1015)	
Waltmeyer v. Kansas City, 71 Mo. App. 354.....	1876, 2029
Walter v. Fisher, 96 Ill. App. 590.....	1570
Walter v. Meader, 77 N. Y. Supp. 407.....	83
Walterhouse v. Joseph Schlitz Brewing Co., 12 S. D. 397.....	1365
Waltermeyer v. Kansas City, 71 Mo. App. 354.....	1866
Walters v. Chicago &c. R. Co., 36 Iowa, 458....(878)	
Walters v. Chicago &c. R. Co., 41 Iowa, 71....(708)	
Walters v. Chicago &c. R. Co., 104 Wis. 251.....	467, 489, 739, 752, 791, 809
Walters v. Denver &c. Light Co., 12 Colo. App. 145.....	691, 1061
Walters v. Hamilton, 75 Mo. App. 237.....	2101
Walters v. Tielkemeyer, 72 Mo. App. 371.....	1084
Walters v. Wayne, 16 Pa. Co. Ct. 613.....	1950
Walther v. The American District Telegraph Co., 11 Misc. 71.....	1343, 1371
Walthers v. Chicago &c. R. Co., 72 Ill. App. 354.....	481
Walton v. N. Y. Cent. &c. Co., 139 Mass. 556.....	23
Walton v. Booth, 34 La. Ann. 913.....	1379
Walton v. Chattanooga Rapid Transit Co., 105 Tenn. 415.....	915
Walton v. Walton, 1 Keyes, 18; 2 Abb. Pr. (N. S.) 428....(44)	
Wamsley v. Atlas S. S. Co., 50 App. Div. 190.....	262
Wandell v. Corbin, as Receiver, 38 Hun, 391.....	449
Waneck v. Winona, 78 Minn. 98.....	2037
Wann v. W. U. T. Co., 37 Mo. 472.....	2389, 2398, 2415, 2430
Wanzer v. Chippewa Val. Electric R. Co., 108 Wis. 319.....	402
Warburton v. G. W. R. Co., L. R. 2 Exch. 30.....	1397
Ward v. Brown, 64 Ill. 307.....	996
Ward v. Central Park &c. R. Co., 11 Abb. (N. S.) 411....(500)	
Ward v. Chicago &c. R. Co., 165 Ill. 462.....	426, 439, 440
Ward v. Chicago &c. R. Co., 61 Ill. App. 530.....	426, 441, 675, 2044
Ward v. Chicago &c. R. Co., 102 Wis. 215.....	503
Ward v. Illinois C. R. Co., (Ky.) 56 S. W. Rep. 807.....	2143, 2155
Ward v. Johnson, 51 Minn. 480.....	172
Ward v. M. & St. P. R. Co., 29 Wis. 144....(659)	
Ward v. Maine C. R. Co., 96 Me. 136.....	657, 661, 667, 934, 2163
Ward v. Milwaukee R. Co., 29 Wis. 144.....	1264, 1265
Ward v. Missouri &c. R. Co., 158 Mo. 226.....	240, 251, 288
Ward v. N. Y. C. R. Co., 47 N. Y. 29.....	823
Ward v. N. Y. C. & H. R. R. Co., 56 Hun, 268.....	587
Ward v. Naughton, 77 N. Y. St. Rep. 344.....	1669
Ward v. New York, 19 App. Div. 48.....	721
Ward v. St. Vincent's Hospital, 65 App. Div. 64.....	1202
Ward v. Shire, (Ky.) 65 S. W. Rep. 8.....	93
Ward v. Steffen, 88 Mo. App. 571.....	850
Ward v. Trimble, 103 Ky. 153.....	72
Ward v. Troy, 55 App. Div. 192.....	2013
Ward v. Western Union Teleg. Co., (Tex. Civ. App.) 51 S. W. Rep. 259.....	2449, 2458
Ward v. West Jersey &c. R. Co., 65 N. J. L. 383.....	855
Ward v. Wilmington &c. R. Co., 113 N. Car. 566....(1026)	
Wardell v. Chicago &c. R. Co., 46 Minn. 514.....	551
Wardell v. New Orleans &c. R. Co., 35 La. Ann. 202.....	467, 472
Warden v. Greer, 6 Watts, 424....(1082)	
Warden v. Missouri &c. R. Co., 78 Mo. App. 664.....	1033, 1223
Warden v. Old Colony R. Co., 137 Mass. 204.....	1480
Wardlaw v. California R. Co., (Cal.) 42 Pac. Rep. 1075.....	439, 440
Wardrop v. Dunlop, 1 Hun, 325.....	1081

	PAGE
Wardsworth v. W. U. T. Co., 86 Tenn. 695.....	2454
Ware v. Evangelical Baptist &c. Soc., 181 Mass. 285.....	2127
Warfield v. Louisville &c. R. Co., 104 Tenn. 74.....	350
Warfield v. New York &c. R. Co., 8 App. Div. 479.....	451
Warmington v. Atchison &c. R. Co., 46 Mo. App. 159.....	1608
Warner v. N. Y. Central R. Co., 44 N. Y. 465....(658).....	734, 773, 1110, 1111
Warner v. Baltimore &c. R. Co., 168 U. S. 339.....	454
Warner v. Baltimore &c. R. Co., 7 App. D. C. 79.....	439, 440
Warner v. Chamberlain, 7 Houst. 18.....	974, 979
Warner v. Erie R. Co., 39 N. Y. 468.....	1408, 1478, 1511
Warner v. Mier Carriage &c. Co., 26 Ind. App. 350.....	2126
Warner v. Muncie, 18 Pa. Co. Ct. 582.....	1962
Warner v. New Orleans &c. R. Co., 104 La. 536.....	1372
Warner v. New York Central R. Co., 52 N. Y. 437....(940)	
Warner v. Penoyer, 91 Fed. Rep. 587.....	75
Warner v. Randolph, 18 App. Div. 458.....	1237
Warner v. Southern P. Co., 113 Cal. 105.....	901
Warner v. West. Trans. Co., 5 Robt. 490....(268)	
Warren v. Dennett, 17 Misc. 86.....	10
Warren v. Engelhart, 13 Neb. 283....(945)	
Warren v. Erie R. Co., 39 N. Y. 468.....	1479
Warren v. Fitchburg R. Co., 8 Allen, 227....(446).....	452, 792
Warren v. Hendricks, (Or.) 66 Pac. Rep. 607.....	51
Warren v. Keokuk &c. R. Co., 41 Iowa, 484....(1045)	1046
Warren v. Manchester Street R. Co., 70 N. H. 352.....	714, 717, 2279
Warren v. Robinson, 19 Utah, 289.....	75
Warren v. Southern &c. R. Co., (Cal.) 67 Pac. Rep. 1.....	772
Warren v. Union R. Co., 46 App. Div. 517.....	2325
Warshawski v. Raritan Tract. Co., (N. J. L.) 52 Atl. Rep. 296.....	2054
Wartman v. Swindell, 54 N. J. L. 589.....	1294
Wasco County v. Gardner, 37 Ore. 392.....	1951
Washburn v. Easton, 172 Mass. 525.....	1809
Washburn v. Jones, 14 Barb. 193.....	137
Washburn v. Nashville &c. R. Co., 3 Head, (Tenn.) 638....(381).....	1643
Washburn-Crosby Co. v. Boston &c. R. Co., 180 Mass. 252.....	247
Washington v. Baltimore &c. R. Co., 17 W. Va. 190....(1015).....	1019, 1022
Washington Gaslight Co. v. District of Columbia, 161 U. S. 316. 1302, 1383, 2262	
Washington v. Spokane Street R. Co., 13 Wash. 9.....	459, 2051
Washington v. Staten Island T. R. Co., 68 Hun, 87.....	696
Washington Man. &c. Co. v. Barnett, (Ky.) 42 S. W. Rep. 1120.....	1538
Washington &c. R. Co. v. Dashiell, 7 App. D. C. 507.....	866
Washington &c. R. Co. v. Grant, 11 App. D. C. 107.....	471, 1112
Washington &c. R. Co. v. Harmon, 147 U. S. 571....(474)	
Washington &c. R. Co. v. Hickey, 166 U. S. 521.....	669, 769
Washington &c. R. Co. v. Lacey, 94 Va. 460.....	743, 755, 774, 784, 1171
Washington &c. R. Co. v. McDade, 135 U. S. 571.....	1404
Washington &c. R. Co. v. Patterson, 9 App. D. C. 423.....	837
Washington &c. R. Co. v. Quayle, 95 Va. 741.....	422
Washington &c. R. Co. v. Wright, 7 App. D. C. 295.....	2335
Washington &c. T. Co. v. Hobson, 15 Gratt, 122.....	2391, 2413
Washington &c. Tile Co. v. Mackey, 15 App. D. C. 410.....	1418
Wasmer v. Delaware &c. R. Co., 80 N. Y. 218....(790)	
.....1334, 2229, 2232, 2259, 2361, 2362, 2366	
Wasson v. McCook, 80 Mo. App. 483.....	776, 787, 1026, 1029
Wasson v. Pettit, 49 Hun, 166.....	1317
Wateman v. Shepard, 21 R. I. 257.....	653
Water Co. v. Ware, 16 Wall. 566.....	633, 654
Waterbury v. Chicago &c. R. Co., 104 Iowa, 32.....	435
Waterbury v. Waterbury Traction Co., 74 Conn. 152.....	1199, 1237
Waterhouse v. Joseph Schiletz Brew. Co., 12 S. D. 397.....	2089
Waterloo Milling Co. v. Kuenster, 158 Ill. 259.....	38
Waterman v. Alden, 42 Ill. App. 294....(68)	
Waterman v. Chicago &c. R. Co., 82 Wis. 613.....	852
Waterman v. Gibson, 5 La. Ann. 672....(98)	

## TABLE OF CASES.

cccxviii

	PAGE
Waterman v. Shepard, 21 R. I. 257.....	2267
Waters v. Fuel Co., 55 N. W. (Minn.) 52....(638)	
Waters v. Kansas City, 94 Mo. App. 413.....	1951
Waters v. Richmond &c. R. Co., 110 N. C. 338.....	2375
Waters Pierce Oil Co. v. Davis, 24 Tex. Civ. App. 508.....	14, 1380, 2068
Watertown v. Greaves, 112 Fed. Rep. 183.....	657, 1095, 1874
Watherford &c. R. Co. v. Seals, (Tex. Civ. App.) 41 S. W. Rep. 841.....	2420
Watier v. Chicago &c. R. Co., 31 Minn. 91....(1043)	1040
Watkins v. Atlantic Ave. R. Co., 20 Hun. 237.....	535
Watkins v. Birmingham &c. R. Co., 120 Ala. 147.....	485, 501
Watkins v. Great Western R. Co., 37 L. T. (N. S.) 193....(432)	
Watkins v. Roberts, 28 Ind. 167.....	234
Watkins v. Union T. Co., 194 Pa. St. 564.....	2317
Watsaka v. Smith, 75 Ill. App. 391.....	1876
Watson v. Brooklyn City R. Co., 14 Misc. 425.....	2338
Watson v. Calvert Bldg. &c. Ass'n, 91 Md. 25.....	2177
Watson v. Duncan, 47 App. Div. 640.....	1561
Watson v. Erie R. Co., 10 Oh. Dec. 454.....	735, 737
Watson v. Erie R. Co., 8 Oh. N. P. 18....(791)	
Watson v. Georgia Pac. R. Co., 81 Ga. 476.....	491
Watson v. Kane, 4 Misc. (N. Y.) 296.....	1322
Watson v. Kingston, 114 N. Y. 88.....	1811, 1961
Watson v. Louisville &c. R. Co., 104 Tenn. 194.....	265, 555
Watson v. Mound City Street R. Co., 133 Mo. 246.....	2316
Watson v. Muirhead, 57 Pa. St. 161.....	2175
Watson v. New Milford, 72 Conn. 561.....	2006
Watson v. New York &c. R. Co., 24 Misc. 628.....	545
Watson v. Needham, 161 Mass. 404.....	1997
Watson v. Northern R. Co., 24 Upp. Can. (Q. B.) 98....(381)	
Watson v. Oswego Street Railway Co., 7 Misc. 562.....	364
Watson v. Oxanna Land Co., 92 Ala. 320.....	2124
Watson v. Portland &c. R. Co., 91 Me. 584.....	508
Watson v. Rhinderknecht, 82 Minn. 235.....	894
Watson v. St. Paul &c. R. Co., 70 Minn. 514.....	952
Watson v. Webb, 28 Wash. 580.....	2258
Watson Cut-Stone Co. v. Small, 181 Ill. 366.....	1738
Watt v. Nevada C. R. Co., 23 Nev. 154.....	890, 1253, 1254
Watt v. Potter, 2 Mason, 80.....	624
Watt v. Southern Bell Teleph. &c. Co., (Va.) 40 S. E. Rep. 107.....	2258, 2365
Watts v. Bolin, 86 Ill. App. 474.....	178
Watts v. Boston & Lowell R. R., 106 Mass. 466....(208)	
Watts v. Hart, 7 Wash. 178.....	1618
Waughop v. Barlett, 165 Ill. 124.....	178
Waverly v. Henry, 67 Ill. App. 407.....	1876, 2259
Waverly v. Page, 105 Iowa, 225.....	2085
Waxahachie v. Cotton Oil Co., (Tex. Civ. App.) 66 S. W. Rep. 226.....	1503, 1585, 1646, 1753
Way v. Dunham, 166 Mass. 263.....	179
Weakley v. Pearce, 5 id. 401....(235)	
Wear v. Am. Ex. Co., 82 Wis. 307.....	1796
Wear v. Gleason, 52 Ark. 364.....	155
Weatherford v. Lowery, (Tex. Civ. App.) 47 S. W. Rep. 34.....	1915, 1916
Weatherford &c. R. Co. v. Duncan, 88 Tex. 611.....	1126, 2166
Weatherford &c. R. Co. v. Seals, (Tex. Civ. App.) 41 S. W. Rep. 841.....	858
Weaver v. Ward, Hob. 134....(1288)	
Weaver v. Grand Rapids &c. R. Co., 107 Mich. 300.....	2390, 2437
Weaver v. Lescure, 89 Ill. App. 628....(176)	190
Weaver v. Philadelphia &c. R. Co., (Pa.) 52 Atl. Rep. 30.....	1796
Webb v. R., W. & O. R. Co., 49 N. Y. 420.....	1130, 1242, 1272
Webb v. Chicago City Ry. Co., 83 Ill. App. 565.....	2315
Webb v. Detroit, 116 Mich. 516.....	1988
Webb v. East Tenn. R. Co., 88 Tenn. 119.....	949
Webb v. Gulf &c. R. Co., (Tex. Civ. App.) 65 S. W. Rep. 684.....	1547
Webb v. Metropolitan Street R. Co., 89 Mo. App. 604....(937)	

	PAGE
Webb v. Portland &c. R. Co., 57 Me. 117.... (784)	
Webb v. Renine, 4 Foster & Fin. N. P. R. 608.....	1475
Webb v. Rome &c. R. Co., 49 N. Y. 420.....	1265
Webb v. Union R. Co., 44 App. Div. 413.....	862
Webb v. Yonkers R. Co., 51 App. Div. 194.....	1205
Webbe v. Western Union Teleg. Co., 169 Ill. 610.....	2411, 2414, 2427
Webber v. W. U. T. Co., 64 Ill. App. 331.....	2409
Webber v. Creston, 75 Iowa, 16.....	855
Webber v. H. & M. Street R. Co., 109 N. Y. 311.....	1367
Webber v. Hoag, 28 N. Y. S. R. 630.....	977
Webber v. Piper, 109 N. Y. 496.....	1412, 1422
Webber v. St. Paul C. R. Co., 67 Minn. 155.....	1159
Weber v. N. Y. C. & H. R. R. R. Co., 58 N. Y. 451.....	
..... 673, 703, 734, 745, 753, 789, 806	
Weber v. Brooklyn &c. R. Co., 47 App. Div. 306.....	524
Weber v. Buffalo R. Co., 20 App. Div. 292.....	641
Weber v. Chicago &c. R. Co., 113 Iowa, 188.....	296, 616, 622
Weber v. New Orleans &c. R. Co., 104 La. 367.... (1091)	
Weber v. Metropolitan Street R. Co., 22 App. Div. 628.....	407
Webster v. Beaver Dam, 84 Fed. Rep. 280.....	1823, 2015
Webster v. Hastings, 59 Neb. 563.... (1374)	
Webster v. Hudson R. Co., 38 N. Y. 260.... (707).....	123, 534, 634, 2204
Webster v. Monongahela River Consol. Coal &c. Co., 201 Pa. St. 278....	1538, 1572
Webster v. New Orleans City &c. R. Co., 51 La. Ann. 299.....	2315
Webster v. R., W. & O. R. Co., 115 N. Y. 112.....	512, 541, 1100
Webster v. Symes, 109 Mich. 1.....	1247
Webster v. Whitworth, 49 Ala. 201.... (51)	
Webster City &c. R. Co. v. Newson, 70 Iowa, 855.... (860)	
Webster Man. Co. v. Mulvany, 68 Ill. App. 607.....	925, 2125
Webster Man. Co. v. Nisbett, 87 Ill. App. 551.....	1405
Webster Man. Co. v. Schmidt, 77 Ill. App. 49.....	1513, 1567
Wedgwood v. Chicago &c. R. Co., 41 Wis. 478.....	1429, 1470
Weed v. Ballston Spa, 76 N. Y. 329.....	692, 1319, 1823, 1875, 1943
Weed v. International &c. R. Co., 21 Tex. Civ. App. 689.....	228
Weed v. Panama R. Co., 17 N. Y. 362.... (217)	
Weed v. Saratoga &c. R. Co., 19 Wend. 534. (338).....	347, 349, 613, 619, 623, 2439
Weeks v. N. Y. & N. H. R. Co., 72 N. Y. 50.....	533, 610
Weeks v. McNulty, 101 Tenn. 495.....	1367
Weeks v. Scharer, 111 Fed. Rep. 330.....	1482, 1490, 1585, 1665
Weeks v. New Orleans &c. R. Co., 40 La. Ann. 800.....	452
Weet v. Village of Brockport, 16 N. Y. 172.....	1902
Wegner v. Second &c. Bank, 76 Mo. 242.....	165
Wehner v. Lagerfelt, (Tex. Civ. App.) 66 S. W. Rep. 221.....	1066
Weick v. Lander, 75 Ill. 93.... (11)	
Weidman v. Symes, 120 Mich. 657.... (176)	
Weidmer v. N. Y. &c. R. Co., 114 N. Y. 462.....	1107, 1260
Weightman v. Jones, 73 Vt. 353.....	88
Weikle v. Minneapolis &c. R. Co., 64 Minn. 296.....	276
Weil v. D. D., E. B. &c. R. Co., 119 N. Y. 147.....	713
Weil v. Edison &c. Light Co., 200 Pa. St. 540.....	1066
Weil v. St. Louis &c. R. Co., 64 Ark. 535.... (737)	
Weiland v. Krejnick, 63 Minn. 314.....	100
Weiland v. Sunwall, 63 Minn. 320.... (100)	
Weiler v. M. R. Co., 53 Hun, 372.....	450
Weinberger v. Kratzenstein, 71 App. Div. 155.....	1341, 1359
Weiner v. Minneapolis Street R. Co., 80 Minn. 312.....	932
Weingartner v. Louisville &c. R. Co., (Ky.) 42 S. W. Rep. 839.....	767, 1013
Weinhald v. Acker, 17 J. & S. 182.....	635
Weinkle v. Brunswick &c. R. Co., 107 Ga. 367.....	1158, 1202
Weinkrantz v. Callahan, 32 Misc. Rep. 715.....	1327
Weinstein v. Terre Haute, 147 Ind. 556.....	1927
Weir v. Plymouth, 148 Pa. St. 566.....	1966
Weisel v. Cobb, 118 N. C. 11.....	94
Weisel v. Eastern R. Co., 79 Minn. 245.....	1536, 1538, 1798



## TABLE OF CASES.

cccxix

	PAGE
Weiser v. St. Paul, (Minn.) 90 N. W. Rep. 8.....	1846
Weisman v. Philadelphia &c. R. Co., 22 R. I. 128.....	319
Weiss v. Bethlehem Iron Co., 88 Fed. Rep. 23.....	1511, 1722
Weiss v. Jenkins, 39 App. Div. 567.....	1072
Weiss v. Metropolitan Street R. Co., 33 App. Div. 221.....	2299, 2302
Weiss v. Metropolitan Street R. Co., 29 Misc. 332.....	470
Weitz v. Mound City R. Co., 53 Mo. App. 39.....	1190
Weitzman v. Nassau Electric R. Co., 33 App. Div. 585.....	716, 1214, 2277
Welch v. P. P. C. Co., 16 Abb. Pr. (N. S.) 352.....	596
Welch v. Brainard, 108 Mich. 38.....	1598
Welch v. Concord R. Co., 68 N. H. 206.....	334
Welch v. Durand, 36 Conn. 182.....	1289
Welch v. Grace, 167 Mass. 590.....	1464, 1785
Welch v. McAllister, 15 Mo. App. 492.....	2128
Welch v. Mohr, 93 Cal. 371....(104).....	115
Welch v. New York &c. R. Co., 176 Mass. 393.....	1803
Welch v. Sage, 47 N. Y. 143.....	183
Welch v. Syracuse R. Co., 70 App. Div. 362.....	458, 1168
Welch v. Wesson, 6 Gray, 505.....	2346
Welch v. Wesson, 6 Gray, 205.....	663
Welch v. Wilson, 101 N. Y. 254....(696).....	
Weld v. N. Y., L. E. & W. R. Co., 68 Hun, 249.....	424
Weldon v. Omaha &c. R. Co., 93 Mo. App. 668.....	1566
Weldon v. Philadelphia &c. R. Co., 2 Penn. (Del.) 1.....	711, 770, 1111, 2150, 2162
Weldon v. Third Ave. R. Co., 3 App. Div. 370.....	728
Welkinson v. Fairrie, 1 H. & C. 633.....	1547
Well v. Mendon, 108 Mich. 251.....	1178
Well v. Sutphin, (Kan.) 68 Pac. Rep. 648.....	628
Wellbrock v. Long Island R. Co., 31 Misc. 424.....	794
Weller v. St. Paul City R. Co., 97 Fed. Rep. 140....(1373).....	
Welling v. Lewiston &c. R. Co., 89 Me. 585.....	2273
Wellingford v. Western Union Teleg. Co., 53 S. C. 410.....	2453
Wellington v. Downer Oil Co., 104 Mass. 64.....	1380
Wellman v. Miner, 19 Misc. 644.....	827
Wellman v. Oregon &c. R. Co., 21 Ore. 530.....	1611
Wells v. B. &c. R. Co., 56 Iowa, 520.....	1690
Wells v. N. Y. C. R. R. Co., 24 N. Y. 181.....	259
Wells v. Alabama &c. R. Co., 67 Miss. 24.....	567
Wells v. Brooklyn, 9 App. Div. 61.....	1866
Wells v. Brooklyn, 45 App. Div. 623.....	1866
Wells v. Brooklyn City R. Co., 58 Hun, 389.....	2309
Wells v. Brooklyn Heights R. Co., 34 Misc. 44.....	2164
Wells v. Coe, 9 Col. 159.....	1573, 1669
Wells v. Heights, 67 App. Div. 212.....	2121
Wells v. Houston, 23 Tex. Civ. App. 629.....	628, 669
Wells v. Howell, 19 Johns. 384....(1001).....	1008
Wells v. New York &c. R. Co., 25 App. Div. 365.....	368, 414
Wells v. Pointer, (Mo.) 69 S. W. Rep. 282.....	134
Wells v. Railway Co., 58 Hun, 389.....	2224
Wells v. Sibley, 31 St. Rep. 40.....	2233
Wells v. Steam Navigation Co., 2 Comst. 204....(137).....	201
Wells v. Steam Navigation Co., 8 N. Y. 375....(202).....	238
Wells v. Steinway R. Co., 18 App. Div. 180.....	457
Wells v. World's Dispensary Medical Ass'n, 9 N. Y. St. Rep. 459.....	2187
Wells Fargo &c. Co. v. Page, (Tex. Civ. App.) 68 S. W. Rep. 528..	1536, 1621, 1696
Wells &c. Co.'s Express v. Fuller, 13 Tex. Civ. App. 610.....	215
Wellston Coal Co. v. Smith, 65 Oh. St. 70.....	1490, 1679, 1682
Welsh v. Butz, 202 Pa. St. 59.....	1498, 1506
Welsh v. Chicago &c. R. Co., 53 Iowa, 632.....	1034, 1040
Welsh v. Cornell, 168 N. Y. 508.....	1479
Welsh v. Erie &c. R. Co., 181 Pa. St. 461.....	1108
Welsh v. German American Bank, 73 N. Y. 424....(158).....	
Welsh v. Jackson &c. R. Co., 81 Mo. 466.....	2291
Welsh v. Lansing, 111 Mich. 589.....	1863

	PAGE
Welsh v. Pullman &c. Co., 16 Abb. U. S. 352.....	150
Welsh v. Railway Co., 81 Mo. 466.....	2229, 2230
Welsh v. Wilson, 101 N. Y. 254.....	693, 2238, 2239
Weltsch v. Stark, 65 Minn. 5.....	1988
Welty v. Lake Superior &c. Co., 100 Wis. 128.....	1592, 1621
Welty v. Ind. &c. R. Co., 105 Ind. 55.... (1040).....	671, 1041
Wendell v. N. Y. Central R. Co., 91 N. Y. 420.....	1900, 2301, 2313, 2343
Wendell v. Baxter, 78 Mass. 494.... (1338)	
Wendell v. Bonter, 12 N. Y. 494.....	635
Wendler v. Equitable Life &c. Soc., 19 App. Div. 50.....	17
Wendler v. Peoples' House Furnishing Co., 165 Mo. 527.....	1779
Wennerstrom v. Kelly, 7 Misc. 173.....	1202
Wentz v. Erie R. Co., 3 Hun, 241.....	571
Wenz v. Savannah &c. R. Co., 108 Ga. 290.....	546
Wenzel v. Shulz, 78 Cal. 221.....	171
Wenzlick v. McCotter, 87 N. Y. 122.....	2258
Werle v. L. I. R. Co., 98 N. Y. 650.....	499
Werner v. Chicago &c. R. Co., 105 Wis. 300.....	446, 1207, 1236
Werner v. Edmiston, 24 Kan. 153.....	2026
Werner v. Rochester, 77 Hun, 33.....	2021
Wertheimer v. Saunders, 95 Wis. 572.... (647).....	1321
Wertz v. W. U. T. Co., 7 Utah, 446.....	2399
Wesley v. Detroit, 117 Mich. 658.....	1863
Wessel v. Gerken, 36 Misc. 221.....	1322
Wessman v. Brooklyn, 40 N. Y. St. R. 698.....	1966
West v. Brockport, 16 N. Y. 161.....	77, 1843
West v. Southern P. Co., 85 Fed. Rep. 392.....	1549
West v. Thomas, 11 So. (Ala.) 768.....	2128
West v. Western Union Tel. Co., 39 Kan. 93.....	849
Westall v. Osborne, 115 Fed. Rep. 282.....	1158
West Boylston v. Mason, 102 Mass. 341.....	2261
West Branch Bank v. Fulmer, 3 Penn. 402.... (35)	
Westbrook v. Crowds, (Tex. Civ. App.) 58 S. W. Rep. 195.....	1467
Westbrook v. Mobile &c. R. Co., 66 Miss. 560.....	707, 714
Westchester Hardwood Co. v. Manhattan El. Light Co., 10 Misc. 415.....	2351
Westchester &c. R. Co. v. Miles, 5 P. F. Smith, (Pa.) 209.... (513)	
Westchester &c. R. Co. v. Miller, 55 Pa. 200.... (368)	
West Chicago &c. Ass'n v. Cohn, 192 Ill. 210.....	1360, 2255
West Chicago Street R. Co. v. Annis, 62 Ill. App. 180.....	2282
West Chicago Street R. Co. v. Boecker, 70 Ill. App. 67.....	657, 2055, 2314
West Chicago Street R. Co. v. Cahill, 64 Ill. App. 539.....	458
West Chicago Street R. Co. v. Carr, 67 Ill. App. 530.....	848
West Chicago Street R. Co. v. Dooley, 76 Ill. App. 424.....	873, 1169
West Chicago Street R. Co. v. Dougherty, 89 Ill. App. 362.....	851, 2272, 2298
West Chicago Street R. Co. v. Dudzik, 67 Ill. App. 681.....	496
West Chicago Street R. Co. v. Grennell, 90 Ill. App. 30.....	1240
West Chicago Street R. Co. v. Huhnke, 82 Ill. App. 404.....	2320
West Chicago Street R. Co. v. James, 69 Ill. App. 609.....	471, 854
West Chicago Street R. Co. v. Johnson, 180 Ill. 285.....	514
West Chicago Street R. Co. v. Johnson, 77 Ill. App. 142.....	912
West Chicago Street R. Co. v. Kennedy, 66 Ill. App. 244.....	1101
West Chicago Street R. Co. v. Kennelly, 170 Ill. 508.....	1133
West Chicago Street R. Co. v. Kromshinsky, 185 Ill. 92.....	395
West Chicago Street R. Co. v. Levy, 182 Ill. 525.....	2049
West Chicago Street R. Co. v. Levy, 82 Ill. App. 202.....	2272
West Chicago Street R. Co. v. Liderman, 187 Ill. 463.... (659)	
West Chicago Street R. Co. v. Lieserowitz, 99 Ill. App. 591.....	922
West Chicago Street R. Co. v. Luka, 72 Ill. App. 60.....	472
West Chicago Street R. Co. v. Luleich, 85 Ill. App. 643.....	11
West Chicago Street R. Co. v. Lups, 74 Ill. App. 420.....	478, 871, 914
West Chicago Street R. Co. v. McCallum, 169 Ill. 240.....	2278
West Chicago Street R. Co. v. McCallum, 67 Ill. App. 645.....	2282
West Chicago Street R. Co. v. McNulty, 166 Ill. 203.....	395
West Chicago Street R. Co. v. McNulty, 64 Ill. App. 549.....	514

## TABLE OF CASES.

ccccxxxi

	PAGE
West Chicago Street R. Co. v. Mabie, 77 Ill. App. 176.....	950
West Chicago Street R. Co. v. Maday, 188 Ill. 308.....	838
West Chicago Street R. Co. v. Manning, 170 Ill. 417.....	439, 440
West Chicago Street R. Co. v. Marks, 182 Ill. 15.....	539
West Chicago Street R. Co. v. Marks, 82 Ill. App. 185.....	409, 515
West Chicago Street R. Co. v. Nash, 64 Ill. App. 548.....	395
West Chicago Street R. Co. v. Nilson, 70 Ill. App. 171.....	2298, 2307
West Chicago Street R. Co. v. O'Connor, 85 Ill. App. 278.....	2273, 2325
West Chicago Street R. Co. v. Peters, 196 Ill. 298.....	1103, 2281
West Chicago Street R. Co. v. Piper, 165 Ill. 325.... (730)	
West Chicago Street R. Co. v. Banstead, 70 Ill. App. 111.....	2320
West Chicago Street R. Co. v. Scanlan, 68 Ill. App. 626.... (878).....	934, 2304
West Chicago Street R. Co. v. Stephens, 66 Ill. App. 303.....	409
West Chicago Street R. Co. v. Stiver, 69 Ill. App. 625.....	472, 515
West Chicago Street R. Co. v. Stoltenburg, 62 Ill. App. 420.....	2282
West Chicago Street R. Co. v. Sullivan, 64 Ill. App. 628.....	2282
West Chicago Street R. Co. v. Thorpe, 187 Ill. 610.....	478
West Chicago Street R. Co. v. Tuerk, 193 Ill. 385.....	395
West Chicago Street R. Co. v. Tuerk, 90 Ill. App. 105.....	535, 914
West Chicago Street R. Co. v. Walsh, 78 Ill. App. 595.....	386, 979
West Chicago Street R. Co. v. Waniata, 68 Ill. App. 481.....	471, 925
West Chicago Street R. Co. v. Williams, 87 Ill. App. 548.....	914, 2273, 2278
West Chicago Street R. Co. v. Wizemann, 83 Ill. App. 402.....	2278
West Chicago Street R. Co. v. Yund, 68 Ill. App. 609.....	2278
Westcott v. Fargo, 61 N. Y. 542.....	240, 2040
Westcott v. Fargo, 6 Lansing, 319.... (311)	
Westcott v. N. Y. C. R. Co., 153 Mass. 460.....	1736
Westerburg v. Kinzua, 142 Pa. St. 471.... (718)	
Westercamp v. Brooks, 115 Iowa, 159.....	863
Westerfield v. Lewis, 43 La. Ann. 63.....	706, 719
Western A. R. Co. v. Bussey, 95 Ga. 584.....	1528
Western Anthracite Coal Co. v. Beaver, 192 Ill. 333.....	1784
Western Anthracite Coal & Co. v. Beaver, 95 Ill. App. 95.....	1784
Western Assur. Co. v. Kemendo, (Tex.) 60 S. W. Rep. 661.....	1314
Western Assur. Co. v. Mohlman Co., 83 Fed. Rep. 811.....	1236
Western Coal & M. Co. v. Ingraham, 70 Fed. Rep. 219.....	1560, 1631, 1680
Western Gas Cons. Co. v. Danner, 97 Fed. Rep. 882.....	685, 862
Western N. Y. L. Ins. Co. v. Clinton, 66 N. Y. 331.....	626
Western R. Co. v. Bloomingdale, 74 Ga. 604.....	2156
Western R. Co. v. Harwell, 91 Ala. 340.....	359
Western R. Co. v. Meigs, 74 Ga. 837.....	1123, 1168
Western R. Co. v. Stocksdales, 83 Md. 245.....	555
Western R. Co. v. Walker, 113 Ala. 267.....	408
Western Screw Co. v. Johnson, 86 Ill. App. 89.....	812, 1403, 1401
Western Stone Co. v. Earnshaw, 98 Ill. App. 538.....	1371, 1412
Western Stone Co. v. Muscial, 196 Ill. 382.....	1468
Western Stone Co. v. Musial, 85 Ill. App. 82.....	1584, 1594
Western Tube Co. v. Gang, 85 Ill. App. 63.....	2205
Western Union Teleg. Co. v. Adair, 115 Ala. 441.....	2427
Western Union Teleg. Co. v. Adams, 87 Ind. 598.....	2413
Western Union Teleg. Co. v. Adams, 75 Tex. 531.....	2429
Western Union Teleg. Co. v. Anderson, (Tex. Civ. App.) 37 S. W. Rep. 619.....	2433
Western Union Teleg. Co. v. Andrews, 78 Tex. 305.....	2432
Western Union Teleg. Co. v. Aubrey, 61 Ark. 613.....	908
Western Union Teleg. Co. v. Axtell, 69 Ind. 199.....	2438
Western Union Teleg. Co. v. Barringer, 84 Tex. 38.....	858, 2429
Western Union Teleg. Co. v. Beals, 56 Neb. 415.....	2178, 2399
Western Union Teleg. Co. v. Bell, (Tex. Civ. App.) 59 S. W. Rep. 918.....	2454
Western Union Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664.....	2458
Western Union Teleg. Co. v. Blanchard, 68 Ga. 299.....	
..... 2391, 2397, 2398, 2409, 2426, 2429.....	2435
Western Union Teleg. Co. v. Briscoe, 18 Ind. App. 22.....	2458
Western Union Teleg. Co. v. Brown, 108 Ind. 538.....	2430, 2438
Western Union Teleg. Co. v. Brown, 71 Tex. 723.....	2432

	PAGE
Western Union Teleg. Co. v. Broesche, 72 Tex. 654.....	2417, 2453
Western Union Teleg. Co. v. Bruner, (Tex.) 19 S. W. Rep. 149.....	2395
Western Union Teleg. Co. v. Bryant, 17 Ind. App. 70.....	2445
Western Union Teleg. Co. v. Buchanan, 35 Ind. 430.....	2391, 2415, 2417
Western Union Teleg. Co. v. Burgess, 43 S. W. Rep. 1033.....	2410, 2420
Western Union Teleg. Co. v. Burgess, (Tex. Civ. App.) 60 S. W. Rep. 1023..	2459
Western Union Teleg. Co. v. Buskirk, 107 Ind. 549.....	2392
Western Union Teleg. Co. v. Cain, 14 Ind. App. 115.....	2432
Western Union Teleg. Co. v. Cain, (Tex. Civ. App.) 40 S. W. Rep. 624....	2420, 2422, 2433
Western Union Teleg. Co. v. Carew, 15 Mich. 525.....	2389, 2391, 2396, 2399, 2415, 2430, 2440
Western Union Teleg. Co. v. Carrier, 15 Tex. Civ. App. 547.....	2453
Western Union Teleg. Co. v. Carter, 85 Tex. 580.....	858, 2446
Western Union Teleg. Co. v. Carter, (Tex. Civ. App.) 58 S. W. Rep. 198....	2426, 2431
Western Union Teleg. Co. v. Carver, 15 Tex. Civ. App. 547.....	941, 2447, 2453
Western Union Teleg. Co. v. Clark, 14 Tex. Civ. App. 563.....	2422, 2446
Western Union Teleg. Co. v. Cleave, (Ky.) 54 S. W. Rep. 827.....	2458
Western Union Teleg. Co. v. Clunch, (Neb.) 90 N. W. Rep. 878.....	1230
Western Union Teleg. Co. v. Cobbs, 47 Ark. 344.....	2413
Western Union Teleg. Co. v. Cook, 54 Neb. 109.....	2391
Western Union Teleg. Co. v. Cook, 61 Fed. Rep. 624.....	2413
Western Union Teleg. Co. v. Cooledge, 86 Ga. 104.....	2413
Western Union Teleg. Co. v. Cooper, 71 Tex. 507.....	2420
Western Union Teleg. Co. v. Cornwall, 2 Col. App. 491.....	2445
Western Union Teleg. Co. v. Crall, 38 Kan. 679.....	2398, 2399
Western Union Teleg. Co. v. Crawford, 110 Ala. 460.....	2398, 2450
Western Union Teleg. Co. v. Crider, (Ky.) 54 S. W. Rep. 963.....	2395, 2430
Western Union Teleg. Co. v. Culberson, 79 Tex. 65.....	2410
Western Union Teleg. Co. v. Cunningham, 99 Ala. 314.... (900).....	2454
Western Union Teleg. Co. v. Daugherty, 54 Ark. 221.....	2410
Western Union Teleg. Co. v. Daus, (Tex. Civ. App.) 59 S. W. Rep. 46.....	2421
Western Union Teleg. Co. v. Davis, 16 Tex. Civ. App. 268.....	2440
Western Union Teleg. Co. v. Davis, 51 S. W. Rep. 258.....	2420
Western Union Teleg. Co. v. Davis, (Tex. Civ. App.) 59 S. W. Rep. 46....	1157, 2422, 2449
Western Union Teleg. Co. v. Dozier, 67 Miss. 288.....	2392
Western Union Teleg. Co. v. Drake, 13 Tex. Civ. App. 572.....	2422
Western Union Teleg. Co. v. Drake, 14 Tex. Civ. App. 601.....	1135, 2433
Western Union Teleg. Co. v. Dubois, 128 Ill. 248.....	2426, 2451
Western Union Teleg. Co. v. Edmonson, 91 Tex. 206.....	2459
Western Union Teleg. Co. v. Edsall, 63 Tex. 668.....	2393
Western Union Teleg. Co. v. Edsall, 74 Tex. 329.....	2449
Western Union Teleg. Co. v. Enbank, 100 Ky. 591.....	2392, 2398, 2410
Western Union Teleg. Co. v. Engler, 75 Fed. Rep. 102.....	923, 2248
Western Union Teleg. Co. v. Fenton, 52 Ind. 1.....	2397, 2398, 2411, 2412, 2413, 2416, 2430
Western Union Teleg. Co. v. Fisher, (Ky.) 54 S. W. Rep. 830.....	2395, 2458
Western Union Teleg. Co. v. Ferguson, 57 Ind. 495.....	2435
Western Union Teleg. Co. v. Ferris, 103 Ind. 91.....	2437
Western Union Teleg. Co. v. Fontaine, 58 Ga. 433.....	2397, 2413, 2429
Western Union Teleg. Co. v. Frith, 105 Tenn. 167.....	936
Western Union Teleg. Co. v. Garrett, (Tex. Civ. App.) 34 S. W. Rep. 649..	2447
Western Union Teleg. Co. v. Getto-McCling &c. Co., (Kan.) 61 Pac. Rep.	1155
504	
Western Union Teleg. Co. v. Gibson, (Tex. Civ. App.) 39 S. W. Rep. 198....	858
Western Union Teleg. Co. v. Gibson, (Tex. Civ. App.) 53 S. W. Rep. 712....	2395
Western Union Teleg. Co. v. Giffin, 93 Tex. 530.....	2459
Western Union Teleg. Co. v. Giffin, (Tex. Civ. App.) 57 S. W. Rep. 327....	2459
Western Union Teleg. Co. v. Graham, 1 Col. 230....	2397, 2398, 2417, 2429, 2441
Western Union Teleg. Co. v. Greene, 56 Ill. 319.....	2361
Western Union Teleg. Co. v. Griffith, 111 Ga. 551.....	859, 1061
Western Union Teleg. Co. v. Griswold, 37 Oh. St. 301....	2389, 2393, 2399, 2441

## TABLE OF CASES.

cccxixiii

	PAGE
Western Union Teleg. Co. v. Goodbar, (Miss.) 7 S. R. 214.....	2398
Western Union Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52.....	2422, 2446
Western Union Teleg. Co. v. Gougar, 84 Ind. 179.....	2410
Western Union Teleg. Co. v. Hale, 11 Tex. Civ. App. 79.....	2428
Western Union Teleg. Co. v. Halton, 71 Ill. App. 63.....	2458
Western Union Teleg. Co. v. Harding, 103 Ind. 505.....	2394, 2436
Western Union Teleg. Co. v. Hargrove, 14 Tex. Civ. App. 79.....	2422
Western Union Teleg. Co. v. Harper, 15 Tex. Civ. App. 37.....	2436
Western Union Teleg. Co. v. Hearne, 77 Tex. 83.....	2399
Western Union Teleg. Co. v. Henderson, 89 Ala. 510.....	2454
..... 858, 900, 2411, 2416, 2417, 2418, 2421,	
Western Union Teleg. Co. v. Henley, 23 Ind. App. 14.....	2435, 2460
Western Union Teleg. Co. v. Hines, 22 Tex. Civ. App. 315.....	2431, 2459, 2460, 2491
Western Union Teleg. Co. v. Hopkins, 49 Ind. 223.....	2428, 2437
Western Union Teleg. Co. v. Hough, 102 Ind. 535.....	2437
Western Union Teleg. Co. v. Houghton, 82 Tex. 561.....	2420
Western Union Teleg. Co. v. Howell, Kan. 685.....	2399
Western Union Teleg. Co. v. Jackson, 19 Tex. Civ. App. 273.....	2421
Western Union Teleg. Co. v. James, 90 Ga. 254.....	2411
Western Union Teleg. Co. v. Jannes, 90 Ga. 254.....	2416
Western Union Teleg. Co. v. Johnson, (Ky.) 54 S. W. Rep. 427.....	2394
Western Union Teleg. Co. v. Johnson, 16 Tex. Civ. App. 546.....	2433
Western Union Teleg. Co. v. Jones, 95 Ind. 228.....	2409
Western Union Teleg. Co. v. Jones, 116 Ind. 361.....	2438
Western Union Teleg. Co. v. Jones, 69 Miss. 658.....	2392, 2419
Western Union Teleg. Co. v. Jones, 81 Tex. 271.....	2433
Western Union Teleg. Co. v. Kinney, 106 Ind. 468.....	2392
Western Union Teleg. Co. v. Landis, 11 Cent. 193.....	2399
Western Union Teleg. Co. v. Lavender, (Tex. Civ. App.) 40 S. W. Rep.	
1035 .....	2433, 2447
Western Union Teleg. Co. v. Liddell, 68 Mich. 1.....	2392
Western Union Teleg. Co. v. Lindley, 62 Ind. 371.....	2418
Western Union Teleg. Co. v. Lovely, (Tex. Civ. App.) 52 S. W. Rep. 563	
..... 2410, 2418,	
Western Union Teleg. Co. v. Lovett, (Tex. Civ. App.) 58 S. W. Rep. 204...	2459
Western Union Teleg. Co. v. Lowery, 32 Neb. 732.....	2413, 2416, 2417
Western Union Teleg. Co. v. Luck, 91 Tex. 178.....	2446
Western Union Teleg. Co. v. Martin, 9 Brad. (Ill. App.) 587.....	2447
Western Union Teleg. Co. v. Matthews, (Ky.) 55 S. W. Rep. 427.....	2421
Western Union Teleg. Co. v. Meek, 49 Ind. 53.....	2391, 2398, 2416, 2428, 2429
Western Union Teleg. Co. v. Mellon, 100 Ky. 429.....	2411
Western Union Teleg. Co. v. Mellon, 96 Tenn. 66.....	2411, 2428
Western Union Teleg. Co. v. Mitchell, 91 Tex. 454.....	2420
Western Union Teleg. Co. v. Morris, 83 Fed. Rep. 992.....	2461
Western Union Teleg. Co. v. Morrison, 33 S. W. Rep. 1025.....	2429, 2447
Western Union Teleg. Co. v. Moessler, 95 Ind. 29.....	2436
Western Union Teleg. Co. v. Mumford, 87 Tenn. 190.....	2389, 2420
Western Union Teleg. Co. v. McCormick, (Miss.) 27 South. Rep. 606.....	2438
Western Union Teleg. Co. v. McDaniel, 103 Ind. 294.....	676, 2391, 2429, 2430, 2437
Western Union Teleg. Co. v. McGill, 57 Fed. Rep. 699.....	945
Western Union Teleg. Co. v. McGuire, 104 Ind. 130.....	2393, 2394
Western Union Teleg. Co. v. McIlvoy, (Ky.) 55 S. W. Rep. 428.....	2419, 2458
Western Union Teleg. Co. v. McKibben, 114 Ind. 511.....	
..... 2413, 2418, 2426, 2428, 2438,	2451
Western Union Teleg. Co. v. McMullen, 58 N. J. L. 155.....	1498, 1682
Western Union Teleg. Co. v. McNair, 120 Ala. 99.....	2457
Western Union Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539.....	2417, 2444
Western Union Teleg. Co. v. Nations, 82 Tex. 539.....	858, 2433
Western Union Teleg. Co. v. Neel, 86 Tex. 368.....	2395
Western Union Teleg. Co. v. Neill, 57 Tex. 283.....	2391, 2398, 2408, 2412, 2430
Western Union Teleg. Co. v. Nelson, 82 Md. 293.....	1062
Western Union Teleg. Co. v. North Packing & Co., 188 Ill. 366.....	2451
Western Union Teleg. Co. v. Norris, (Tex. Civ. App.) 60 S. W. Rep. 982...	
..... 2417, 2431,	2436

	PAGE
Western Union Teleg. Co. v. Odom, 21 Tex. Civ. App. 537.....	2399, 2459
Western Union Teleg. Co. v. Pendleton, 95 Ind. 12.....	2428, 2437, 2438
Western Union Teleg. Co. v. Preston, (Tex. Civ. App.) 54 S. W. Rep. 650..	2458
Western Union Teleg. Co. v. Pruett, (Tex. Civ. App.) 35 S. W. Rep. 78....	2414, 2453
Western Union Teleg. Co. v. Redinger, 22 Tex. Civ. App. 362.....	2422
Western Union Teleg. Co. v. Reed, 96 Ind. 195.....	2437
Western Union Teleg. Co. v. Reins, 63 Tex. 27.....	2409
Western Union Teleg. Co. v. Reynolds, 77 Va. 173.....	2389, 2397, 2444
Western Union Teleg. Co. v. Richman, (Pa.) 6 Cent. 565.....	2399, 2412, 2428
Western Union Teleg. Co. v. Robinson, 97 Tenn. 638.....	1112, 2395, 2458
Western Union Teleg. Co. v. Rogers, 68 Miss. 748.....	858
Western Union Teleg. Co. v. Rosentreter, 80 Tex. 406.....	2432
Western Union Teleg. Co. v. Russel, 12 Tex. Civ. App. 82.....	2433
Western Union Teleg. Co. v. Satterfield, 34 Ill. App. 386.....	28
Western Union Teleg. Co. v. Scirele, 103 Ind. 227.....	2427, 2430, 2440
Western Union Teleg. Co. v. Schumate, (Tex. Civ. App.) 21 S. W. Rep. 109.....	2396
Western Union Teleg. Co. v. Seals, (Tex. Civ. App.) 45 S. W. Rep. 964....	2397, 2420
Western Union Teleg. Co. v. Seed, 115 Ala. 670.....	900
Western Union Teleg. Co. v. Sheffield, 71 Tex. 570.....	2446
Western Union Teleg. Co. v. Short, 53 Ark. 434.....	2397, 2430
Western Union Teleg. Co. v. Simpson, 73 Tex. 422.....	2441, 2449
Western Union Teleg. Co. v. Simpson, 10 Kan. App. 473.....	2452
Western Union Teleg. Co. v. Smith, (Tex. Civ. App.) 33 S. W. Rep. 742 ..	2457
Western Union Teleg. Co. v. Smith, (Tex. Civ. App.) 46 S. W. Rep. 659... ..	1113
Western Union Teleg. Co. v. Snodgrass, (Tex. Civ. App.) 60 S. W. Rep. 308..	2429
Western Union Teleg. Co. v. Stacey, (Tex. Civ. App.) 41 S. W. Rep. 100 ..	2458
Western Union Teleg. Co. v. Startemeire, 6 Ind. App. 125... (858)	
Western Union Teleg. Co. v. Steinburger, (Ky.) 54 S. W. Rep. 829 ..	2394, 2458
Western Union Teleg. Co. v. Stevenson, 128 Pa. St. 442... ..	2396, 2397, 2399, 2415
Western Union Teleg. Co. v. Swain, 109 Ind. 405.....	2438
Western Union Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 435.....	2422, 2429, 2447, 2458
Western Union Teleg. Co. v. Teague, (Tex. Civ. App.) 36 S. W. Rep. 301..	2458
Western Union Teleg. Co. v. Thorn, 64 Fed. Rep. 287.....	1064
Western Union Teleg. Co. v. Tobin, (Tex. Civ. App.) 56 S. W. Rep. 540 ..	2431, 2461
Western Union Teleg. Co. v. Todd, (Ind.) 53 N. E. Rep. 194... ..	2393, 2416, 2458
Western Union Teleg. Co. v. Texas, 105 U. S. 460.....	2389
Western Union Teleg. Co. v. Tracy, 114 Fed. 282.....	1469, 1490
Western Union Teleg. Co. v. Trissal, 98 Ind. 566.....	2418
Western Union Teleg. Co. v. Trumbell, 1 Ind. App. 121.....	2411
Western Union Teleg. Co. v. Turner, (Tex. Civ. App.) 60 S. W. Rep. 432..	2440, 2447
Western Union Teleg. Co. v. Tyler, 74 Ill. 168.....	2416, 2448
Western Union Teleg. Co. v. Van Cleave, (Ky.) 54 S. W. Rep. 827... ..	2394, 2395
Western Union Teleg. Co. v. Va. Paper Co., 87 Va. 418.....	2421
Western Union Teleg. Co. v. Vanway, (Tex. Civ. App.) 54 S. W. Rep. 414 ..	2410, 2425, 2433
Western Union Teleg. Co. v. Walker, (Tex. Civ. App.) 47 S. W. Rep. 396..	2433
Western Union Teleg. Co. v. Waller, (Tex. Civ. App.) 47 S. W. Rep. 396... ..	2446
Western Union Teleg. Co. v. Ward, 23 Ind. 377.....	2390
Western Union Teleg. Co. v. Warren, (Tex. Civ. App.) 36 S. W. Rep. 314..	2458
Western Union Teleg. Co. v. Way, 83 Ala. 542.....	900, 2396, 2416
Western Union Teleg. Co. v. Wildhelm, 48 Neb. 916.....	2452
Western Union Teleg. Co. v. Wilson, 108 Ind. 308.....	2394, 2409, 2438
Western Union Teleg. Co. v. Wilson, (Tex. Civ. App.) 51 S. W. Rep. 521..	2446
Western Union Teleg. Co. v. Wisdom, 85 Tex. 261.....	2433
Western Union Teleg. Co. v. Wofford, (Tex. Civ. App.) 42 S. W. Rep. 119 ..	937, 1160, 2448
Western Union Teleg. Co. v. Wofford, (Tex.) 60 S. W. Rep. 546.....	2421
Western Union Teleg. Co. v. Wood, 57 Fed. Rep. 471.....	858, 2454

## TABLE OF CASES.

cccxxy

	PAGE
Western Union Telegr. Co. v. Woods, 88 Ill. App. 375.....	395, 838, 870, 1075
Western Union Telegr. Co. v. Woods, 56 Kan. 737.....	2451
Western Union Telegr. Co. v. Yopst, 118 Ind. 248.....	2390, 2393, 2394, 2409, 2413, 2416, 2425, 2434, 2438, 2448
Western Union Telegr. Co. v. Young, 93 Ind. 118.....	2409
Western Union Telegr. Co. v. Young, 77 Tex. 345.....	2420
Western Wheeled Scraper Co. v. Sadilek, 50 Neb. 105.....	41
Western &c. Min. Co. v. Berberich, 94 Fed. Rep. 329.....	1452
Western &c. R. Co. v. Adams, Ga. 279.... (699)	
Western &c. R. Co. v. Bailey, 105 Ga. 100.....	1442
Western &c. R. Co. v. Bass, 104 Ga. 390.....	943, 1370
Western &c. R. Co. v. Beason, 112 Ga. 553.....	1158
Western &c. R. Co. v. Bishop, 50 Ga. 465.....	699, 1772
Western &c. R. Co. v. Brown, 102 Ga. 13.....	940
Western &c. R. Co. v. Bussey, 95 Ga. 584.....	1730, 1734
Western &c. R. Co. v. Clinton, 66 N. Y. 326.....	626
Western &c. R. Co. v. Earwood, 104 Ga. 127.....	439, 440
Western &c. R. Co. v. Esslinger, 95 Ga. 734.....	1538
Western &c. R. Co. v. Exposition Cotton Mills, 81 Ga. 522.....	245
Western &c. R. Co. v. Goodwin, 105 Ga. 237.....	491
Western &c. R. Co. v. Holsonback, 112 Ga. 82.....	2158
Western &c. R. Co. v. Kehoe, 83 Md. 434.... (79)	
Western &c. R. Co. v. Ohio Valley &c. Co., 107 Ga. 512.....	315
Western &c. R. Co. v. Robinson, 114 Ga. 159.....	1020, 1034
Western &c. R. Co. v. Rogers, 104 Ga. 224.....	711, 1032, 1145
Western &c. R. Co. v. Sistrunk, 85 Ala. 352.....	1019, 1022
Western &c. R. Co. v. Stanley, 61 Md. 266.....	460
Western &c. R. Co. v. Strickland, 114 Ga. 133.... (767)	
Western &c. R. Co. v. Turner, 72 Ga. 292.....	583
Western &c. R. Co. v. Voiles, 98 Ga. 446.....	369, 439, 440
Western &c. R. Co. v. Wilson, 71 Ga. 22.....	11
Western &c. Storage Co., v. Ermeling, 73 Ill. App. 394.....	890
Westfall v. Erie R. Co., 5 Hun. 75.....	1141, 1256
Westfield v. Mayo, 122 Mass. 100.....	2261
Westgate v. Carr, 43 Ill. 450.....	997, 1007
West Jersey R. Co. v. Abbott, 60 N. J. L. 150.....	1251, 1253
West Jersey R. Co. v. Paulding, 58 N. J. L. 178.....	1170
West Jersey &c. R. Co. v. Welsh, 62 N. J. L. 655.....	13, 420
Westland v. Gold Coin Mines Co., 101 Fed. Rep. 59.....	1452
Westliche Post Ass'n v. Allen, 26 Mo. App. 181.....	2238
Weston v. N. Y. Elevated R. Co., 73 N. Y. 595.....	434
Weston v. Troy, 139 N. Y. 281.....	694, 1095, 1889
Weston Paper Co. v. Pope, 155 Ind. 394.....	2096
Westover v. Aetna Life Ins. Co., 99 N. Y. 56.....	1184
Westville Coal Co. v. Schwartz, 177 Ill. 272.....	1665, 1700
Westville Coal Co. v. Milka, 75 Ill. App. 638.....	1592
Westville Coal Co. v. Wood, 96 Ill. App. 616.....	1570
Wetherbee v. Partridge, 175 Mass. 185.....	650
Wetherill v. Milwaukee &c. R. Co., 24 Minn. 410.....	1018
Wetmore v. Chamberlain, 64 Kan. 324.....	1934
Wetzel v. Philadelphia Trac. Co., 184 Pa. St. 407.....	1095
Weussbaum v. Solomon, 54 App. Div. 554.....	1161
Weyand v. Atchison &c. R. Co., 75 Iowa, 573.....	316
Weyerhouse v. Dun, 100 N. Y. 150.....	37, 176, 2180
Whaalan v. Mad River &c. R. Co., 8 Oh. St. 249.....	1660
Whalen v. N. Y. C. & H. R. R. Co., 58 Hun, 431.....	759
Whalen v. Centenary Ch., 62 Mo. 326.....	1643
Whalen v. Citizens & Gaslight Co., 151 N. Y. 70.....	1089, 2240
Whalen v. Citizens' Gaslight Co., 10 Misc. 281.....	1864
Whalen v. Consolidated T. Co., 61 N. J. L. 606.....	683
Whalen v. Michigan C. R. Co., 114 Mich. 512.... 1444, 1526, 1529, 1531, 1586,	1607
Whalen v. St. Louis &c. R. Co., 60 Mo. 323.... (785)	850
Whalen v. Whitecomb, 178 Mass. 33.....	1703
Whalley v. Macon &c. R. Co., 104 Ga. 764.....	1741

	PAGE
Whallon v. Sprague Electric Elevator Co., 1 App. Div. 264.....	1400, 1560
Whately v. Zenida Coal Co., 122 Ala. 118.....	681, 1451, 1622, 1722, 2043, 2046
Wheeler v. Aiken &c. Bank, 75 Fed. Rep. 781.....	75
Wheeler v. Barker, 51 Neb. 846.....	86
Wheeler v. Boone, 108 Iowa, 235.....	1867
Wheeler v. Brant, 23 Barb. 324.... (987).....	977
Wheeler v. Erie R. Co., 2 Thomp. & Cook. 634.... (1037) ..	
Wheeler v. Fisher Oil Co., 6 Oh. N. P. 309.....	2097
Wheeler v. Gibbon, 126 N. C. 811.....	684
Wheeler v. Grand Trunk R. Co., 70 N. H. 607.....	513
Wheeler v. Mason Man. Co., 135 Mass. 294.....	1503
Wheeler v. Newbould, 16 N. Y. 392.....	128
Wheeler v. Oceanic S. Nav. Co., 52 Hun, 75.....	616
Wheeler v. Plymouth, 116 Ind. 158.....	1909
Wheeler v. R. Co., 115 U. S. 29.... (279) ..	
Wheeler v. Russell, 17 Mass. 258.....	2378
Wheeler v. St. Joseph &c. R. Co., 66 Mo. App. 260.....	2108, 2114
Wheeler v. Tyler &c. R. Co., 91 Tex. 356.....	1156
Wheeler v. Wason &c. Co., 135 Mass. 294.....	1489
Wheeling &c. R. Co. v. Suhrwiar, 20 Oh. C. C. 558.....	731, 921, 927
Wheelock v. Boston &c. R. Co., 105 Mass. 203.... (605) ..	
Wheelwright v. Boston &c. R. Co., 135 Mass. 225.....	1093
Whelan v. N. Y. &c. R. Co., 38 Fed. R. 15.....	536, 897
Whelan v. Rio Grande &c. R. Co., 111 Fed. Rep. 326.....	952
Whelden v. Lyford, 84 Me. 114.....	2383
Whelden v. Chappel, 8 R. I. 230.....	2383
Whelton v. West End &c. R. Co., 172 Mass. 555.....	1147, 1803
Wherry v. Duluth &c. R. Co., 64 Minn. 415.... (766) ..	
Whicher v. Boston &c. R. Co., 176 Mass. 275.....	600
Whichita v. Coggsball, 3 Kan. App. 540.....	1878
Whiddon v. Williams, 98 Ga. 310.....	67
Whipple v. Michigan C. R. Co., (Mich.) 90 N. W. Rep. 287.....	397
Whipple v. New York &c. R. Co., 19 R. I. 587.....	1437, 1589, 1692
Whipple v. Rich, 180 Mass. 477.....	1223
Whirley v. Whitman, 1 Head, (Tenn.) 610.....	2133, 2135
Whisten v. Brengal, 16 Misc. 37.....	1092, 1766
Whitaker v. D. & H. C. Co., 126 N. Y. 544.....	1530, 1532, 1730
Whitaker v. Ferguson, 16 Utah, 240.....	2249
Whitaker v. Staten Island &c. R. Co., 65 App. Div. 451.....	408
Whitaker v. Staten Island &c. R. Co., 72 App. Div. 468.....	485
Whitbeck v. N. Y. Cent. R. Co., 36 Barb. 644.... (888) ..	
Whitcomb v. Detroit &c. R. Co., 125 Mich. 572.... (1098) ..	
Whitcomb v. Hardy, 73 Minn. 285.....	629
Whitcomb v. McNulty, 105 Fed. 863.....	1713
Whitcomb v. Standard Oil Co., 153 Ind. 513.....	1801
White v. Albany R. Co., 35 App. Div. 23.....	2281, 2293
White v. Atchison &c. R. Co., 84 Mo. App. 411.....	2169
White v. Ballard, 19 Wash. 284.....	1821, 1916
White v. Bank, 4 Brewster, (Pa.) 234.... (102) ..	
White v. Boston &c. R. Co., 144 Mass. 404.....	1102
White v. Chicago &c. R. Co., 102 Wis. 489.... (804) ..	
White v. Eidlitz, 19 App. Div. 256.....	1479
White v. Fitchburg R. Co., 136 Mass. 321.....	798
White v. Grand Rapids &c. R. Co., 107 Mich. 681.....	549
White v. Houston &c. R. Co., (Tex. Civ. App.) 46 S. W. Rep. 382.....	1755
White v. M. &c. R. Co., 31 Kan. 280.....	1259
White v. Mayor, 15 App. Div. 440.....	1797
White v. Merritt, 7 N. Y. 352.... (1080) ..	
White v. Miller, 9 Week. Dig. 153.... (940) ..	
White v. Milwaukee &c. R. Co., 61 Wis. 536.....	2033, 2038, 2285
White v. Newport News Shipbuilding &c. Co., 95 Va. 355.....	1559
White v. New York, 15 App. Div. 440.....	638, 2013
White v. New York &c. R. Co., 68 App. Div. 561.....	2168
White v. Peninsular R. Co., 20 Wash. 132.....	518



	PAGE
White v. Riley, 121 Mich. 413.....	1836
White v. Riley, 113 Mich. 295.....	1841
White v. R. Co., 26 W. Va. 800.... (553)	
White v. San Antonio, (Tex. Civ. App.) 57 S. W. Rep. 858.....	1988
White v. Sanders, 168 Mass. 296.....	867
White v. Sharp, 27 Hun. 94.....	1555
White v. Sherman, 168 Ill. 589.....	46
White v. Tebo, 43 App. Div. 418.....	2099
White v. Trinidad, 10 Colo. App. 327.....	1856
White v. U. & B. R. Co., 15 Hun. 333.....	1025
White v. Vicksburg R. & Co., (Miss.) 31 South. Rep. 709.....	2289
White v. Weir, 33 App. Div. 145.....	338
White v. West End Street R. Co., 165 Mass. 522.....	492
White v. Winnisimmet Co., 61 Mass. 155.....	199, 603, 605
White v. Witteman Lithographic Co., 131 N. Y. 631.....	1748, 1782
White v. Worcester Consol. Street R. Co., 167 Mass. 43.....	2326
White v. W. U. T. Co., 14 Fed. Rep. 710.....	2398, 2416, 2417
Whitehall & Co. v. New York & Co., 51 N. Y. 369.... (940)	
Whitehead v. St. Louis & Co. R. Co., 99 Mo. 263.... (381)	
Whitehead v. St. Louis & Co. R. Co., 22 Mo. App. 60.... (23)	
Whiteman v. Siebert, 27 Misc. 814.....	2181
Whitemore v. Haroldson, 2 Lea, (Tenn.) 312.....	149
Whitesell v. Hall, 101 Iowa, 629.....	2190
Whitewire v. Muncy Creek, 17 Pa. Super. Ct. 399.....	1840
Whitewright v. Taylor, (Tex. Civ. App.) 57 S. W. Rep. 311.....	1838
Whitfield v. Carrolton, 50 Mo. App. 98.....	1997
Whitfield v. Paris, 84 Tex. 431.....	1986
Whitford v. Panama R. Co., 23 N. Y. 465.....	958, 960
Whitford v. Southbridge, 119 Mass. 564.....	657
Whitley v. Southern R. Co., 122 S. C. 987.....	384, 465
Whitlock v. Brighton, 2 App. Div. 21.....	1824
Whitman v. Wisconsin & Co. R. Co., 58 Wis. 408.....	1430
Whitman & Co. v. Wurm, (Ky.) 66 S. W. Rep. 609.....	730
Whitmore v. City Bank of Rochester, 77 N. Y. 363.....	36
Whitmore v. Orono Pulp & Co., 91 Me. 297.....	1356, 2068
Whitney v. Gross, 140 Mass. 232.....	1137
Whitney v. Maine & Co. R. Co., 69 Me. 208.... (767)	
Whitney v. Martin, 88 N. Y. 535.....	69
Whitney v. Merchant & Co. Ex. Co., 104 Mass. 152.....	40
Whitney v. Milwaukee, 57 Wis. 639.....	1865
Whitney v. New York & Co. R. Co., 102 Fed. 850.....	376, 1103, 1112
Whitney v. Snyder, 2 Lansing, (N. Y.) 477.....	168, 626
Whitney v. Ticonderoga, 127 N. Y. 40, 46.....	1164
Whitney & Co. v. O'Rourke, 172 Ill. 177.....	1415, 1675, 2204
Whitney & Co. v. O'Rourke, 68 Ill. App. 487.....	647
Whiton v. Snyder, 88 N. Y. 299, 308.....	1222
Whitout v. Chicago & Co. R. Co., 13 Wall. 270.... (857)	
Whitsen v. Ames, 68 Minn. 23.....	1162
Whittaker v. Bent, 167 Mass. 588.....	1779, 1804
Whittaker v. Collins, 34 Minn. 999.....	2197
Whittaker v. D. & H. C. Co., 49 Hun. 400.....	1535
Whittaker v. Eighth Ave. R. Co., 51 N. Y. 295.....	24, 1938, 2270, 2340, 2361
Whittal v. New York, 64 N. Y. Supp. 250.....	1866
Whittlemore v. Thomas, 153 Mass. 347.....	995
Whittingham v. Schopf, (Ky.) 67 S. W. Rep. 846.....	72
Whitton v. South Carolina & Co. R. Co., 106 Ga. 796.....	1708
Whitworth v. Erie Railway Co., 87 N. Y. 420.....	129, 241, 352
Whitty v. Oshkosh, 106 Wis. 87.....	1864, 1870, 1882, 2047
Whorden v. Argentine Twp., 112 Mich. 20.....	2047
Wichita Nat. Bank v. Weeks, 5 Kan. App. 694.....	71
Wichita Gas & Co. v. Wright, 9 Kan. App. 730.....	888, 1383
Wichita & Co. R. Co. v. Davis, 37 Kan. 743.... (659)	
Wichita & Co. R. Co. v. Hart, 7 Kan. App. 554.....	1052
Wichita & Co. R. Co. v. Koch, 8 Kan. App. 642.... (240)	

	PAGE
Wickham v. Chicago &c. R. Co., 95 Wis. 23.....	777, 1034, 2149
Wickliffe v. Moring, (Ky.) 68 S. W. Rep. 641.....	1872
Widemer v. New York Elevated R. Co., 114 N. Y. 462.....	1276
Wiedman v. Erie R. Co., 66 App. Div. 347.....	752
Wiegand v. Central R. Co., 75 Fed. Rep. 370.....	297, 622
Wiel v. Cowles, 45 Hun, 307.....	1182
Wiese v. Remme, 140 Mo. 289.....	651, 683, 718, 1330
Wiggert v. Fox, L. R. 11 Exch. 832.....	1397
Wiggin v. St. Louis, 135 Mo. 558.....	651, 1863, 1881
Wiggins v. King, 91 Hun, 340.....	548, 560
Wightman v. Chicago &c. R. Co., 73 Wis. 169.....	574
Wigton v. Metropolitan Street R. Co., 38 App. Div. 207.....	900
Wihnky v. Second Ave. R. Co., 14 App. Div. 515.....	2292
Wilber v. Closson, 35 Me. 26.....	1000, 1008
Wilber v. Pollansbee, 97 Wis. 577.....	647, 1136, 1321, 1322
Wilber v. New York &c. R. Co., 8 App. Div. 138.....	810
Wilber v. New York &c. R. Co., 17 App. Div. 623.....	808
Wilberding v. Dubuque, 111 Iowa, 484.....	863, 1133, 1874
Wilbert v. N. Y. & Erie R. R. Co., 12 N. Y. 245.... (212).....	337
Wilbert v. N. Y. &c. R. Co., 19 Barb. 36.....	824
Wilbite v. Speakman, 79 Ala. 400.....	999
Wilcox v. Cate, 65 Vt. 478.....	1360
Wilcox v. Chicago &c. R. Co., 111 Fed. Rep. 435.....	2208
Wilcox v. Hagan, 5 Ind. 546.....	104, 115, 117
Wilcox v. Hines, 100 Tenn. 538.....	1323, 1356
Wilcox v. Marmalee, 3 Sandf. 610.... (349)	
Wilcox v. Parmlee, 3 Sandf. S. C. Rep. 610.....	2439
Wilcox v. Rome, W. & O. R. Co., 39 N. Y. 358.....	674, 744, 791
Wilcox v. San Antonio &c. R. Co., 11 Tex. Civ. App. 187.....	422
Wilcox v. Zane, 167 Mass. 302.....	1322
Wild v. Boston &c. R. Co., 171 Mass. 245.....	938, 1263
Wilde v. New Orleans, 12 La. 15.....	1993
Wilde v. Northern R. Co., 53 N. Y. 156.... (460)	
Wilde v. Trans. Co., 47 Iowa, 247.... (279)	
Wilder v. Maine &c. R. Co., 65 Me. 332.... (1041)	
Wilder v. Metropolitan Street R. Co., 10 App. Div. 364.....	1103, 1129
Wilder v. Moffat, 33 Misc. 777.....	1110
Wilds v. H. R. Co., 24 N. Y. 430.....	656, 744, 791, 1120
Wilds v. H. R. R. Co., 29 N. Y. 315.....	674, 757, 773
Wilds v. H. R. R. Co., 23 How. 492.....	1671
Wiley v. L. I. R. Co., 76 Hun, 29.....	772, 807
Wiley v. Bond, 23 Misc. 658.....	1091
Wiley v. F. N. Bank, 47 Vt. 546; 50 id. 389.... (124)	
Wiley v. Portsmouth, 35 N. H. 304.....	1844
Wiley v. Smith, 25 App. Div. 351.....	2338
Wiley v. West Jersey R. Co., 44 N. J. L. 247.....	1256, 1261
Wilhelm v. Brooklyn &c. R. Co., 32 App. Div. 637.....	680
Wilhelm v. Defiance, 58 Oh. St. 56.....	1301
Wilhelm v. Defiance, 58 Oh. St. 56.....	2261
Wilkes v. Jackson, (Va.) 2 Hen. & Munf. 355.....	2207
Wilkes v. Western &c. R. Co., 109 Ga. 794.....	426
Wilkie v. Raleigh &c. R. Co., 127 N. C. 203.....	840, 1434, 1677
Wilkins v. Earle, 44 N. Y. 172.... (142).....	135, 138
Wilkins v. Flint, 128 Mich. 262.....	864, 1862, 1869
Wilkins v. Wainright, 173 Mass. 212.....	1374
Wilkins v. Omaha &c. Co., 96 Iowa, 668.....	2203, 2325
Wilkins v. Wilmington, 2 Marv. (Del.) 132.....	1178, 1935, 1948, 1951
Wilkinson v. Griswold, 12 Smedes & Mar. 669.....	2180
Wilkinson v. Johnson, 3 Barn. & Cres. 428.... (166)	
Wilkinson v. Searcy, 76 Ala. 176.....	
Will v. Sedalia, 64 Mo. App. 494.....	2036
Will v. Mendon, 108 Mich. 251.....	1828
Willard v. Bridge, 4 Barb. 361.....	132
Willard v. Nelson, 35 Neb. 651.... (172)	

## TABLE OF CASES.

cccccix

	PAGE
Willard v. Reingardt, 2 E. D. Smith, (N. Y.) 148.....	149
Willett v. Goetz, 125 Mich. 581.....	976
Willett v. Michigan C. R. Co., 114 Mich. 411....(762).....	784
Willett v. Rich, 142 Mass. 356.....	133
Willett v. St. Albans, 69 Vt. 330.....	907, 1815, 1964
Willett v. Hatch, 132 N. Y. 41.....	128
Willey v. Boston Electric Light Co., 168 Mass. 40.....	1143, 1729
Willey v. Palen, 65 How. (N. Y.) Fr. 435.....	2365
Williams v. R. Co., 109 Mo. 475.....	1482
Williams v. R. Co., 93 N. C. 42....(1082)	
Williams v. Adams, 3 Allen, 171.....	85
Williams v. Brooklyn, 33 App. Div. 539.....	921, 936, 1819
Williams v. Carterville, 97 Ill. App. 160.....	1237, 1945
Williams v. Central R. Co., 43 Iowa, 396.....	1547
Williams v. Clough, 3 Hurlst. & Norm. 258.....	1601, 1750
Williams v. Delaware & C. R. Co., 116 N. Y. 632.....	695, 1584, 1597, 1714, 1715
Williams v. Delaware & C. R. Co., 39 App. Div. 647....(1089)	
Williams v. Fresno Canal Co., 96 Cal. 14....(638)	
Williams v. Gardiner, 58 Hun, 508.....	1317, 1318
Williams v. Gill, 122 N. C. 967.....	527
Williams v. Gobble, 106 Tenn. 367.....	1135
Williams v. Gready, 112 Mass. 79.....	2343
Williams v. Hamilton, 104 Iowa, 423.....	628
Williams v. Hanly, 16 Ind. App. 464.....	908
Williams v. Hannibal, 94 Mo. App. 549.....	1862, 1876
Williams v. Hays, 157 N. Y. 541.....	679
Williams v. Hilman, 71 Me. 211.....	2187
Williams v. International & C. R. Co., (Tex. Civ. App.) 67 S. W. Rep. 1085..	503
Williams v. Koehler, 41 App. Div. 426.....	9
Williams v. Louisville & C. R. Co., 98 Ky. 247.....	2165
Williams v. Louisville & C. R. Co., (Ky.) 45 S. W. Rep. 71.....	1103
Williams v. Louisville & C. R. Co., (Ky.) 64 S. W. Rep. 738.....	1549
Williams v. Michigan & C. R. Co., 2 Mich. 260.....	1001, 1007, 1008, 1012, 1013, 1014, 1018
Williams v. Mobile & C. R. Co., (Miss.) 19 South. Rep. 90.....	420
Williams v. Moore, 69 Ill. App. 618.....	141
Williams v. Moray, 74 Ind. 25....(982)	
Williams v. Nally, (Ky.) 45 S. W. Rep. 874.....	1240
Williams v. Nixon, 2 Beav. 472....(63)	
Williams v. Northern Lumber Co., 113 Fed. Rep. 382.....	1598, 1800
Williams v. Oregon Shore-Line R. Co., 18 Utah, 210.....	268, 377
Williams v. Parks, (Neb.) 89 N. W. Rep. 395.....	86
Williams v. Petoskey, 108 Mich. 260.....	1831
Williams v. Pullman & C. R. Co., 40 La. Ann. 417.....	31, 523, 527
Williams v. St. Louis & C. R. Co., 179 Mo. 316.....	1479
Williams v. St. Louis & C. R. Co., (Tex. Civ. App.) 36 S. W. Rep. 329.....	493
Williams v. Southern & C. R. Co., 91 Ala. 635.....	954
Williams v. Southern R. Co., 130 N. C. 116.....	1261
Williams v. Syracuse Iron Works, 31 Hun, 392.....	1729
Williams v. Thacker Coal & C. Co., 44 W. Va. 599.....	1802
Williams v. Vanderbilt, 28 N. Y. 217.....	231, 829
Williams v. Webb, 27 Misc. 508.....	599, 830
Williams v. Wood, 55 Minn. 323.....	828
Williamsburgh Savings Bank v. Solon, 136 N. Y. 465....(520)	
Williamson v. Brooklyn & C. R. Co., 53 App. Div. 399.....	912
Williamson v. Metropolitan Street R. Co., 29 Misc. 324.....	2286, 2312
Williamsport v. Lisk, 21 Ind. App. 414.....	1877, 1992
Willingham v. Rockdale Oil & C. Co., 101 Ga. 713.....	1719
Willis v. Armstrong County, 183 Pa. St. 184.....	1848
Willis v. Atlantic & C. R. Co., 120 N. C. 508.....	1113, 1160
Willis v. Atlantic & C. R. Co., 122 N. C. 905.....	421, 1529
Willis v. Finley, 173 Pa. St. 28....(181)	
Willis v. Grand Trunk R. Co., 62 Me. 488.....	247
Willis v. Long Island R. Co., 34 N. Y. 670.....	498

	PAGE
Willis v. Missouri R. Co., 61 Tex. 432....(964)	
Willis v. Newburne, 118 N. C. 132.....	1821
Willis v. Sharp, 124 N. Y. 406....(92)	
Willis v. Willis, 16 Ala. 652.....	50
Willock v. Missouri &c. R. Co., 79 Mo. App. 76.....	318
Willoughby v. Horridge, 16 Eng. L. & Eq. 437....(603)	
Willen v. Metropolitan Street R. Co., 74 N. Y. Supp. 774.....	928
Willson v. Northern P. R. Co., 5 Wash. 621.....	833
Willy v. Mulledy, 78 N. Y. 310.....	1171, 1172, 1341, 1362
Wilmarth v. Babcock, 2 Hill, 194.....	2202
Wilmerding v. McKesson, 103 N. Y. 329.....	43, 65
Wilmington v. Ewing, 2 Penn. (Del.) 66.....	1823
Wilnot v. Corrigan &c. R. Co., 106 Mo. 535.....	510
Wilnot v. Howard, 39 Vt. 447.....	2192, 2197
Wilson v. R. Y. C. &c. R. R. Co., 97 N. Y. 87.....	241
Wilson v. S. T. Co., 21 Barb. 68.....	1172
Wilson v. Arnold, 172 Pa. St. 264.....	87
Wilson v. Brett., 11 Mees & Wells, 113.....	2185
Wilson v. Broadway & Seventh Ave. R. Co., 8 Misc. 451.....	916, 2280
Wilson v. California Cent. R. Co., 94 Cal. 166.....	321
Wilson v. Charleston &c. C. R. Co., 51 S. C. 79.....	1606, 1628
Wilson v. Charlestown, 8 Allen, 137.....	700
Wilson v. Denver &c. R. Co., 7 Col. 101.....	2046
Wilson v. Dickel, 7 App. Div. 175.....	110
Wilson v. Grand Trunk R. Co., 56 Me. 60.....	611
Wilson v. Halpin, 1 Daly, (N. Y.) 496.....	153
Wilson v. Hamilton, 4 Oh. St. 722....(199).....	271, 603
Wilson v. Harrington, 72 Wis. 591.....	2194
Wilson v. Hudson River Water Co., 71 Hun, 292.....	1621
Wilson v. Keeling, (Ky.) 50 S. W. Rep. 539.....	1204
Wilson v. Knapp, 70 N. Y. 596.....	826, 2026
Wilson v. Lancashire &c. R. Co., 99 Eng. C. L. 632....(824)	
Wilson v. Linde Co., 47 App. Div. 327.....	132
Wilson v. Louisiana &c. R. Co., 51 La. Ann. 1133.....	1444, 1588, 1591, 1678
Wilson v. McIntosh, 1 Stark, (N. P.) 237....(124)	
Wilson v. Madison &c. R. Co., 18 Ind. 226.....	1614, 1620
Wilson v. Massachusetts &c. Mills, 169 Mass. 67.....	1492
Wilson v. Mayor &c., 1 Den. 595.....	1817, 1902, 1960
Wilson v. Merry, L. R. 1 H. L. Cas. 326.....	1664
Wilson v. Mich. R. Co., 94 Mich. 20.....	1735
Wilson v. Minneapolis Street R. Co., 74 Minn. 436.....	2272, 2274, 2278
Wilson v. Missouri &c. R. Co., 66 Mo. App. 388....(824)	
Wilson v. N. Y., 1-Denio, 595.....	1962, 1965
Wilson v. New Bedford, 108 Mass. 261.....	2073
Wilson v. New Orleans &c. R. Co., 68 Miss. 9.....	577
Wilson v. Northern &c. R. Co., 26 Minn. 278....(688)	
Wilson v. Newport Dock Co., 4 H. & C., 232....(665)	
Wilson v. New York &c. R. Co., 41 App. Div. 36.....	740, 804
Wilson v. Noonan, 27 Wis. 598.....	30
Wilson v. O'Hara, 14 Pa. Super. Ct. 258.....	1842, 1851
Wilson v. Olano, 28 App. Div. 448.....	2120
Wilson v. Paper Co., 75 Wis. 579.....	1566
Wilson v. Pa. R. Co., 132 Pa. St. 27....(851)	
Wilson v. Pecos &c. R. Co., (Tex. Civ. App.) 58 S. W. Rep. 183.....	1135
Wilson v. Peverly, 2 N. H. 548.....	21
Wilson v. Railroad Co., 56 Me. 60....(615)	
Wilson v. Railroad Co., 21 Gratt. 654....(291).....	279
Wilson v. Railway Co., 8 Misc. 451.....	2229
Wilson v. Russ, 20 Me. 421.....	2174, 2175
Wilson v. Sioux &c. Min. Co., 16 Utah, 392.....	1396, 1511, 1675
Wilson v. Southern P. Co., 13 Utah, 352.....	959, 1158, 1163
Wilson v. Trafalgar Co., 83 Ind. 326.....	657
Wilson v. Trafalgar &c. Co., 93 Ind. 287.....	657
Wilson v. Treadwell, 81 Cal. 59....(1355)	

## TABLE OF CASES.

cccxli

	PAGE
Wilson v. Troy, 135 N. Y. 96.....	1941
Wilson v. Troy, 60 Hun, 183.....	940, 2008, 2016
Wilson v. Waddell, 2 App. Cas. 95.....	2072
Wilson v. Waterbury, 73 Conn. 416.....	1813, 1909, 1967
Wilson v. Watertown, 3 Hun, 508.....	1832, 1920
Wilson v. Wheeling, 19-W. Va. 323.... (650)	
Wilson v. White, 71 Ga. 506.....	2245
Wilson v. Wil. & Man. R. Co., 10 Rich. L. R. (S. C.) 52.... (989)	
Wilson v. Williams, (Ky.) 58 S. W. Rep. 444.....	1461, 1706
Wilson v. Willimantic &c. R. Co., 50 Conn. 433.....	1404, 1405
Wilson v. Winona &c. R. Co., 37 Minn. 326.....	1550
Wilson's Assigned Estate, 14 Lanc. L. Rev. 370.....	94
Wilter v. St. Paul, 40 Minn. 460.....	1946
Wilton v. Middlesex R. Co., 107 Mass. 108.....	12, 416, 504
Wimber v. Iowa C. R. Co., 114 Iowa, 551.....	930
Winans v. Randolph, 169 Pa. St. 606.....	1290
Winbigler v. Los Angeles, 45 Cal. 36.....	1960
Winch v. B. L. &c. R. Co., 13 Eng. L. & Eq. 506.... (1334)	
Winchell v. St. Paul City R. Co., (Minn.) 90 N. W. Rep. 1050.....	397
Winchester v. Carroll, 99 Va. 727.....	1828, 1883, 1957, 2054, 2058
Winczewski v. Winona &c. R. Co., 80 Minn. 245.....	1747
Windfall Man. Co. v. Patterson, 148 Ind. 414.....	1383
Windover v. Troy C. R. Co., 4 App. Div. 202.....	1545, 1586
Windsor v. Delaware &c. Canal Co., 92 Hun, 127.....	679
Winfield v. Peeden, 8 Kan. App. 671.....	1997
Wing v. N. Y. &c. R. Co., 1 Hilt. (N. Y.) 235.....	236
Wing v. Ford, 89 Me. 140.....	191
Winkle Terra Cotta Co. v. Homersky, 77 Ill. App. 42.....	1401
Winkler v. Carolina &c. R. Co., 126 N. C. 370.....	1031, 1033, 1040, 1054
Winkler v. Fisher, 95 Wis. 355.....	5
Winkler v. St. Louis Basket & B. Co., 137 Mo. 394.....	1545
Winkler v. St. Louis &c. R. Co., 21 Mo. App. 99.....	428
Winne v. Jones, 111 Mass. 360.....	2346
Winnegar v. Cent. Pass. R. Co., 85 Ky. 547.....	532, 954
Winner v. Lathrop, 67 Hun, 511.....	2032, 2187
Winship v. Enfield, 42 N. H. 197.....	1914
Winship v. New York &c. R. Co., 170 Mass. 464.....	536
Winship Mach. Co. v. Burger, 110 Ga. 296.....	1683
Winslow v. Boston &c. R. Co., 165 Mass. 264.....	453
Winslow v. Cincinnati, 6 Oh. N. P. 47.....	1827
Winslow v. Vermont &c. R. Co., 42 Vt. 700.....	2419
Winston v. Illinois C. R. Co., (Ky.) 65 S. W. Rep. 13.....	954
Winter v. Croastown Street Railway of Buffalo, 8 Misc. 362.....	2330
Winter v. New York &c. R. Co., 66 N. J. L. 677.... (755)	
Winter v. Pac. R. Co., 41 Mo. 503.... (618)	
Winter v. Railroad Co., 74 Iowa, 448.....	2051
Winter v. Railway Co., 8 Misc. 362.....	2231
Winter v. Williamsburgh Sav. Bank, 68 App. Div. 193.....	162
Wintermute v. Clark, 5 Sand. (N. Y.) 242.....	155
Winters v. Cowen, 90 Fed. Rep. 99.....	556, 907
Winters v. Kansas &c. R. Co., 99 Mo. 509.....	714
Wintringham v. Hayes, 144 N. Y. 1.....	110, 1234
Wirrell v. Gheen, 39 Pa. St. 388.... (173)	
Wise v. Morgan, 101 Tenn. 273.....	1379
Wise v. South Covington &c. R. Co., (Ky.) 34 S. W. Rep. 894.....	528
Wiser v. Chesley, 53 Mo. 549.....	142, 154, 155, 1104
Wibelman v. Western Union Teleg. Co., 62 N. Y. S. 491.....	2390, 2437
Wiskie v. Montello Granite Co., 111 Wis. 443.....	1666, 1705
Wisner v. Chelsey, 53 Mo. 547.... (109)	
Wisner v. Missouri R. Co., 19 Mo. App. 662.....	510
Wisner v. St. Paul &c. R. Co., 47 Minn. 468.... (719)	
Witherill v. Milwaukee &c. R. Co., 24 Minn. 410.... (1021)	
Witherow v. Tannehill, 194 Pa. St. 21.....	2101

	PAGE
Witsell v. West Asheville &c. R. Co., 120 N. C. 557.....	399
Witt v. Tennessee &c. R. Co., 99 Tenn. 442.....	319
Wittenberg v. Friederich, 8 App. Div. 433.....	641, 1400
Wittenberg v. Onsgard, 78 Minn. 342.....	1235, 2037
Witterbottom v. Wright, 10 M. & W. 109.....	1380
Wittleder v. Citizens' &c. Illum. Co., 47 App. Div. 410.....	1059
Wittman v. Cincinnati &c. R. Co., 10 Oh. S. & C. P. Dec. 563.....	953
Witty v. C. &c. R. Co., 83 Ky. 21..... (674)	
Wiwirowski v. L. S. & M. S. R. Co., 124 N. Y. 420.....	748, 1111
Woburn v. Boston &c. R. Co., 109 Mass. 283..... (819)	
Wodrocza v. Consolidated Gas Co., 29 Misc. 637.....	1107
Woeckner v. Erie Electric Motor Co., 176 Pa. St. 451.....	708, 2297
Woeckner v. Erie &c. Motor Co., 182 Pa. St. 182.....	719, 880, 1126
Woefel Leather Co. v. Thomas, 68 Ill. App. 374.....	1143
Woehrl v. Metropolitan L. Ins. Co., 21 Misc. 88.....	1310
Woehrl v. Minnesota &c. R. Co., 82 Minn. 165.....	804
Wohlhart v. Beckert, 92 N. Y. 490.....	1202, 1377
Wojciechowski v. Spreckles' Sugar Ref. Co., 177 Pa. St. 57.....	1753
Wojchoski v. Central R. Co., 10 Pa. Super. Ct. 469..... (758)	
Wolf v. American Tract. &c. Co., 164 N. Y. 30.....	2263
Wolf v. American Traction Soc., 25 App. Div. 98.....	641
Wolf v. Big Creek Stone Co., 148 Ind. 317.....	1556
Wolf v. Brooklyn Ferry Co., 54 App. Div. 67.....	605
Wolf v. Chalker, 31 Conn. 128.....	1008
Wolf v. Collins, 196 Ill. 281.....	1370
Wolf v. Great Northern R. Co., 72 Minn. 435.....	1595
Wolf v. Hemrich Bros. Brewing Co., 28 Wash. 187.....	2352
Wolf v. Kilpatrick, 101 N. Y. 146.....	2233
Wolf v. Lake Erie &c. R. Co., 55 Oh. St. 517.....	717, 952
Wolf v. Simmons, 75 Miss. 539.....	72
Wolf v. Third Avenue R. Co., 67 App. Div. 605.....	458, 642, 893, 922
Wolf v. W. U. T. Co., 62 Pa. St. 83.....	265, 2390, 2409, 2411, 2415
Wolfe v. Lehigh Valley R. Co., 9 Kulp. (Pa.) 401.....	276, 346
Wolff v. Lamann, (Ky.) 56 S. W. Rep. 408.....	883, 986
Wolff v. Railway Co., 68 Ga. 653..... (343)	
Wolfkiel v. Sixth Ave. R. Co., 38 N. Y. 49.....	483
Wolford v. Lyon Grand &c. Co., 63 Cal. 483.....	908
Wolfskehl v. W. U. T. Co., 46 Hun, 542.....	2427
Wolfskill v. Los Angeles R. Co., 129 Cal. 114.....	2370
Wolgamuth's Estate, 16 Lanc. L. Rev. 229.....	48
Wolsen v. R. Co., 19 N. Y. 267..... (1013)	
Womach v. St. Joseph, 168 Mo. 236.....	1898
Wonder v. Baltimore &c. R. Co., 32 Md. 418.....	1405, 1615, 1620
Wood v. M. & H. P. R. Co., Wis. 541..... (350)	
Wood v. N. Y. C. & H. R. R. Co., 70 N. Y. 195.....	1757
Wood v. American Nat. Bank, (Va.) 40 S. E. Rep. 931.....	907
Wood v. Andes, 11 Hun, 544..... (703, 798)	
Wood v. Bartholomew, 122 N. C. 177.....	1094, 1379
Wood v. Bedford &c. R. Co., 8 Phila. 94..... (1334)	
Wood v. Brooklyn City R. Co., 5 App. Div. 492.....	506
Wood v. Brown, 82 Pa. St. 116..... (83)	
Wood v. Chicago &c. R. Co., 66 Minn. 49.....	1712
Wood v. Crocker, 18 Wis. 345..... (313)	
Wood v. Detroit &c. R. Co., 52 Mich. 402.....	32, 2332
Wood v. Diamond Electric Co., 185 Pa. St. 529.....	1066
Wood v. Gilboa, 76 Hun, 175.....	1176, 1848
Wood v. Heiges, 83 Md. 257.....	1411, 1418, 1448, 1557
Wood v. Hinton, 47 W. Va. 645.....	1983
Wood v. Ill. R. Co., 23 Ill. App. 370.....	1426
Wood v. Ind. School Dist. &c., 44 Iowa, 27.....	648
Wood v. Lake Shore &c. R. Co., 49 Mich. 370.....	473
Wood v. La Rue, 9 Mich. 158..... (1001)	
Wood v. Leadbitter, 13 N. & W. 838.....	590
Wood v. Louisville &c. R. Co., 101 Ky. 703.....	366

## TABLE OF CASES.

cccxliii

	PAGE
Wood v. Louisville &c. R. Co., 88 Fed. Rep. 44.....	931, 1438, 1693
Wood v. Luscomb, 23 Wis. 287.....	2347
Wood v. Milwaukee &c. R. Co., 27 Wis. 541..... (313)	
Wood v. New York &c. R. Co., 32 App. Div. 606.....	1518
Wood v. Pennsylvania R. Co., 177 Pa. St. 306.....	429
Wood v. Prussian Nat. Ins. Co., 99 Wis. 497.....	1307
Wood v. Remick, 143 Mass. 453..... (105).....	116
Wood v. Southern Ex. Co., 95 Ga. 451.....	281
Wood v. Southern R. Co., 118 N. C. 1056.....	240, 252
Wood v. Vaughan, 28 N. B. 472.....	970, 976, 980
Wood v. Watertown, 58 Hun, 298.....	639
Woodard v. N. Y., L. E. & W. R. Co., 106 N. Y. 369..... (762).....	2312
Woodbridge v. Marks, 5 App. Div. 604.....	981, 2047
Woodbridge v. Marks, 17 App. Div. 139.....	985
Woodbridge v. Del. &c. R. Co., 105 Pa. St. 460.....	2159
Woodbury v. District of Columbia, 5 Macky, 127.....	914
Wooden v. W. N., N. Y. & P. R. Co., 126 N. Y. 10.....	961
Wooden v. Western &c. R. Co., 147 N. Y. 508.....	1618, 1662, 1668
Woodfolk v. Bank of America, 10 Bush. (Ky.) 504..... (182)	
Woodford v. Brinker, 47 App. Div. 632.....	2086
Woodhull v. New York, 150 N. Y. 450.....	1984
Woodhull v. Mayor &c., 76 Hun, 390.....	1984
Woodin v. Austin, 51 Barb. 9..... (202)	
Woodman v. N. Y., L. E. & W. R. Co., 106 N. Y. 369.....	693
Woodman v. R. Co., 149 Mass. 335.....	648, 1098
Woodman v. Hubbard, 5 Foster, (Vt.) 67.....	2384
Woodman v. State of New York, 127 N. Y. 397.....	2222
Woodroffe v. Roxborough &c. R. Co., 201 Pa. St. 521.....	517
Woodruff v. Erie R. Co., 93 N. Y. 609.....	1334
Woodruff v. Erie R. Co., 25 Hun, 246.....	1334
Woodruff v. Painter & Eldridge, 150 Pa. St. 91.....	2130
Woodruff v. Sherrard, 9 Hun, 322..... (295)	
Woodruff &c. Co. v. Diehl, 84 Ind. 474..... (596)	
Woods v. Chicago &c. R. Co., 108 Mich. 396.....	920
Woods v. Cotton Co., 134 Mass. 357.....	1317
Woods v. Devin, 13 Ill. 746.....	207, 614
Woods v. McClure, 7 Ind. 155.....	117
Woods v. Long Island R. Co., 159 N. Y. 546.....	1631
Woods v. Long Island R. Co., 11 App. Div. 16.....	1428
Woods v. Metropolitan Street R. Co., 48 Mo. App. 125.....	549
Woods v. Miller, 30 App. Div. 232.....	2102
Woods v. Pangburn, 75 N. Y. 495.....	2202, 2204
Woods v. Tipton County, 128 Ind. 289.....	704
Woods v. Trinity Parish, 21 West. L. Rep. (D. C.) 259.....	645
Woodson v. Johnson County, 109 Ga. 454.....	1642, 1664, 2048
Woodson v. Milwaukee &c. R. Co., 21 Minn. 60.....	1258
Woodward v. M. S. & N. I. R. Co., 10 Oh. St. 101..... (958)	
Woodward v. N. Y., L. E. & W. R. Co., 106 N. Y. 381..... (797).....	674
Woodward v. Washburn, 3 Denio, (N. Y.) 369..... (846)	
Woodward Iron Co. v. Andrews, 114 Ala. 243.....	1158, 1714, 1805
Woodward Iron Co. v. Cook, 124 Ala. 349.....	869, 1489, 1622
Woodward Iron Co. v. Herndon, 114 Ala. 191.....	1442, 1714
Woodworth v. New York &c. R. Co., 55 App. Div. 23.....	791
Wooldridge v. White, 105 Ky. 247..... (883)	
Woolery v. Louisville &c. R. Co., 107 Ind. 381.....	688
Woolley v. Grand Street &c. R. Co., 83 N. Y. 121.....	693, 1130, 2337
Woolf v. Chalker, 31 Conn. 121.....	977, 981, 986, 991
Woolley v. Baldwin, 101 N. Y. 688.....	80
Woolsen v. Northern P. R. Co., 19 N. H. 267..... (1012).....	1044
Woolsey v. Haas, 65 Mo. App. 198..... (991)	
Woolsey v. Trustees of Ellenville, 61 Hun, 136.....	843
Woolsey v. Trustees of Ellenville, 69 Hun, 489.....	2043
Woolwine v. Chesapeake &c. R. Co., 36 W. Va. 329.....	2113
Wooster v. B. & Seventh Ave. R. Co., 72 Hun, 197.....	1121

	PAGE
Wooster v. Bliss, 90 Hun, 79.....	1563
Woram v. Noble, 41 Hun, 398.....	2233
Worcester v. Eaton, 11 Mass. 368.....	2378
Worcester Bank v. Dorchester Bank, 10 Cush. 488.... (182)	
Worcester County v. Ryckman, 91 Md. 36.....	1840
Work v. Chicago &c. R. Co., 105 Fed. Rep. 874.....	764, 810
Workman v. New York, 179 U. S. 552.....	1989
World Man. Co. v. Hamilton-Kenwood Cycle Co., 123 Mich. 620.....	191
Worlds v. Georgia R. Co., 99 Ga. 283.....	1584, 1738
World's Columbian Exposition v. Bell, 76 Ill. App. 591.....	1596, 1606, 1624
World's Columbian Exposition v. Lehigh, 196 Ill. 612.....	1624
World's Columbian &c. Co. v. France, 91 Fed. Rep. 64.....	101, 114, 117
World's Columbian Exhibition v. France, 96 Fed. Rep. 687.....	114
Wormack v. W. U. T. Co., 58 Tex. 176.....	2397, 2399
Wormley v. Gregg, 65 Ill. 251.... (973)	
Wormwell v. M. C. R. Co., 10 Atl. Rep. (Me.) 49.....	1600
Worster v. Forty-second St. & G. St. R. Co., 50 N. Y. 203.....	817, 2229, 2237
Worthington v. Cent. Vt. R. Co., 64 Vt. 107.....	511
Worthington v. Goforth, (Ala.) 26 South. Rep. 531.....	1492
Worthington v. Mencer, 96 Ala. 310.....	703
Worthington v. Morgan, 17 Ind. App. 603.....	1819
Worthington v. Parker, 11 Daly, 545, 546.....	1321
Wortman v. Minich, 28 Ind. App. 31.....	1094, 1698
Wosbigian v. Washburn &c. Man. Co., 167 Mass. 20.....	1602
Wosika v. St. Paul &c. R. Co., 80 Minn. 364.....	2274
Wottrich v. Freeman, 71 N. Y. 601.... (1797)	
Wrae v. Swann, 79 Ala. 330.....	584
Wright v. Augusta, 78 Ga. 241.....	1987
Wright v. Baller, 42 Hun, 77.....	1120
Wright v. Big Rapids Door &c. Co., 124 Mich. 91.....	650, 2128, 2129
Wright v. Boston & Maine R. Co., 129 Mass. 440.....	792, 2141
Wright v. Boston &c. R. Co., 142 Mass. 296.....	815
Wright v. Caldwell, 3 Mich. 51.....	611
Wright v. Compton, 53 Ind. 337.....	22, 29, 1768
Wright v. Georgia R. Co., 34 Ga. 330.....	681
Wright v. Glens Falls &c. Street R. Co., 24 App. Div. 617.....	560
Wright v. Lancaster, (Pa.) 25 Atl. Rep. 245.....	1821
Wright v. Malden R. Co., 4 Allen, 283.... (705)	
Wright v. Mulvaney, 78 Wis. 89.... (826)	
Wright v. N. Y. C. R. Co., 25 N. Y. 562.....	1408, 1478, 1601, 1627
Wright v. Northampton &c. R. Co., 122 N. C. 852.....	1618
Wright v. Pacific Coast Oil Co., (Cal.) 53 Pac. Rep. 1086.....	1727
Wright v. Portland, 118 Mich. 23.....	2014
Wright v. Prest. D. & H. C. Co., 40 Hun, 343.....	1760
Wright v. Rawson, 52 Iowa, 329.....	1451
Wright v. Southern P. Co., 14 Utah, 383.....	1124, 1532, 1568, 1673
Wright v. Southern P. Co., 15 Utah, 421.....	1218
Wright v. Southern R. Co., 122 N. C. 959.....	1433
Wright v. Southern R. Co., 123 N. C. 280.....	1633
Wright v. Southern R. Co., 127 N. C. 225.....	1106
Wright v. Southern R. Co., 80 Fed. Rep. 260.....	1553, 1613, 1671, 1741
Wright v. Wilcox, 19 Wend. 343.....	16, 23, 28
Wright v. Wright, 21 Conn. 344.... (1007)	
Wright's Estate, 182 Pa. St. 90.....	94
Wrightson v. Tydings, 94 Md. 358.....	51
Wrinn v. Jones, 111 Mass. 360.....	2346
Writt v. Girard Lumber Co., 91 Wis. 496.....	1710
Wulff v. Wood Harvester Co., 67 Minn. 423.....	1721
Wurderman v. Barnes, 92 Wis. 206.....	2194
Wyatt v. Wallace, 67 Ark. 575.....	188
Wyatt v. Citizen R. Co., 55 Mo. 485.... (476)	
Wyatt v. Harrison, 3 B. & Ad. 871.....	2070, 2101
Wyatt v. Rome, 105 Ga. 312.....	1988
Wyckoff v. Queens Co. Ferry Co., 52 N. Y. 34.....	199, 603, 604



## TABLE OF CASES.

cccxlv

	PAGE
Wyeth v. Benz-Bowles Co., (Ky.) 66 S. W. Rep. 825.....	72
Wylde v. Northern &c. R. Co., 53 N. Y. 156.... (342).....	354, 355, 1110
Wylor v. Rothschild, 53 Neb. 566.....	1200
Wyllie v. Palmer, 137 N. Y. 248.....	15, 1291, 1377
Wyman v. Clark, 180 Mass. 173.....	1698
Wyman v. Jay, 5 Exch. 352.....	1601
Wyman v. Northern Pac. R. Co., 34 Minn. 210.....	569
Wyman v. Orr, 47 App. Div. 136.....	1749
Wyman v. Philadelphia, 175 Pa. St. 117.....	1886, 1895
Wymore v. Mahaska County, 78 Iowa, 396.....	706, 714
Wynantskill Knitting Co. v. Murray, 90 Hun, 554.....	328
Wynn v. Central Park N. & E. R. Co., 133 N. Y. 575.....	541, 542
Wynne v. Atlantic Ave. R. Co., 14 Misc. 414.....	542
Wynne v. Haight, 27 App. Div. 7.....	1325
Wyoming v. Detroit R. Co., 64 Mich. 93.... (751)	
Wyrick v. Missouri &c. R. Co., 74 Mo. App. 406.....	251, 288
Yahn v. Ottemwa, 60 Iowa, 429.....	730, 2246
Yarnall v. St. Louis &c. R. Co., 75 Mo. 575.... (785).....	2148
Yate v. Willan, 2 East, 128.... (268)	
Yates v. Goodwin, 96 Me. 90.....	179
Yates v. McCullough Iron Co., 69 Md. 370.....	1615
Yates v. The People, 32 N. Y. 509.... (1240)	
Yates v. Squeers, 19 Iowa, 26.....	31
Yates v. Southwestern &c. Co., 40 Ia. Ann. 467.....	2126
Yates v. White, 4 Bing. (N. S.) 272.... (939)	
Yaw v. Whitmore, 37 App. Div. 98.....	1414
Yaw v. Whitmore, 46 App. Div. 422.....	1455
Yazoo City Co. v. Smith, 78 Miss. 140.....	1563
Yazoo &c. R. Co. v. Aden, 77 Miss. 382.....	577
Yazoo &c. R. Co. v. Anderson, 77 Miss. 28.... (420)	
Yazoo &c. R. Co. v. Davis, 73 Miss. 678.....	2090
Yazoo &c. R. Co. v. Faust, (Miss.) 32 South. Rep. 9.....	474
Yazoo &c. R. Co. v. Foster, (Miss.) 23 South. Rep. 581.....	2460
Yazoo &c. R. Co. v. Jones, 73 Miss. 229.....	1156
Yazoo &c. R. Co. v. Millsaps, 76 Miss. 855.....	214
Yazoo &c. R. Co. v. Rogers, (Miss.) 31 South. Rep. 581.....	547, 833
Yazoo &c. R. Co. v. Whittington, 74 Miss. 410.....	1028
Yazoo &c. R. Co. v. Wright, 78 Miss. 125.....	1028
Yeager v. Southern C. R. Co., (Cal.) 51 Pac. Rep. 190.....	1229
Yeager v. Spirit Lake 115 Iowa, 593.... (1178)	
Yeakell v. Alexander, 48 Ill. 263.... (907)	
Yearsley v. Sunset Teleph. &c. Co., 110 Cal. 236.....	1462
Yellow Med. County Bank v. Tagley, 57 Minn. 391.....	172
Yeomans v. Contra Costa S. Nav. Co., 44 Cal. 71.... (372)	
Yerkes v. Keokuk &c. Co. 7 Mo. App. 265.....	1513
Yerkes v. National Bank of Port Jervis, 69 N. Y. 383.....	1102
Yerkes v. Northern P. R. Co., 112 Wis. 184.....	35
Yerkon v. Springfield Water Works, 65 Cal. 619.....	913, 1542, 1592
Yoakum v. Dunn, 1 Tex. Civ. App. 524.....	2102
Yoakum v. Selph, 19 Tex. (S. W.) 145.... (95)	
Yoeh v. Home &c. Ins. Co., 111 Cal. 503.....	831
Yoders v. Amswell, 172 Pa. St. 447.....	1310
Yore v. Mueller Coal &c. Co., 147 Mo. 679.....	1835
York v. Central R. Co., 3 Wall. (U. S.) 107.... (238)	
York v. Chicago &c. R. Co., 98 Iowa, 544.....	2356
Yotter v. Detroit, 107 Mich. 4.....	272
Youll v. Sioux City R. Co., 66 Iowa, 346.....	1734
Young v. N. Y. Lake Erie & W. R. R. Co., 107 N. Y. 505.....	1865
Young v. Atlantic Ave. Railroad Co., 10 Misc. 541.....	1552, 1752
Young v. Boston &c. R. Co., 168 Mass. 219.....	762
Young v. Boston &c. R. Co., 69 N. H. 356.....	2281
Young v. Brandsford, 12 Lea, (Tenn.) 232.....	1610
Young v. Brandsford, 12 Lea, (Tenn.) 232.....	1413, 1686, 1711
Young v. Brewster, 62 Mo. App. 628.....	1108, 2031
	1084

	PAGE
Young v. Bullen, (Ky.) 43 S. W. Rep. 687.....	56
Young v. Burlington Co., 79 Iowa, 415.....	1414
Young v. Charleston, 20 C. C. 116.....	1960
Young v. Chicago &c. R. Co., 100 Iowa, 357.....	482, 1091
Young v. Citizens' Street R. Co., 148 Ind. 54.....	1091, 2298, 2323
Young v. Clark, 16 Utah, 42.....	2151, 2163
Young v. Cowden, 98 Tenn. 577.....	2352, 2353
Young v. Dietzgen, 76 N. Y. Supp. 123.....	1806
Young v. Hahn, (Tex. Civ. App.) 69 S. W. Rep. 203.....	1461, 1463, 1634, 1661
Young v. Hannibal &c. R. Co., 79 Mo. 336..... (776)	
Young v. McComb, 11 App. Div. 480.....	1980
Young v. Mason, (Ind. App.) 35 N. E. Rep. 521.....	2196
Young v. Miller, 167 Mass. 224.....	1495
Young v. Missouri &c. R. Co., 72 Mo. App. 263.....	683
Young v. New York &c. R. Co., 171 Mass. 33.....	370
Young v. Railway Co., 10 Misc. 541.....	2228
Young v. St. Louis &c. R. Co., 44 Iowa, 172..... (1029)	
Young v. Texas &c. R. Co., 51 La. Ann. 295.....	419
Young v. Webb City, 150 Mo. 333.....	1872
Young v. Western U. T. Co., 65 N. Y. 163.....	2409, 2413
Young v. W. U. T. Co., 107 N. C. 370.....	858, 2432, 2454
Young v. West Virginia &c. R. Co., 42 W. Va. 112.....	1707
Youngblood v. Comer, 97 Ga. 152.....	1602
Youngbluth v. Stephens, 104 Wis. 343.....	1540, 1754
Younge v. Groat, 4 Bing. 253.....	174
Younger v. Louisville &c. R. Co., (Ky.) 41 S. W. Rep. 25.....	1035
Yunker v. Marshall, 65 Ill. App. 667.....	2189
Zachery v. Mobile &c. R. Co., 75 Miss. 746.....	365
Zahn v. Milwaukee &c. R. Co., (Wis.) 89 N. W. Rep. 889.....	1587
Zanesville v. Fannan, 53 Oh. St. 605.....	1917
Zanger v. Detroit City R. Co., 87 Mich. 646.....	2238
Zboynski v. Brooklyn City R. Co., 10 Misc. 7.....	2043
Zeigler v. Day, 123 Mass. 152.....	1669
Zeigler v. Gotzian &c. Co., 86 Minn. 290.....	1558
Zeigler v. North Eastern R. Co., 7 S. C. 402..... (1025)	
Zell v. Dunkell, 156 Pa. St. 353.....	2130
Zemp v. Wilmington &c. R. Co., 9 Rich. L. (S. C.) 84..... (511)	
Zeuner v. C. & A. R. Co., 27 Pa. St. 334..... (345)	
Zibbell v. Grand Rapids, (Mich.) 89 N. W. Rep. 563.....	860, 1147, 1200
Ziegler v. West Bend, 102 Wis. 17.....	2013
Zimet v. Hollenback, 9 Kulp, (Pa.) 564.....	983
Zimmer v. N. Y. Central R. R. Co., 137 N. Y. 463.....	274, 279, 280
Zimmer v. N. Y. C. & H. R. R. Co., 7 Hun, 552.....	795
Zimmer v. Third Ave. R. Co., 36 App. Div. 265.....	544, 1193
Zimmerman v. Hannibal &c. R. Co., 71 Mo. 476.....	702, 753
Zimmerman v. Roat, 75 Pa. St. 191..... (174)	
Zimmerman v. Stahl, 38 App. Div. 638.....	1168
Zimmerman v. Union R. Co., 3 App. Div. 219.....	2271, 2272, 2310
Zimmerman v. Union R. Co., 28 App. Div. 445.....	729
Zingrebe v. Union R. Co., 56 App. Div. 555.....	845, 917
Zintek v. Stimson Mill Co., 7 Wash. 178.....	1661
Zipperlein v. Pittsburg &c. R. Co., 8 Oh. S. & C. P. 587..... (941)	
Ziulovsky v. Twenty-Third Street Ry. Co., 8 Misc. 463.....	2231, 2303
Zoebisch v. Tarbell, 10 Allen, 385.....	1400
Zoliewski v. N. Y. Cent. &c. R. R. Co., 1 Misc. 438.....	796
Zouch v. Ches. &c. R. Co., 36 W. Va. 524.....	258
Zumault v. Kansas City &c. Air Line, 71 Mo. App. 670.....	428, 776
Zump v. W. & M. R. Co., 9 Rich. (S. C.) 8..... (381)	
Zurn v. Tetlow, 134 Pa. St. 213.....	1510, 1753
Zwack v. New York &c. R. Co., 160 N. Y. 362.....	770, 773

# NEGLIGENCE.

## RULES—DECISIONS—OPINIONS.

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### AGENCY.

#### I. LIABILITY OF PRINCIPAL FOR NEGLIGENCE OF HIS AGENT.

- (a) When the agency exists.
- (b) When agent is acting within scope of his employment.
- (c) When he is not acting within scope of his employment.
- (d) Willful and malicious acts of agents.

#### II. BANKS AND OTHER AGENTS FOR COLLECTION, &C.

#### III. EXECUTORS AND TESTAMENTARY TRUSTEES.

- (a) Investment.
- (b) Collection.
- (c) Distribution.
- (d) Disbursements.
- (e) Care of estate.
- (f) Liability for negligence of co-executor.

#### IV. TRUSTEES, DIRECTORS, FINANCIAL AGENTS AND OFFICERS.

#### V. PUBLIC OFFICERS.

#### VI. RECEIVERS AND ASSIGNEES.

#### I. Liability of Principal for Negligence of His Agent.

The master is liable to a third person for the negligence, or misfeasance of the servant, while the latter is acting in the master's business, and within the scope of the servant's employment, notwithstanding the fact that the servant's negligent act may be contrary to the master's direction, and, as between the two, a violation of the duty which the latter owes to the former. *Quinn v. Power*, 87 N. Y. 535.

*Schuler v. Hudson R. Co.*, 38 Barb. 553; *Toledo, etc. R. Co. v. Goddard*, 25 Ind. 185; *Johnson v. Chicago, etc. R. Co.*, 58 Iowa 348; *Buckingham v. Fisher*, 70 Ill. 124.

## (a). WHEN THE AGENCY EXISTS.

"A" bought a box of "B" and sent his porter to "B's" store to get it, and such porter, while lowering it to the sidewalk, injured passer-by. "A" was liable and not "B." *Stevens v. Armstrong*, 6 N. Y. 435; rev'g judg't for pl'ff.

One directing his servant to shovel snow from a roof, is liable to a third person for negligent execution of the work by servant, or by one who volunteers to help him. *Althorf v. Wolfe*, 22 N. Y. 355 aff'g judg't for pl'ff.

Citing *Booth v. Mister*, 7 Carr. & Payne, 66. It would have been different had defendant contracted to have the work done. *Blake v. Ferris*, 5 N. Y. 48; *Lansing v. N. Y. &c. R. Co.*, 49 N. Y. 525; *Tousey v. Roberts*, 114 N. Y. 312.

Master of boat conveying wheat consigned to Albany was, upon arrival there, directed by consignees to proceed across the river to East Albany where cargo undelivered was injured. The carrier contended that the master in crossing the river was not acting under his employment or authority. But the agreement was construed to authorize a delivery at the port of Albany and not merely the city of Albany and it was held that there was not sufficient delivery to discharge the carrier. *Gibbs v. Van Buren*, 48 N. Y. 661; aff'g judg't for pl'ff.

Where a person was sued for negligence of his alleged coachman, in causing a collision, evidence that defendant did not own the horse and coach was evidence that he did not hire the coachman, in the absence of other evidence on that subject, and whoever owned the coach and horse was therefore liable for the injury. *Sloane v. Elmer*, 64 N. Y. 201 rev'g 1 Hun, 310.

The defendants notified the vendor of boilers, that they were defective; the vendor sent "O" to repair them, and when done, to "fire up" the boilers and test them. "N," the defendant's engineer fired up the boilers and an explosion occurred, killing "O."

It was presumed, that the fire was started at the request of those interested in the work of repair, or that the engineer voluntarily did it, and if so, the defendants were not liable; and even if "N" were acting as a servant of defendants, there was nothing to permit any inference of negligence on his part. The defendants did not owe the same duty to "O," which they would have owed to an employé of their own, into whose hands the boiler had been placed for use. *Olive v. The Whitne Marble Co.*, 103 N. Y. 292.

An owner agreed that the rents of a house should be paid the defendant, his creditor, to meet a debt; the owner would not pay for sewer connection, and the defendant, to keep the tenant, suggested to a plumber

to make it at defendant's expense. The plumber left open a ditch and the plaintiff was thereby hurt. Defendant was not liable for plumber's act. *Kelly v. Doody*, 116 N. Y. 575.

Distinguishing *Clifford v. Dam*, 81 N. Y. 52.

"L," a stevedore, engaged the plaintiff, a gangway man, to assist in unloading the defendant's vessel. "L" was paid a price per ton and the defendant furnished the power and the men to run the winch. The plaintiff gave the signals to the winchmen to "go ahead," and the load was hoisted by a rope winding around a drum of the winch. The rope ran off the drum, and the winchmen stopped and called the plaintiff's attention to this, and the latter seized the rope to lift it on the drum, ordering the winchmen, at the same time, to "back" so as to release the rope, but the winchmen went ahead and the plaintiff's hand was drawn against the drum and injured. "L" had no power to order or control the winchmen and was not a co-employé of the plaintiff, and the plaintiff recovered against the defendant on the ground of the winchmen's negligence. *Johnson v. Netherlands Ass. Co.*, 132 N. Y. 576.

Defendant's apprentice, with his assent, took defendant's team to ride and did injury. While the apprentice was in custody the defendant entered into an agreement to pay for injuries. Defendant was liable. *Sherwood v. Fischer*, 3 Hun, 606.

Defendant let stevedores take his engine and its engineer to hoist material; stevedore's servant was injured by alleged negligence of engineer in lowering hoisting rope too rapidly. Defendant was not liable, as he owed plaintiff no duty that was broken (following *King v. N. Y. Central R. Co.*, 66 N. Y. 181; and *Burke v. DeCastro*, 11 Hun, 354), *Coyle v. Pierrepont*, 33 Hun, 311.

Reargument and held that defendant was liable for engineer's negligence (following *Gerlach v. Edelmeyer*, 15 J. & S. 292, aff'd 88 N. Y. 645), *Coyle v. Pierrepont*, 37 Hun, 379.

Defendant sent his servant to Fisher's factory to receive paper shavings thrown in bags from upper floor through a hatchway. Defendant's servant undertook to warn passers-by; plaintiff, one of Fisher's employés, in passing, through default of defendant's servant to warn, was injured. She knew that the hatchway was used for lowering papers; this did not make her liable for contributory negligence. Defendant liable for negligence of servant. *Post v. Stockwell*, 44 Hun, 28.

Where a union station is within control or ownership of several roads, though managed through the medium of a distinct corporation, any one of them is liable for the acts of a station agent. *Penfield v. Cleveland R. Co.*, 26 App Div. 413; s. c., 50 N. Y. Supp. 79.

Injury caused by servant of defendant while hired by him to another

with full control and direction for the occasion, imposed no liability on defendant. *Brown v. Smith*, 86 Ga. 274.

That negligence of a third person contributed to the general result does not relieve a principal from liability for negligence of his agent. *Chicago v. O'Malley*, 196 Ill. 197.

Defendant's soliciting agent, though off duty for the day, had been requested by a fellow servant to purchase an article for use in the business. After purchasing the article, the agent became intoxicated and injured plaintiff. Defendant was not liable. *Corper &c. Malting Co. v. Huggins*, 96 Ill. App. 144.

Power of control and discharge held necessary to the application of the rule of *respondeat superior*. *Crudup v. Schreiner*, 98 Ill. App. 337.

Damage done to a customer's building in the delivery of coal by one not an employé, whose delivery was subsequently ratified. The ratification created the relation of master and servant and established liability for the damage. *Dempsey v. Chambers*, 154 Mass. 330.

*Byington v. Simpson*, 134 Mass. 169; *Colvin v. Peabody*, 155 id. 104; *Stevenson v. Joy*, 152 id. 45.

A person employed by a servant without authority takes the risk of the employment. *Blair v. Grand Rapids &c. R. Co.*, 60 Mich. 124.

A master may be liable for the act of his sub-agent or under-servant unless he be under the exclusive control of another. *So. Express Co. v. Brown*, 67 Miss. 260.

A person employed without master's authority or knowledge, by one of his servants, injured another. Master not liable. *Mangan v. Foley*, 33 Mo. App. 250.

One hired by defendant's servant without defendant's authority, negligently handled a crate of crockery, injuring plaintiff. Defendant not liable. *Jewell v. Grand Trunk R. Co.*, 55 N. H. 84.

For negligence of an independent contractor working according to his own methods and not subject to the control of his employer, the latter is not liable. *Powell v. Construction Co.*, 88 Tenn. 692.

See "Contractor," post p. 631.

Care in the selection of agents held no defense to an action for their negligence. *St. Louis &c. R. Co. v. Miller*, (Tex. Civ. App.) 66 S. W. Rep. 139.

That under a trackage agreement a company's trains were subjected to a joint schedule and the control of another's train dispatcher, etc., did not affect its liability for the negligence of its own engineer in the operation of the train itself. *Clark v. Geer*, 86 Fed. Rep. 447.

Contract for depot facilities held not to render a railroad company

liable for the negligence of the depot company's servants. *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100.

Injury caused by employes while doing certain things, which their employers are not under obligation to do, imposes no liability on the latter. *Dells v. Stollenwerk*, 78 Wis. 339.

Father offered his son money for all crows killed in his fields. The son negligently injured another with his gun while two miles away, squirrel hunting. Son was held not to be father's servant. *Winkler v. Fisher*, 95 Wis. 355.

(b). WHEN AGENT IS ACTING WITHIN SCOPE OF HIS EMPLOYMENT.

Although the servant deviate from instructions of the master, yet, if a negligent act be done in the prosecution of the master's business, the master would be liable. The instructions of the master to the servant do not govern. *Cosgrove v. Ogden*, 49 N. Y. 255; aff'g judg't for pl'ff.

Goods discharged upon carrier's pier were but partially protected; while defendant's agents were engaged in placing tarpaulins over them to protect them from the storm, one of the tarpaulins was forcibly taken from them, against their protest, by persons in the carrier's employ, and used to cover the hatch of the ship. The act of the carrier's servants was wrongful, but the injury was not willful in the sense that they designed it; they were at the time engaged in the master's business, and although he did not authorize the wrong, it was done in the course of their employment and for his benefit, and he was liable for an injury resulting therefrom. Action was to recover freight charges. *Gleadell v. Thomson*, 56 N. Y. 194; aff'g judg't for def'ts, who were the owners of the goods.

Plaintiff purchased gin of the defendants, and it was shipped to him. The plaintiff shipped it back on the ground that it was deficient in quantity, and defendant's car-man took it from the depot and receipted for it. The defendants declined to receive it and directed the car-man to return it, which he did not do. The defendants, by suit, recovered the price of the gin against the plaintiff, which recovery was paid by the plaintiff upon the assurance that the gin had been re-shipped. In an action to recover back this amount, it was held, that although the car-man's receipt did not bind the defendants, yet it made them liable for the custody and safe-keeping of the property, and hence for the loss thereof, from the car-man's negligence or misconduct. *Purcell v. Jaycox*, 59 N. Y. 288.

The defendant's clerk threw down a bale of cotton and injured a longshoreman loading cotton. It was for the jury to say whether the

clerk was acting within the scope of duty. Evidence as to clerk's duties was conflicting. *Courtney v. Baker*, 60 N. Y. 1.

"C," defendant's agent, was directed to test a boiler under pressure of 150 pounds, but at the wish of the customer that it be tested under a pressure of 180 pounds, replied that "he would test it to 200, anyhow." When the steam began to escape at a pressure of 198 pounds "C" held down the lever of the escape valve, whereby the boiler exploded and a person passing in the street was injured. The act of "C" was reckless and foolhardy, and he was acting in the defendant's business, and, although in making the tests he went beyond their express wish, they were chargeable. *Ochsenbein v. Shapley*, 85 N. Y. 214; rev'g judg't for pl'ff on account of error in charge.

A ferryboat making a regular trip took on a boatman, and, without compensation, the pilot agreed to leave him on board his boat in mid-stream, and, going out of his course to do so, so collided with a part of a tow as to knock off the plaintiff's intestate, who was on a canal boat attached to said tow, and kill him. Although the owners of the ferryboat were ignorant of the transaction, they were liable. *Quinn v. Power*, 87 N. Y. 535; rev'g 17 Hun, 102, and judg't for def't. The case was retried, and a judgment for plaintiff reversed for improper evidence. 29 Hun, 183.

See *Joel v. Morison*, 6 Carr. & P. 50; *Sleath v. Wilson*, 9 id. 607; *Phila. & Read &c. R. Co. v. Derby*, 14 How. (U. S.) 486.

The plaintiff recovered for being run over in the street by careless and reckless conduct, or want of skill, on the part of a driver, defendant's servant. *Groth v. Washburn*, 89 N. Y. 615, aff'g judg't for pl'ff.

Defendant's car driver asked boy of fourteen to give him a drink from his can; boy stepped on platform to do so; driver drank, but would not stop to let boy off; whipped up the horses just as the boy was alighting. Defendant was liable. *Day v. B. C. R. Co.*, 12 Hun, 435; s. c. aff'd, 76 N. Y. 593.

Employé asked boy to walk up elevated track to hydrant for water, which he did, pail in hand. In crossing track in front of an engine, the engine was started so as to cause the plaintiff injury. Engineer saw him coming, one hundred feet away, knew he was going to hydrant and must cross the track, but saw no more of him until hurt. It was the engineer's duty to see that the boy was out of the way. Master was liable. *Corcoran v. N. Y. Elevated R. Co.*, 19 Hun, 368.

Passenger was informed by conductor or train agent, that he could get off train at station and continue his journey upon the next train on the same ticket, but the agent of the second train refused to recognize



the ticket, which had been punched, and put passenger off. Defendant was liable. *Tarbell v. Northern Central R. Co.*, 24 Hun, 51.

Citing *Story's Agency*, § 452; *Pa. R. Co. v. McCloskey*, 23 Pa. St. 526.

Distinguishing *Dietrich v. Penn. R. Co.*, 71 Pa. St. 432; *Oil Creek &c. Co. v. Clark*, 72 id. 231; *Denny v. N. Y. C., &c. R. Co.*, 5 Daly, 50.

Agent gave bill of lading reciting "contents unknown," but for certain amount of beans; consignor drew draft, with bill annexed, on consignee and discounted it with plaintiff. In fact, the goods were never delivered to the company. Defendant was liable for the result of its agent's act. Discussion of effect of bill as between it and shipper, and between it and third persons acting on faith thereof. *Bank of Batavia v. N. Y., L. E. & W. R. Co.*, 33 Hun, 589, ordering judg't for pl'ff on the verdict; aff'd, 106 N. Y. 195.

Citing *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; *Farmers & M. Bank v. Erie Ry. Co.*, 72 id. 188; *New York & N. H. R. Co. v. Schuler*, 34 id. 30; *Armour v. Michigan Central R. Co.*, 65 id. 111; rev'g 3 J. & S. 563, and other cases. See post, p. 1081.

**From opinion.**—"In *Grant v. Norway*, 10 C. B. 665, it was held, that a bill of lading made by a master of a ship, for goods not received, gave no right of action against the owner of the vessel to the plaintiff, who had made advances on faith of the bill of lading, and taken indorsement and delivery of it from the person named in it as the shipper. And that principle and case were adopted and followed in *Hubbersty v. Ward*, 8 Exch. 330; 18 Eng. L. & E. 551; *Coleman v. Riches*, 16 C. B. 104; 29 Eng. L. & E. 323; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182; *Pollard v. Vinton*, 105 U. S. (15 Otto) 7; *Robinson v. Memphis & Charleston Railroad Company*, 9 Fed. R. 129, 142; *Baltimore & Ohio Railroad Co. v. Wilkens*, 44 Md. 11; s. c. 22 Am. R. 26. This proposition is put upon the ground that the master of the ship, and the agent of the carrier, have no authority to issue bills of lading for property not received for shipment, that such is the limitation of his apparent authority of which everybody must take notice, and that it is a fraud on the part of the agent for which he, and not his principal, is liable to one making advances on the faith of the bill of lading. And the principle of these cases is declared as the correct and governing rule in *Brown v. Powell D. S. Coal Company*, L. R. 10 C. P. 562; s. c. 14 Moak, 420; *Sears v. Wingate*, 3 Allen 103; *Lowell F. C. Savings Bank v. Winchester*, 8 id. 109-118; and see *Daniel on Neg. Insts.* (3d ed §§ 1733, 1733a.) Directly in conflict with those first before cited on this question is *Sioux City & P. Railroad Company v. First National Bank*, 10 Neb. 556; s. c. 35 Am. R. 488, and they do not seem to have the support on principle of the courts of this state."

A carrier is not liable to an innocent holder of a bill of lading of cotton issued fraudulently by carrier's agent in conjunction with another person. *Friedlander v. Texas R. Co.*, 130 U. S. 416. See *Hickox v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *Pollard v. Vinton*, 105 U. S. 7; *Lickbarrow v. Mason*, 2 T. R. 77; *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B., 147.

A bill of lading issued for goods not received imposes no liability upon a carrier. *Nat. Bank of Commerce v. Chicago &c. R. Co.*, 44 Minn. 224. See *Lalland v. His Creditors*, 42 La. Ann. 705.

Transfer of a bill of lading to an innocent holder for value does not preclude defense; so where the receipt of a bill of lading for cotton was accepted in the faith that the cotton would be delivered, and it was not delivered, the carrier not liable. *Hazard v. Illinois Cent. R. Co.*, 87 Miss. 32.

It was a question for the jury whether an express agent at a station had authority to keep over night, for the owner, a trunk which had been carried to its destination, and charges paid, and receipted for by the owner, and which the agent delivered on the following day to the wrong man. *Oderkirk v. Fargo Express Co.*, 61 Hun, 418.

A gang of trackmen were removing an old cattle pass on the railroad track for the purpose of rebuilding it. The two sticks, about ten feet in length by twelve inches thick, were, upon their removal, appropriated by one of the workmen, and by the assistance of his companions carried across the track and thrown in a ditch in front of the company's land about six or seven feet from the beaten track of the highway, where they remained from Thursday afternoon until Saturday morning, when a team was scared by them and started into a run, throwing out the driver's wife and injuring her. The question whether the employes were engaged in the master's business when they placed the sticks beside the way, so as to bind the master, was for the jury. *Tinker v. N. Y., O. & W. R. Co.*, 71 Hun, 431, rev'g non-suit.

Citing *Phila. & C. R. Co. v. Derby*, 14 How. (U. S.) 482, 486; *Pittsburgh R. Co. v. Maurer*, 21 Ohio St. 421; distinguishing *Dells v. Stollewerk*, 78 Wis. 339.

A passer-by was struck by a box thrown from a mill door to a wagon. The act of the servant of the mill owner in throwing the box was held to be within the scope of his employment, though his master had nothing to do with the transportation of the goods from his mill. *Kelly v. Cohoes Knitting Co.*, 8 App. Div. 156.

Citing *Cosgrove v. Ogden*, 49 N. Y. 255; *Mott v. Consumers Ice Co.*, 73 id. 543.

Defendant's clerk, in the absence of the regular driver, undertook to drive defendant's wagon; though not a part of his regular duties, he had performed this service on several previous occasions. In an action for injuries from clerk's negligent driving the court refused to dismiss the complaint on the ground that he was not a servant acting within the scope of his authority. *Petersen v. Hubbell*, 12 App. Div. 372.

Defendant's servants, while engaged in carting ice to a place, deviated from the direct route and stopped for purposes of their own. Plaintiff was injured by ice falling from the wagon upon resuming their journey. The master was liable as it appeared that the injury was caused by the defective loading of the wagon and not by reason of any act following from the deviation. *Geraty v. National Ice Co.*, 16 App. Div. 174; s. c. aff'd, 160 N. Y. 658.

Defendant's clerk, while moving some of defendant's goods, borrowed, without his knowledge or authority, a handcart for the purpose; and while so engaged damaged plaintiff's property. The court charged the jury that, to find for the plaintiff, they must find that the servant was acting, if not under instructions, with the knowledge and approval of the defendant. Held erroneous, the test being whether the motive prompting the act and the purpose sought by it are within the scope of the servant's employment. *Keep v. Walsh*, 17 App. Div. 104.

A party hired a wagon from defendant, and on returning it, was told to leave it in the street, by one of defendant's employes. It was allowed to remain there with the knowledge of defendant's foreman, and over an hour afterwards plaintiff was injured by the falling of its shafts. Defendant was held liable. *Sullivan v. McManus*, 19 App. Div. 167.

Defendant's servant after using benzine to clean matrices, threw the waste benzine out of the window, contrary to instructions. It fell upon the plaintiff and caused injury. Defendant was held liable. *Reigler v. Tribune Association*, 40 App. Div. 324; s. c., aff'd, 167 N. Y. 542.

Defendant's servant deviated a couple of blocks from his route to visit a friend, and stopping, left the horses unattended in the street. They started off but were stopped and started back by a stranger who injured plaintiff in doing so. The deviation was held to be a misconduct within the scope of the servant's employment and not an abandonment of it. *Williams v. Koehler*, 41 App. Div. 426.

Employes of an electric company engaged in stringing its wires on poles receiving general directions to cut only such overhanging branches as could not be protected by insulation. The company was held liable for their acts in exceeding such necessity. *Van Siclen v. Jamaica Electric Light Co.*, 45 App. 1; s. c., aff'd, 168 N. Y. 650.

Plaintiff left defendant's restaurant without being served and without stopping at the cashier's desk. The general manager, thinking he was attempting to avoid payment, followed him to the sidewalk and had him arrested. Defendant was held liable. *Dupre v. Childs*, 52 App. Div. 306; s. c., aff'd, 169 N. Y. 585.

Defendant's driver was directed to collect the price of goods marked "C. O. D." or return them to the store. The goods in question were sent in exchange for goods returned by plaintiff but were, through some mistake, marked "C. O. D." Plaintiff sought to retain the goods and the driver procured his arrest for theft. The driver's act was within the scope of his employment and defendant was liable for false arrest. *Craven v. Bloomingdale*, 54 App. Div. 266; s. c., rev'd, 171 N. Y. 439, on ground that it was not a case for punitive damages.

President and manager of a corporation having no personal interest in the matter, but for the corporation's interest solely, made an arrest consulting with the corporation attorney before doing so. The corporation was responsible for his act. *Schwarting v. Van Wie &c. Grocery Co.*, 69 App. Div. 282.

An employé in charge of a restaurant caused the arrest of one who refused to pay for a meal. *Warren v. Dennett*, 17 Misc. 86.

The contracting agent of defendant who had agreed to send plaintiff's trunk to his home agreed to be responsible for it when it had been apparently lost, which induced the plaintiff to cease looking for it. The defendant was held liable. *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. 396.

Defendant's servants were authorized to remove obstructions to the replacing of glass in windows. They unnecessarily and against instructions interfered with a gas fixture, causing an explosion. *McCauley v. Hutkoff*, 20 Misc. 97.

A servant committed assault and battery in obtaining possession of property, though the master merely directed him to take it. *Griffith v. Friendly*, 30 Misc. 393.

Citing *Cohen v. Dry Dock &c. R. Co.*, 69 N. Y. 173; *Rounds v. Delaware &c. R. Co.*, 64 id. 129.

Permission of conductor to get on a freight car, while it is being loaded, fixes liability on company for the negligent handling of a steam shovel employed on the same. *Alabama &c. R. Co. v. Varbrough*, 83 Ala. 238.

Servants of a telegraph company cut trees in constructing a line, though contrary to instruction. *Postal Telegraph &c. Co. v. Brantley*, 107 Ala. 683.

Explosion of gas through negligence of boy seventeen years old, left in charge of store, in looking for a leak with a lighted match. *Pine Bluff Water &c. Co. v. Schneider*, 62 Ark. 109; s. c., 33 L. R. A. 366.

Plaintiff's driver, returning home with a loaded wagon, took an indirect route, and, stopping on an errand of his own, left his horses unhitched in the street. They started up, ran into and injured plaintiff. *Ritchie v. Waller*, 63 Conn. 155; s. c., 27 L. R. A. 161.

See, also, *Phelon v. Stiles*, 43 Conn., 426; *Stone v. Hills*, 45 id., 44.

Defendant's foreman directed the moving of cars which were being loaded by it on a side-track leading to its mill though it did not operate such cars or track. It was within the apparent scope of his authority though he was unauthorized to do that particular act. *Camp v. Hall*, 39 Fla. 535.

Injury caused by invitation of employé, dressed in company's uniform to board a moving train. *Western &c. R. Co. v. Wilson*, 71 Ga. 22.

*The Central R. &c. Co. v. Smith*, 80 Ga. 526.

Where the invitation to jump on was by one in company's uniform, the court declined to rule as a matter of law that defendant was not liable. *Savannah &c. R. Co. v. Morton*, 71 Ga. 24.

Engineer negligently or maliciously allows steam to escape, causing injury to plaintiff while crossing in front of engine. *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298.

Injury to a child growing out of the unauthorized loan of a push-car by the company's agent to persons unaccustomed to its use. *Pittsburg &c. R. Co. v. Thomas Bumstead*, 48 Ill. 221.

Engine was detached from train and used in conveying employes to their dinner. Such was the custom. *East St. Louis &c. R. Co. v. Reames*, 173 Ill. 582; aff'g 75 Ill. App. 28.

Injury to boy customarily allowed by defendant's servants to ride on freight cars. *Lummert v. Chicago &c. R. Co.*, 9 Ill. App. 388.

See, also *C. & A. R. R. Co. v. Murray*, 71 Ill. 601; *Weick v. Lander*, 75 Ill. 93.

(Cases of this class are collected under COMMON CARRIER OF PASSENGERS, WHO IS A PASSENGER, post 368, and under PRIVATE PREMISES, post 368.

Defendant's agent for the collection of rents, caused injuries through careless driving. *Lovington v. Baucheus*, 34 Ill. App. 544.

A servant ordered to keep people out of a park, ordered plaintiff therefrom and threw a rock at him as he was leaving. *Alton R. &c. Co. v. Cox*, 84 Ill. App. 202.

Street car conductor charged plaintiff with passing a counterfeit coin and calling a policeman caused his arrest. *West Chicago St. R. Co. v. Luleich*, 85 Ill. App. 643.

Defendant's driver, while engaged in delivering goods, went out of his way to call upon his wife, leaving the horse unattended in the street. During his absence a child got on the wagon step and, when the wagon was started up, fell off and was injured. Held, that there was not such a turning away from the master's service as to prevent latter's liability. *Chicago &c. Bottling Co. v. McGinnis*, 86 Ill. App. 38.

Store usher's act in following a customer into the street and compelling her to return to the store for interview concerning a supposed theft was within the scope of his authority. *Field v. Kane*, 99 Ill. App. 1.

Accident due to failure of company's employes to remove the carcass of an animal killed by a train. *Baxter v. Chicago &c. R. Co.*, 87 Iowa, 488.

Defendant sent servant with son to clear up a meadow; servant with consent of son, who had general authority to act for defendant, set fire to a hay stack. The fire escaped and did damage. Held, that it was properly submitted to the jury to determine the authority of the son to set the fire. *Lewis v. Schultz*, 98 Iowa, 344.

Clerk touched customer, requiring her to enter a room, and accused her of theft. Employer liable. *McDonald v. Franchere*, 102 Iowa, 496.

A street being blocked by a freight train, brakeman told plaintiff to pass through, as there was plenty of time. *Scott v. St. Louis &c. R. Co.*, 112 Iowa, 54.

Where servant, directed to go to a certain place and kill a beef, went there and finding no animal but a bull, killed it. *Maier v. Randolph*, 33 Kas. 340.

Boy rode on construction train with permission of conductor who had been instructed not to allow passengers on his train. *St. Joseph &c. R. Co. v. Wheeler*, 35 Kas. 185.

Sale of morphine for calomel by drug clerk, held gross negligence and ground for punitive damages against his principal. *Smith v. Middleton*, (Ky.) 66 S. W. Rep. 388.

One entered a freight train by permission of conductor, although violating company's regulations, and was injured by reason of employé's negligence. *Hanson v. Railway &c. Co.*, 37 La. Ann. 111.

One engaged to unload car threw heavy board into street, without warning. *Holmes v. Tennessee Coal &c. R. Co.*, 49 La. Ann. 1465.

One employed to do general farm work, in driving cattle out of corn field, threw a stone and killed one. *Evans v. Davidson*, 53 Md. 245.

Truck was left in public streets contrary to master's directions. *Powell v. Deveny*, 3 Cush. 300.

Servants engaged in removing stones trespassed on plaintiff's land, although ordered by defendant not to do so. *Southwick v. Esles*, 7 Cush. 385.

Servant failed to observe the rule of the road; notwithstanding the person injured had a right of action under statute against the servant, master was liable. *Reynolds v. Hanrahan*, 100 Mass. 313.

Street car driver without authority to do so invited girls to ride upon front platform gratis. One of them was injured through his negligence. *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

Cars obstructed a highway contrary to rule of company. *Commonwealth v. New York &c. R. Co.*, 112 Mass. 412.

Foreman of a lumber camp was within scope of his employment in ordering the burning of brush to clear land for crops, where owner had

furnished tools therefore and received the benefit of the crops raised thereon. *Smaltz v. Boyce*, 109 Mich. 382.

Person in train by permission of conductor, in absence of proof of lack of authority in conductor. *Gradin v. St. Paul & C. R. Co.*, 30 Minn. 217.

Injury to child, caused by negligent driving of agent employed to drive express wagon, who, after having delivered a trunk, engaged in carrying a load of poles for himself. *Mulvehill v. Bates*, 31 Minn. 364.

*Osborne v. McMasters*, 40 Minn. 103; *Ellegard v. Ackland*, 43 id. 352; *Gunderson v. Northwestern Elevator Co.*, 47 id. 161.

Superintendent, having general charge of premises, arrested one who entered thereon and attempted, by threats, to induce employes to quit. *Smith v. Munch*, 65 Minn. 256.

Under a statute making railroad station agents, conservators of the peace, defendant's agent though without instructions made an unjustifiable arrest of passenger. *King v. Illinois Central*, 69 Miss. 245.

Defendant's servants chased and worried plaintiff's cattle with dogs, in excess of defendant's directions. *Schmidt v. Adams*, 18 Mo. App. 432.

Detention of cattle entering through partition fence for impounding charges is within scope of servant's duty to protect premises. *Lamb v. Davidson*, 69 Mo. App. 107.

Floorwalker and superintendent of store caused arrest of customer on charge of theft by saleswomen, although directed not to arrest unless they had themselves witnessed such an act. *Knowles v. Bullene & Co.*, 71 Mo. App. 341.

Salesman contrary to instructions, directed customer to go down defective stairs. *Clack v. Southern Electrical Supply Co.*, 72 Mo. App. 506.

See, also, *Harrison v. Kansas City & C. R. Co.*, 50 Mo. App. 332; *McNicols v. Nelson*, 45 id. 446; *Sparks v. Transfer Co.*, 104 Mo. 531.

An electrically propelled sprinkling car on a projection of which were hanging black coats of the employes swinging in the wind, frightened a horse of gentle disposition. *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481; s. c., 38 L. R. A. 236.

Defendant's iceman, after delivering ice, ran back to the wagon with his tongs open and ran into a child, who was injured by the tong. *Price v. Simon*, 62 N. J. L. 153.

Brakeman in charge of freight train is acting within the scope of his authority in ejecting a trespasser. *West Jersey & C. R. Co. v. Welsh*, 62 N. J. L. 655.

Defendant was under contract to deliver pure milk to a cheese factory. His servant without his knowledge delivered adulterated milk. Master was held liable for resulting damage. *Stranahan &c. Co. v. Coit*, 55 Oh. St. 398.

A railroad detective caused arrest of plaintiff on charge of passing counterfeit coin, though acting contrary to his instructions as to the caution to be exercised. *Eichengreen v. Louisville &c. R. Co.*, 96 Tenn. 229; s. c., 31 L. R. A. 702.

Employé of mill was injured while coupling cars at request of conductor in order to place a car in convenient position for the employé to load his company's goods on. The employé was acting in his employer's interests and was allowed to recover from the railroad company. *Eason v. Railway Co.*, 65 Tex. 578.

But where the employé acts as a volunteer and not in furtherance of his master's business he cannot recover. *Bonner v. Eddy*, 79 Tex. 540.

Although a tugboat company may owe no duty to one as a passenger, an invitation by its employes to a child under the age of discretion imposes a liability on it, where an accident occurs in consequence. *Cook v. Houston &c. R. Co.*, 76 Tex. 353.

Manager of a farm, having authority to keep plaintiff's hogs off it, penned them and hauled them to a ranch of defendants. *Burnett v. Oechsner*, 92 Tex. 588.

Section hands unnecessarily placing hand car over a highway while waiting for their foreman, frightened plaintiff's horse. *Sherman &c. R. Co. v. Bridges*, 16 Tex. Civ. App. 64.

Depot master, appointed at defendant's request as special policeman, arrested plaintiff for selling a ticket on the depot platform. *Missouri &c. R. Co. v. Warner*, 19 Tex. Civ. App. 463.

Switchmen engaged in piloting an engine from a roundhouse is acting within the scope of his duties in moving another engine out of the way, though thereby he disobeys the company's rules. *Galveston &c. R. Co. v. Masterson*, (Tex. Civ. App.) 51 S. W. Rep. 1091.

Defendant's salesman failed to notify a purchaser of the explosive quality of its gasoline, and assured him it could be safely stored in a certain place, where the high temperature caused it to explode. *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508.

Employé's act of locking in party found in his employer's cars and sending for the sheriff was within the scope of his duty to protect his master's property, and, where unlawful, master was liable. *Texas &c. R. Co. v. Parker*, (Tex. Civ. App.) 68 S. W. Rep. 831.

Collision injuring one by invitation riding in defendant's trains, notwithstanding the engineer of the other colliding engine was forbidden



to run on that track at that time. *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

A company is liable for the reckless driving of its agent when he gives all his time and services to the business of the company. *Singer Manf. Co. v. Rahn*, 132 U. S. 518.

Giving of information concerning the source of the bank's deposits was within the scope of the authority of the cashier. Bank was liable for a false statement made in the interest of the bank though not expressly directed. *Hindman v. First Nat. Bank*, 112 Fed. Rep. 931.

Customer refused to pay for drink and, after an altercation, the bartender assaulted him. Whether the bartender was acting within scope of his duties was properly left to the jury. *Bergman v. Hendrickson*, 106 Wis. 434.

(c). WHEN HE IS NOT ACTING WITHIN SCOPE OF HIS EMPLOYMENT.

An expert and boy to accompany him were sent upon request of chairman of committee by defendant's firm, who were dealers in fireworks, to arrange the fixed pieces and take charge of the display. While expert was so engaged a member of said citizens' committee, which had the display in hand, told the boy to set off rockets, which the boy did so negligently as to injure a bystander. Held, that the act of the boy was not within the scope of his employment, and defendants were not liable. *Wyllie v. Palmer*, 137 N. Y. 248, aff'd 63 Hun, 8.

**From opinion.**—"There can be no doubt, I think, that such liability, would fall upon the members of the committee and persons in general charge and not upon the defendants. *Butler v. Townsend*, 126 N. Y. 105; *Olive v. Whitney Marble Co.*, 103 id. 292; *Blake v. Ferris*, 5 id. 48.

"The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with the result of some neglect or wrong, at the time and in respect to the very transaction out of which the injury arose. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 406; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 id. 117; *Penn. Co. v. Roy*, 102 U. S. 451; *Wood v. Cobb*, 13 Allen 58; *Kimball v. Cushman*, 103 Mass. 194; *Ward v. New England Fibre Co.*, 154 id. 419."

Plaintiff, under contract to repair defendant's elevators, requested the elevator boy to operate it, while he used it as a platform from which to do plastering. He was not allowed to recover for injuries caused by the negligence of the elevator boy, who was held to be the servant of the plaintiff for the time being. *Higgins v. Western Union Teleg. Co.*, 156 N. Y. 75; rev'g s. c., 11 Misc. 32.

Defendant's driver was directed to take his truck to the stable; but, meeting another of defendant's drivers, as a personal favor to him, undertook to carry the latter's trunk, and for this purpose took the truck

in another direction from the stable, and, while so doing, ran over a traveler in the street. Defendant not liable. *Cavanagh v. Dinsmore*, 12 Hun, 465.

Citing *Sheridan v. Charlich*, 4 Daly 338; *Wright v. Wilcox*, 19 Wend. 343; *Frazer v. Freeman*, 43 N. Y. 566; *S. & R. on Negligence*, 69 § 63; *Story v. Ashton*, L. R. 4 Q. B. 476.

A passenger engaged a buckboard to convey himself and wife from North Creek to Blue Mountain Lake, in the Adirondacks, of a person running a transportation line between such points. The passenger, annoyed by the dust created by teams in advance, asked the driver, if he would have to creep behind them and take their dust all day, and the driver said, "No, there is a place just beyond here where I can pass;" and the passenger said, "All right, you will do so then." At the fork of the road the driver pulled his horses to the left and urged them into a sharp trot, but the driver of the forward carriage started his horses on a run, and both teams raced, until, the road narrowing, the carriages collided, and the driver of the forward carriage was injured. The passenger was not liable. *Richardson v. Van Ness*, 53 Hun, 267.

The motorman of an electric car was alleged to have invited a boy to ride upon the car, because the boy had opened a switch for him. Motorman had been forbidden to allow anyone to ride upon such terms, and his act was not within the scope of his duty, nor was it for the company's interest or benefit, and the defendant owed the boy no duty as a passenger. *Finley v. Hudson Electric R. Co.*, 64 Hun, 373, rev'g judgt. for pl'ff; s. c., aff'd, 146 N. Y. 369.

Citing *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104-109; *Fleming v. B. C. R. Co.*, 1 Abb. N. C. 433; aff'd 74 N. Y. 618; *Buckley v. N. Y. & H. R. Co.*, 43 Super. Ct. 187.

**From opinion.**—"The root of the master's liability for the servant's act is his consent, express or implied, and when his acts are done within the scope of his employment or for his master's benefit or in the furtherance of his interest, although not strictly in the line of his duty, yet, in the course of his employment, the master's assent is implied and he is accordingly held liable. *Meehan v. Morewood*, 52 Hun, 566; *Mulligan v. N. Y. & R. B. R. Co.*, (129 N. Y. 506.) As in the case of *Quinn v. Powers* (87 N. Y. 535), where, although the servant departed from the strict line of duty, yet, what was done was in the line of his business, for the master's benefit, in furtherance of his interests, and, what the master might naturally have done, if he had been present."

Where a station agent, in the performance of a duty imposed upon him explodes torpedoes for the purpose of signaling a train, in the vicinity of a station where persons were standing on the platform, the railroad company is liable for injuries resulting therefrom, if such act was negligent and dangerous.

If in so doing the station agent went outside of his employment in order to effect a purpose of his own and exploded the torpedoes for his own amusement, and not for the purpose of signaling a train, the company would not be liable.

It rests upon the plaintiff, in an action brought to recover damages caused by the explosion of a torpedo, to show that the person exploding the same was acting within the scope of his employment by the railroad company against which the action was brought. *Smith v. The New York Central and Hudson River Railroad Company*, 78 Hun, 524.

A carpenter employed to install a refrigerating plant requested the operator of an elevator, whose duty was confined to its operation for the hotel and its guests, to assist him in his work by operating it for him while thus engaged. The operator was not acting within the scope of his employment but solely for the carpenter's accommodation. *Jossaers v. Walker*, 14 App. Div. 303.

A man in general charge of a cotton storage business gave instructions as to the use of the building in which the business was conducted to the employes of one having a contract to paint it. Such instructions were held not within the scope of his employment and his employer not liable for injury from a defective window bar he had declared to be safe. *Wendler v. Equitable Life &c. Soc.*, 19 App. Div. 50.

Defendant's agent employed to collect installments of the purchase price of its machines, but expressly instructed not to touch or take the goods on non-payment, committed an assault and battery in seizing a machine on default in payment of one of the installments by a customer. *Fencran v. Singer Man. Co.*, 20 App. Div. 574.

Defendant employed a person to keep lamps guarding a structure in the street lit, and to keep boys away from them. While boys were playing about the structure such servant threw stones at them. It was held that he was not acting within the scope of his authority. *Kaiser v. McLean*, 20 App. Div. 326.

Plaintiff did not sustain any relation to the defendant as passenger and he was arrested by one not in the latter's employ or acting for it, though after his arrest defendant's detective searched the plaintiff without direction or authority. In the absence of proof of authority it was held that the acts of defendant's agent were not necessarily within the scope of employment of a "detective." *Penny v. New York Central &c. R. Co.*, 34 App. Div. 10.

But an allegation of unlawful arrest by defendant's "agent or servant" in its store was held good against demurrer. *Fogarty v. Wana-maker*, 60 App. Div. 433.

A packing clerk carried a person on defendant's elevator marked "for

freight only," in violation of the rules and contrary to the course of his employment though twice before he had done so with defendant's consent. Such act was held not to be within the scope of his authority. *Cogswell v. Rochester Mach. Screw Co.*, 39 App. Div. 223 (Affirming an order for a new trial, on which evidence was introduced showing authority in clerk to carry passengers. Verdict was directed for defendant and the appellate court sent the case back to be tried by a jury. s. c., *sub. nom. Mormon v. Rochester &c. Co.*, 53 App. Div. 497).

Defendant's carpenter, employed to repair its gates, was standing near, and, when plaintiff, whose duty it was to raise them, attempted to do so, negligently struck a part of the machinery causing injury to the plaintiff. The complaint was dismissed upon the pleadings because it failed to state that the carpenter's act was done in pursuance of any design to repair the gates. *Fisher v. Brooklyn Jockey Club*, 50 App. Div. 446.

Defendant was in the habit of offering rewards for property lost by its customers, placing a certain employé in charge of such matters. Another employé having no connection with the former caused plaintiff's arrest upon information from an applicant for the reward. The defendant was not liable. *Lubliner v. Tiffany & Co.*, 54 App. Div. 326.

Citing *Mulligan v. New York &c. R. Co.*, 129 N. Y. 511.

Defendant's purser, after plaintiff had left its boat and given up her ticket, required her to enter a waiting room with another who charged her with theft and detained her there until she established her innocence. It was held that the acts were done after she had ceased to become a passenger, after his duties to defendant had ceased and were beyond the scope of the purser's employment. *McKay v. Hudson River Line*, 56 App. Div. 201.

Defendant's employé was sent to repair an electrical machine, used as motive power of a press. After completing the repairs, he took his tools to go home. While standing waiting for the train, the foreman of the establishment asked him to discharge the electricity with which the press had become stored. In attempting to do so the press was moved catching and injuring plaintiff's hand. The employé's act was not within the scope of his employment. *Flinn v. World's Dispensary Med. Ass'n*, 64 App. Div. 490.

Defendant's servant, in violation of express instructions, allowed a third person to ride a horse, which became ungovernable and injured plaintiff. Defendant was not liable. *Long v. Richmond*, 68 App. Div. 466.

Firing a cannon on a pleasure yacht is no part of the duty of one in charge of it in owner's absence, and owner is not responsible for in-

juries to plaintiff caused by the firing of it. *Haack v. Fearing*, 5 Robt. (N. Y.) 528.

Coachman, directed to drive horses when necessary for exercise in the country, drove in the city, in defendant's absence, when exercise was unnecessary, and for his own pleasure. *Fiske v. Enders*, 73 Conn. 338.

Permission to ride upon train held beyond scope of employment of engineer. *Chicago &c. R. Co. v. Casey*, 9 Ill. App. 632.

Defendant's servant, in charge of its depot, properly ejected plaintiff and started to return to the room when an altercation was started by the latter which resulted in his injury. *Chicago &c. R. Co. v. Randolph*, 65 Ill. App. 208.

Brakeman ejected a trespasser, though there was a conductor on the train with express authority so to do. *Chicago &c. R. Co. v. Brackman*, 78 Ill. App. 141.

Railroad company, held not responsible for negligence of section hand in leaving, on an open switch, a hand car he had been using, without its knowledge or consent, for his own purposes. *Sammis v. Chicago &c. R. Co.*, 97 Ill. App. 28.

Knowledge of the invalidity of a note on the part of an officer is not notice to his corporation where his interests are adverse to its. *Metcalf v. Draper*, 98 Ill. App. 399.

Passerby got on slowly moving train to assist in setting brakes on the request of an employé. *Everhart v. Terre Haute &c. R. Co.*, 78 Ind. 292.

Motorman threw stones to frighten away boys, who had been placing stones on track. Employer had warned him to take especial precautions against such mischief. *Dolan v. Hubinger*, 109 Iowa, 408.

Citing *Kincade v. Railway Co.*, 107 Iowa, 682; *Golden v. Newbrand*, 52 id. 59; *Porter v. Railroad Co.*, 41 id. 358.

Stranger to the employer injured while going through a dark room by the advice of an employé. *Lachat &c. v. Lutz*, 15 Ky. L. R. 75.

Station agent employed to sell tickets and look after freight business ran company's hand car without its consent for his own profit. *Eastern &c. R. Co. v. Powell*, (Ky.) 33 S. W. Rep. 629.

Injury to person on hand car by foreman's invitation. *Hoar v. Maine &c. R. Co.*, 70 Me. 65.

Principal is not liable for false imprisonment, when none of its officers, who could bind it, without express authority, were present at the arrest, and there was no express authority. *Nat. Bank &c. v. Baker*, 77 Md. 462.

Doorkeeper of a church employed to exclude persons, not having tickets, caused the arrest of plaintiff who attempted to enter without one. *Barabasz v. Kabat*, 86 Md. 23.

Toll gatherer on a turnpike arrested persons for evading payment of toll. *Baltimore &c. Turnpike Road v. Green*, 86 Md. 161.

Plaintiff, employed to repair defendant's elevator, unnecessarily and without defendant's knowledge went into the shaft and was injured by the car, allowed by the elevator boy to descend contrary to plaintiff's instructions to him. Defendant was not liable. *Hall v. Poole*, 94 Md. 171.

Servant of warehousemen present at the burning of the warehouse in the night time, but not in the course of their employment, neglected to remove plaintiff's goods. *Aldrich v. B. & W. R. Co.*, 100 Mass. 31.

Porter of a parlor car running on defendant's railroad threw a bundle containing his soiled clothing off the car and injured a person not a passenger. *Walton v. N. Y. Cent. &c. Co.*, 139 Mass. 556.

Defendant's driver invited boy nine years old to ride and drive. The driver went to sleep and the boy fell from cart. *Driscoll v. Scanlon*, 165 Mass. 348.

Principal held not liable for negligence of agent resulting in injury to boy allowed to ride on his team in violation of orders. *Mahler v. Stott*, (Mich.) 89 N. W. Rep. 340.

Punishment administered by a servant to children who broke defendant's axe in his absence. *Brown v. Boston Ice Co.*, 178 Mass. 108.

Section men employed by defendants, to warm their coffee, kindled a fire, which subsequently spread to and destroyed plaintiff's property. *Morier v. St. Paul &c. R. Co.*, 31 Minn. 35.

Defendant's engineer took ashes from the furnace in consideration of disposing of them after hours, and a child fell into them and was hurt. *Burke v. Shaw*, 59 Miss. 443.

Boy secretly on car, and when discovered put to a dangerous service by the brakeman. *Sherman v. Hannibal &c. R. Co.*, 70 Mo. 62.

*Snyder v. Han. & St. Joseph &c. R. Co.*, 60 Mo. 413; *Higgins v. Han. & St. Joseph R. Co.*, 36 id. 418.

Violence of the second mate of a boat in compelling a deck hand to work. *Jones v. St. Louis &c. Packet Co.*, 43 Mo. App. 398.

*Whitehead v. St. Louis &c. R. Co.*, 22 Mo. App. 60.

Departure from scope of his employment by servant at request of plaintiff bars latter's recovery against master. *Snider v. Crawford*, 41 Mo. App. 8.

See also *Garretzen v. Duenckel*, 50 Mo. 104.

Plaintiff was invited on defendant's premises by latter's employé while engaged in the performance of his duties, but the invitation was not in pursuance thereof. *Hartman v. Muehlbach*, 64 Mo. App. 565.

A stranger killed by servant employed to guard certain feed, and seize and detain persons found disturbing it. *Davis v. Houghtellin*, 33 Neb. 582.

*Miller v. Burl., &c. R. Co.*, 8 Neb. 219.

Servant carried brands from a fire into ploughing field without authority from the master, and the fire communicated itself to plaintiff's barn. *Wilson v. Peverly*, 2 N. H. 548.

Plaintiff was invited on defendant's premises by latter's employé while running away was shot by latter's servant whose sole duty was to clean lamps, and report the presence of loiterers. *Turley v. Boston &c. R. Co.*, 70 N. H. 348.

A railroad company, held liable to plaintiff for injury received while crossing its tracks from the negligent management of a push car by one to whom it had been loaned for his own purposes by the section foreman. *Erie R. Co. v. Salisbury*, (N. J. L.) 50 Atl. Rep. 117.

Plaintiff engaged to paint elevator shaft from the elevator objected to waiting for elevator boy to go to supper, whereupon latter showed plaintiff how and told him to operate it himself. *Arzt v. Lit*, 198 Pa. St. 519.

An invitation to jump upon a train by one not in charge as temporary brakeman or engineer, does not render the company liable. *Cotter v. Frankfort &c. R. Co.*, 15 Phila. 255.

Manager of a farm arrested plaintiff for taking a wagon from the farm which the latter claimed was his. *Comby v. Wanamaker*, 14 Mont. Co. L. Rep. 30.

Boy on handcar by the invitation of employé, but against the regulations of the company. *Gulf &c. R. Co. v. Dawkins*, 77 Tex. 228.

*Dawkins v. Gulf &c. R. Co.*, 77 Tex. 232.

Foreman, contrary to instructions, ran a handcar on a private errand. *Branch v. International &c. R. Co.*, 92 Tex. 288.

Yardman attempted to stop a runaway horse. *San Antonio &c. R. Co. v. Belt*, (Tex. Civ. App.) 46 S. W. Rep. 374.

*Citing Railway Co. v. Anderson*, 82 Tex. 516.

Defendant's clerk, a restaurant attendant at a railway station, as the result of an altercation with a customer regarding change alleged to be due the customer on a prior occasion, followed him out upon the platform and shot him. Held not to be acting within the scope of his employment. *Lutle v. Crescent News &c. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 240.

Act of conductor in causing arrest of passenger after ejecting him for non-payment of fare held beyond the scope of his employment. And

a clerk in the claim department of defendant, sent to ascertain the cause of the arrest, did not ratify his action by trying to convince the magistrate that it was right. *Lazinsky v. Metropolitan Street R. Co.*, 88 Fed. Rep. 437.

The unauthorized statements by the president of a bank as to the conduct, etc., of its cashier, who wished to procure a bond were not within the scope of his authority so as to bind the bank for such misrepresentations. *U. S. Fidelity &c. Co. v. Muir*, 115 Fed. Rep. 264.

Foreman loaned hand car to boys, one of whom was injured thereby. *Robinson v. McNeil*, 18 Wash. 163.

(d). WILLFUL AND MALICIOUS ACTS OF AGENTS.\*

1. NEW YORK CASES.
2. CASES IN OTHER STATES.
  - (a) Master liable.
  - (b) Master not liable.

A master is liable for the act of his servant done in the course of his employment, or in connection with, or furtherance of, some service committed to him by his master, and in such case it is immaterial whether the act be done willfully or recklessly (*Mott v. Consumers' Ice Co.*, 73 N. Y. 543); illegally (*Hoffman v. N. Y. Cent., etc. R. Co.*, 87 N. Y. 25; *Wright v. Compton*, 54 Ind. 337; *McClung v. Dearborne*, 134 Pa. St. 396), violently and regardlessly of safety (*Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129; *Kline v. C. P. R. Co.*, 37 Cal. 400); brutally and with excessive force; *McCann v. S. A. R. Co.*, 117 N. Y. 505; *Shea v. Sixth Ave. R. Co.*, 62 id. 180; *Levi v. Brooks*, 121 Mass. 501; *Steamboat Co. v. Brockett*, 121 U. S. 637.

But if a servant go beyond his employment, and, without regard to his service, act maliciously, or in order to effect some purpose foreign to his service, commit a trespass or injure another, the master is not liable. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Frazier v. Freeman*, 43 id. 566. The same seems to be the case where the act, in its very nature, enforces the conviction that the servant was assuming to and did the act for himself. *Mali v. Lord*, 39 N. Y. 381; *Foster v. Essex Bank*, 17 Mass. 479; *Henry v. Pittsburgh &c. R. Co.*, 139 Pa. St. 289; *Peryea v. Thompson*, 5 Hum. (Tenn.) 397.

This rule is subject to the qualification that the master is not liable for injury caused by servant, when the person injured has used words or acts calculated to arouse and bring on a personal altercation and collision with the servant. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110. *Scott v. Central Park, North & E. R. R. Co.*, 53 Hun, 414; *New Orleans &c. R. Co. v. Jopes*, 142 U. S. 18.

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\* NOTE.—The cases relating to common carriers of passengers are collected under that head, post page 518.

As to care due trespassers by carriers of passengers see also same head.



1. NEW YORK CASES.

A principal neither authorizing nor ratifying a willful trespass committed by his agent is not liable therefor, nor is a corporation liable, although the act be authorized and sanctioned by the president and general agent thereof. In this case the plaintiff's boat was run into by the willful act of the captain of the defendant's boat. *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; 1 Hill, 480.

The master is not responsible for the willful injury committed by the servant in the transaction of his business unless he so act by the express or implied authority of his employer. The defendant's superintendent and clerks called a policeman into the store and directed the arrest and examination of a woman suspected of stealing goods. This was done without the knowledge or express or implied authority of the master, and he was not liable.

Presumptively a servant is not authorized to do that which the master if present, would not be authorized to do. *Mali v. Lord*, 39 N. Y. 381.

*Griswold v. Haven*, 25 N. Y. 526; *Wright v. Wilcox*, 19 Wend. 343; *Bank v. Baker*, 26 Atl. Rep. (Md.) 867.

The plaintiff's intestate was shot and killed by "M" while in the employment of the defendant, and while the defendant, together with "M" and another servant, were endeavoring under claim of right to enter upon the premises of the intestate, and there was no evidence that the fatal shot was fired by the express direction, or assent, of the defendant.

In an action to recover damages for causing the death it was erroneous to refuse to charge the jury that if they believed that "M" fired the shot with the premeditated design to effect death the defendant was not liable for the act. *Fraser &c. v. Freeman*, 43 N. Y. 566.

See *Davis v. Houghtellin*, 33 Neb. 582.

See, also, *Denver &c. R. Co. v. Harris*, 2 Pac. R. (N. M.) 369.

The provisions of title 13, chap. 20, part 1, of the Revised Statutes (1 R. S. 695), entitled "of the law of the road and the regulation of public stages," are not applicable to street railways, and a street railway company is not liable, under section 6 of said title, for the willful act of one of its employes.

At common law the liability of the owner of a vehicle, used for the transportation of persons for injuries resulting from the acts of his driver extends to those injuries only which result from the driver's misjudgment or negligence, while engaged for the owner in his vocation as a driver. *Wright v. Wilcox*, 19 Wend. 344, 345; *Hibbard v. The N. Y. & E. R. R. Co.*, 15 N. Y. R. 467; *Mali v. Lord*, 39 id. 383; *Fraser v. Freeman*, 43 id. 566; *Isaacs v. Third Avenue R. R. Co.*, 47

N. Y. 122. *Whitaker v. Eighth Avenue R. R. Co.*, 51 N. Y. 295, rev'g 5 Robt. 650, and judg't for pl'ff.

A brakeman, in the course of his duty of keeping the cars free from intruder, kicked a boy, who fell from the car against a pile of wood and was thrown under the car and injured.

The defendant was liable. *Rounds v. D., L. & W. R. Co.*, 64 N. Y. 129; 3 Hun, 329.

*Johnson v. Chicago &c. R. Co.*, 58 Iowa, 348.

The plaintiff attempted to cross the platform of a car standing at the crossing and was thrown off by the driver. The complaint alleged that the driver did it willfully, but the court held, on demurrer, that the driver was acting as a "servant and agent in the employment of the defendant" when the act was done, and the demurrer was overruled on the ground that it may have been a part of the servant's duty to keep the platform clear. *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180.

In an action for injuries, alleged to have been sustained through the wrongful act of defendant's servant, plaintiff's evidence tended to show that a driver of one of defendant's ice carts, while engaged in the performance of his duties, and in the course of his employment, carelessly and *recklessly* drove his cart against plaintiff's carriage, causing the injury complained of. Upon the cross-examination of one of plaintiff's witnesses, whose direct examination tended to show gross carelessness on the part of the driver, the witness, in answer to a question as to whether the driver drove into plaintiff's carriage purposely, answered: "It seems so; it looks like it." The question being substantially repeated, the witness answered: "Well, I could not tell." Plaintiff also offered in evidence a former answer—amended pleadings having been subsequently served—which contained an admission that defendant's servant, then in its employ as driver of an ice cart, "willfully and not negligently nor carelessly, drove said ice cart against the carriage of the plaintiff." Plaintiff was nonsuited. Held, error; that the first answer of plaintiff's witness, above stated, was but the expression of an opinion upon a fact to be determined by the jury, not by the witness; but that as an opinion its effect was destroyed by the last answer; that plaintiff was not estopped from questioning the allegation of the answer, that the act was done "willfully;" also, that the answer did not exclude all presumption of liability, as the act may have been done "willfully," and yet, in the course of the employment, and so have made defendant liable. *Mott v. Consumers' Ice Company*, 73 N. Y. 543. rev'g nonsuit.

From opinion.—"In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer

for them. There are intimations in several cases of authority, that for the willful acts of the servant the master is not responsible. *McManus v. Crickett*, 1 East. 106; *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455; *Wright v. Wilcox*, 19 Wend. 343. But these intimations are subject to the material qualification, that the acts designated 'willful,' are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master. In such case the master would not be excused from liability by reason of the quality of the act. *Limpus v. London Gen'l Omnibus Co.*, 1 H. & C. 526; *Seymour v. Greenwood*, 6 H. & N. 359; affirmed 7 id. 355; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180; *Jackson v. Second Ave. R. Co.*, 47 id. 274. But if a servant goes outside of his employment, and without regard to his service, acting maliciously, or in order to affect some purpose of his own, wantonly commits a trespass, or causes damage to another, the master is not responsible; so that the inquiry is whether the wrongful act is in the course of the employment, or outside of it, and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act. *Croft v. Alison*, 4 B. & Ald. 590; *Wright v. Wilcox*, *supra*; *Vanderbilt v. Richmond Turnpike Co.*, 2 Const. 479; *Mali v. Lord*, 39 N. Y. 381; *Fraser v. Freeman*, 43 id. 566; *Higgins v. Watervliet T. Co.*, 46 id. 23; *Rounds v. D., L. & W. R. R. Co.*, 64 id. 129; *Isaacs v. Third Avenue R. Co.*, 47 id. 122."

The conductor of, or a brakeman upon, a railroad passenger train has authority to remove, in a lawful manner, a trespasser upon the platform of a car; whether the authority is conferred by the rules of the company or not, it is implied and is incident to his position.

The fact that the conductor or brakeman acts illegally in removing such a trespasser does not exonerate the company from liability, if his action be within the scope of his employment. In the absence of a finding or proof that the authority was exercised, as a mere cover for accomplishing an independent and wrongful purpose of his own, the company is liable, although the act was reckless and illegal and a breach of his duty to his master.

Plaintiff, a boy of eight years of age, jumped upon the steps of a car in a passenger train on defendant's road, and sat down upon the platform of the car; he was kicked from the car by a conductor or a brakeman, while the train was running at a speed of about ten miles an hour, and was injured. Recovery sustained. *Hoffman v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 25; aff'g s. c., 14 J. & S. 526.

The plaintiff, while crossing the street, to get out of the way of a truck, crossed the platform of a car. The conductor kicked at him, and caused him to jump in front of another car coming in the opposite direction at unlawful speed, whereby he was injured. The defendant was liable. *McCann Sixth Ave. R. Co.*, 117 N. Y. 505.

Plaintiff, boy of thirteen years, caught on the forward part of caboose; brakeman threw water in his face and the tendency of this

was to make him fall, whereby he was injured. Question as to whether the act was improper and dangerous and done with the intention to remove the plaintiff from the train, and whether it caused the injury, was properly left to the jury. Verdict for plaintiff sustained. *Clark v. N. Y. L. E. & W. R. Co.*, 40 Hun, 605; s. c., aff'd, 113 N. Y. 670.

Boy stealing a ride on a train going ten miles an hour; brakeman ordered boy off and threw pieces of coal at him, one striking him on the head causing him to drop under the car and so receive injury. Defendant liable. Not necessary to show specific order to brakeman to keep boys off trains. *Lang v. N. Y., L. E. & W. R. Co.*, 51 Hun, 603; s. c., aff'd, 123 N. Y. 656.

In an action for the wrongful acts of his employé, the motive of the servant is immaterial.

Where, by the directions of a telegraph and telephone company, certain wires belonging to an electric power company have been cut from fixtures on housetops and removed therefrom without notice to the owner thereof, and without offering the electric power company a reasonable opportunity of collecting together and reclaiming such property and in addition such wires were removed by the employés and servants of the telegraph and telephone corporation, the employer should be held liable therefor. *The Electric Power Co. v. The Metropolitan Telephone and Telegraph Co.*, 75 Hun, 68; s. c., aff'd, 148 N. Y. 746.

Upon the trial of an action brought to recover damages resulting from personal injuries, it was shown that the plaintiff, a boy of eleven years of age, while riding upon a coal train of the defendant, fell off and received the injuries complained of. The plaintiff's testimony was to the effect that one of the brakemen threw coal at him, and as he was about to get off he was hit in the back of the neck by a large lump of coal thrown by the brakeman and knocked from the car. The complaint was dismissed on the ground that the brakeman was not shown to have any express authority from the defendant to remove intruders from the train, and that none could be implied from his position or the nature of his employment.

Held, that under the circumstances, the complaint was improperly dismissed and that the case in all its aspects was one to be determined by the jury. *Lang v. The New York, Lake Erie and Western Railroad Company*, 80 Hun, 275.

A person in the service of a company was engaged in making collections of money due it for property leased by such company, with instructions to retake the property from those who were in arrears, and were supposed to intend not to pay therefor.

Held, that when such person proceeded to take such property he was

acting in the business of his employer, and in the scope of his employment;

That although the action to accomplish such purpose became willful on his part, his employers were not for that reason necessarily relieved from the consequences of his conduct, while so engaged, where it was prejudicial to others, for which such person would himself be personally liable. *O'Connell v. Samuel*, 81 Hun, 357.

It was held error to refuse to charge that "defendants are not liable for the acts of their agent or servant not done within the scope of his authority, or course of his employment," where the jury might have found that a lodging house porter's act of pushing plaintiff downstairs was not done pursuant to defendant's instructions to eject but was wholly a wanton act on his part when angered by plaintiff's conduct. *Montgomery v. Sartirano*, 16 App. Div. 95.

Defendant's trainer having authority to employ jockeys compelled plaintiff, a boy under the statutory age allowed for such employment, to ride a horse of a third person, against his will. The act imposed no liability on the defendant. *Ray v. Keene*, 19 App. Div. 147; s. c., *aff'd*, 160 N. Y. 706.

Defendant's agent went upon demised premises to repair the same and, in doing so, wantonly and willfully destroyed the tenant's property, maliciously delayed the work, instituted summary proceedings, &c. Defendant was liable for the acts as being done in furtherance of his interest though willfully and maliciously executed. *Levy v. Ely*, 48 App. Div. 554.

Defendant's watchman employed to protect his property was instructed to frighten away intruders by shooting the revolver with which he was furnished into the air. He, however, wantonly shot a boy who was not attempting to trespass. Defendant was not liable. *Grimes v. Young*, 51 App. Div. 239.

While it is the duty of a street car conductor to keep the car free of trespassers, and he has the right to put one off, he must do so in a proper manner, having regard to the safety of the person, and he has no right by demonstration and ejaculation, to produce fear, and thus cause such person to attempt to alight, if by so doing he unnecessarily expose him to the hazard of injury. *Ansteth v. The Buffalo Railway Co.*, 9 Misc. 419; s. c., *aff'd*, 149 N. Y. 210.

Citing *Clark v. N. Y., L. E. & W. R. Co.*, 40 Hun, 605; 113 N. Y. 670; *McCann v. Sixth Ave., R. Co.*, 117 N. Y. 505.

A street car driver refused repeated requests of a newsboy to stop the car so that he could alight, and ordered him to jump off, at the same time reaching for his whip. The boy then jumped from the car, fell

and was injured. Contributory negligence was not predicable of the fact that he jumped from a moving car. *Baber v. The Broadway & Seventh Avenue Railroad Co.*, 10 Misc. 109. (New York Common Pleas.)

Driver whipped up his team when he knew plaintiff, an infant, was attempting to mount it on the side. His employer was held not liable for injury to infant. *Wright v. Wilcox*, 19 Wend. 343.

If a boy, running alongside a car, not attempting to get on, should be kicked by a brakeman the railway company would be liable. *Molloy v. New York & C. R. Co.*, 10 Daly, 453.

## 2. CASES IN OTHER STATES.

(a) MASTER LIABLE.—Brakeman having authority to eject trespassers ejected a passenger while train was in motion. *Southern R. Co. v. Wildman*, 119 Ala. 565.

A master is liable for the tortious acts of his servants engaged in his employment, though done willfully, without orders or even against orders. *Duggins v. Watson*, 15 Ark. 118.

Demand by conductor that an infant wrongfully on defendant's train jump from it while in motion. *Kline v. C. P. R. Co.*, 37 Cal. 400.

Agent with authority to purchase ties for railroad company stated that his principal wanted to lend them to another company, and had them loaded on principal's cars; in fact, he bought them for another party. *Southwestern R. Co. v. Knott*, 48 Ga. 516.

Engineer frightened plaintiff's horses by unusual and unnecessary whistling. *Chicago, & C. R. Co. v. Dickson*, 63 Ill. 151.

Brakeman having authority to eject trespassers from freight trains, dragged plaintiff out from brace rods while train was in motion, and threw a stone at him. *Illinois Central R. Co. v. King*, 179 Ill. 91; aff'd s. c., 77 Ill. App. 581.

Telegraph lineman committing trespass in cutting trees that he thought endangered wires. *W. U. Tel. Co. v. Satterfield*, 34 Ill. App. 386.

Plaintiff was driving in middle of road, which was over 60 feet wide when he was run into carelessly and willfully by defendant's servant. *Dinsmore v. Wolber*, 85 Ill. App. 152.

Motorman's conduct after discovering danger of frightening horses, was willful and wanton. *Pioneer Fireproof Constr. Co. v. Sunderland*, 87 Ill. App. 213.

Maliciously blowing off steam so as to injure one on a canal boat close at hand. *Regan v. Reed*, 96 Ill. App. 460.

Master may be liable, although the act of the servant is unlawful.

as where blasting was being done. *Wright v. Compton*, 53 Ind. 337.

Plaintiff was ejected from a train with violence, pushed from the car into a cow pit and injured. Complaint charging trespass need not allege authorization or ratification of the act; it is sufficient if it is within the general scope of agent's employment. *Indiana &c. R. Co. v. Anthony*, 43 Ind. 183.

See also, *Jeffersonville &c. R. Co. v. Rogers*, 38 Ind. 116.

Blowing off steam to frighten children, made the railroad company liable for injuries from a fall due to fright. *Alsever v. Minneapolis &c. R. Co.*, (Iowa) 88 N. W. Rep. 841.

Motorman bumping into carriage in attempting to clear track would render master liable. But otherwise where he does it with the declared intention to give plaintiff "a shot anyhow." See *Baltimore &c. R. Co. v. Pierce*, 89 Md. 495, 504.

See also, *Central R. Co. v. Peacock*, 69 Md. 257; *Baltimore &c. R. Co. v. Barger*, 80 id. 23.

Where servants engaged in removing stones trespassed on plaintiff's land although ordered by defendant not to do so. *Southwick v. Esles*, 7 Cush. 385.

Assault by drayman in the employ of defendant while engaged in removing furniture from plaintiff's house by defendant's direction. *Levi v. Brooks*, 121 Mass. 501.

Assault by restaurant waiters upon plaintiff for remarks he made on their rude treatment of his relative. *Byrant v. Rich*, 106 Mass. 180.

Station agent having authority to keep "bums" away, put benzine on plaintiff's clothes, in part to amuse himself. *Meade v. Chicago &c. R. Co.*, 68 Mo. App. 92.

Whether defendant's servants had used more force than was necessary in ejecting trespasser was properly submitted to the jury. *Rowell v. Boston &c. R. Co.*, 68 N. H. 358.

Person shot by employé in the active carrying out of employer's orders. *Denver &c. R. Co. v. Harris*, 3 Johns. (N. M.) 109.

Brakeman having authority to eject trespassers from freight trains, did so maliciously; put a boy off a tender with violence while it was in motion. *Pierce v. North Carolina R. Co.*, 124 N. C. 83.

A servant adulterated milk to injure his employer and gratify his malice toward him. *Stranahan &c. Co. v. Coit*, 55 Oh. St. 398.

Janitor in cleaning a room, in anger jerked the ladder on which plaintiff was working, from under him. Held, error to direct verdict for defendant. *Nelson Business College Co. v. Lloyd*, 60 Oh. St. 448; aff'g s. c., 13 Oh. C. C. 358.

Upon being sent by their master, servants entered a house, and forcibly took possession of an organ, in violation of express directions. *McClung v. Dearborne*, 134 Pa. St. 396.

Engineer wantonly and maliciously blew whistle frightening plaintiff's mule. *Skipper v. Clifton Man. Co.*, 58 S. C. 143.

Brakeman having authority to eject trespassers from freight trains, cursed and drew a pistol in ejecting plaintiff. *Texas &c. R. Co. v. Lyons*, (Tex. Civ. App.) 50 S. W. Rep. 161.

Brakeman having authority to eject trespassers from freight trains, threatened to kill plaintiff unless he jumped off while train was in motion. *Houston &c. R. Co. v. Grigsby*, 13 Tex. Civ. App. 639.

Assault by defendant's watchman on a person who, contrary to the rules of the steamboat company, was "abaft the shaft." *Steamboat Co. v. Brockett*, 121 U. S. 637.

Plaintiff, who was arrested without cause by defendant's conductor, during his employment as such, may recover for the same. *Gillingham v. Ohio River R. Co.*, 35 W. Va. 538.

A German translation of an English article contained a libel against the plaintiff. The fact that the agent's translation was inaccurate did not relieve the defendant from liability. *Wilson v. Noonan*, 27 Wis. 598.

(b) MASTER NOT LIABLE.—The conductor stopped his train and, pistol in hand, pursued a boy, and compelled him to go with him on the train. *Gilman v. South &c. R. Co.*, 70 Ala. 268.

Injuries occurred to a passenger of a street car from the wanton and malicious conduct of one of its engineers in approaching the street car, for the purpose of frightening the passengers. *Stephenson v. So. Pac. Co.*, 93 Cal. 558.

*Hahn v. So. Pac. &c. Co.*, 51 Cal. 605.

Person pushed off train and injured by one who claimed that he was an employé. In absence of further proof of agency, defendant was not liable. *Lindsay v. Central R. &c. Co.*, 46 Ga. 448.

Tortious arrest and imprisonment by municipal police officers. *Attaway v. Cartersville*, 68 Ga. 740.

*Cook v. Macon*, 54 Ga. 568; *Harris v. Atlanta*, 62 id. 290; *McElroy v. Albany*, 65 id. 387.

It is not the business of the agents of a manufacturing company to prosecute a forgery; and where malicious prosecution is charged against the agents and no apparent authority is shown the company is not liable. *Springfield &c. Co. v. Green*, 25 Ill. App. 106.

*Chicago &c. R. Co. v. Mogk*, 44 Ill. App. 17.



Company's flagman, incensed at words of the plaintiff, threw a stone at him, and injured him. *I. C. R. Co. v. Ross*, 31 Ill. App. 170.

Car driver, to prevent annoyance to himself, struck at boys running along by side of car for fun. *Mogk v. Chicago City R. Co.*, 80 Ill. App. 411.

Person, not a passenger on a train, assaulted by an employe. Complaint held bad on demurrer for failure to aver assailant's duties. *Smith v. Louisville &c. R. Co.*, 124 Ind. 394.

See, however, *Carter v. Louisville &c. R. Co.*, 98 Ind. 552, where servants in charge of a switching engine were held to have implied authority to eject trespassers, and company was liable for injuries caused by their recklessness.

See, also, "Carriers of Passengers," post p. 360.

Willful act of defendant's engineer in running over and killing two of plaintiff's horses. *De Camp v. M. & M. R. Co.*, 12 Iowa, 348.

See, also, *Cook v. Illinois Central R. Co.*, 30 Iowa, 202; *Porter v. Chicago &c. R. Co.*, 41 Iowa, 358.

Servant was directed to turn a horse belonging to another out of master's pasture, and thereafter, while the horse was being driven home by its owner's servant, he frightened it so that it jumped upon a fence and was killed. *Yates v. Squeers*, 19 Iowa, 26.

For assault by defendant's agent upon one demanding freight when it did not appear that such conduct was in the line of agent's duty. *Hudson v. Mo. &c. R. Co.*, 16 Kas. 470.

Claim agent of defendant railroad company procured plaintiff's arrest on charge of burglarizing a post office. Defendant held not liable for malicious prosecution. *Atchison &c. R. Co. v. Brown*, 57 Kan. 758.

See also *Mafit v. Chicago &c. R. Co.*, 57 Kan. 912.

Person, not a passenger, assaulted by car porter; no liability for Palace Car Company. *Williams v. Pullman &c. Co.*, 40 La. Ann. 87.

See *Williams v. Pullman &c. Co.*, 40 La. Ann. 417, where railroad company was held liable. (See "Common Carrier of Passengers, Drawing Room and Sleeping Cars," post, 596.)

Person suspected of breaking open a car on a freight train shot by conductor while standing quietly on a platform. *Candiff v. Louisville &c. R. Co.*, 42 La. Ann. 477.

Foreman, authorized to discharge employes, acted in a way, and used language, which kept them from dealing with plaintiff. *Graham v. St. Charles Street R. Co.*, 47 La. Ann. 1656.

A servant of a livery stable keeper where plaintiff's mare was kept was instructed by plaintiff to take her out and exercise her, such not being a part of contract of livery, which he did, and as consequence of his immoderate driving of her she died. *Adams v. Rouzer*, 62 Md. 264.

Cashier of defendant's bank stole certain special deposits of gold. *Foster v. Essex Bank*, 17 Mass. 479.

Janitor removed elevator boy's stool, on which latter was about to sit, so that he lost his balance and started the car as a passenger was about to alight. *Gibson v. International Trust Co.*, 177 Mass. 100.

Where defendant's driver, in anger resulting from an altercation, runs into and smashes plaintiff's wagon, defendant's liability, is properly submitted to the jury. *Wood v. Detroit &c. R. Co.*, 52 Mich. 402.

Defendant's servant having charge of its coal dock accused plaintiff with dishonesty in using too large sacks of coal, and, upon denial by the latter, assaulted him. *Johanson v. Pioneer Fuel Co.*, 72 Minn. 405.

Plaintiff, a stranger, standing at a railroad crossing, was injured while uncoupling cars by order of defendant's engineer made with threats of bodily violence. *New Orleans &c. R. Co. v. Harrison*, 48 Miss. 112.

Defendant's baggage master, provoked by plaintiff's abusive language, struck him. *Southern Express Co. v. Fitzner*, 59 Miss. 581.

Watchman invited plaintiff to see defendant's ice plant and, while on the premises, for a practical joke, scared him. *Canton Cotton Warehouse Co. v. Pool*, 78 Miss. 147.

Conductor knowingly and willfully detained and transported one unlawfully arrested. *Jackson v. St. Louis &c. R. Co.*, 87 Mo. 422.

Brakeman stepped on plaintiff's fingers as he was getting off moving freight train pursuant to order. *Farber v. Missouri &c. R. Co.*, 32 Mo. App. 378.

Defendant's baggage master, provoked by plaintiff's abusive language, struck him. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110.

A boy on a car was willfully and wantonly struck by the driver and thereby thrown off the car. *Pittsb. &c. R. Co. v. Donahue*, 70 Pa. St. 119.

Unauthorized libel of employé. *Henry v. Pittsb. &c. R. Co.*, 13 Pa. St. 289.

Motorman left his car and committed an assault on one driving a team on the tracks. *Rudgeair v. Reading Traction Co.*, 180 Pa. St. 333.

Boy on a car was wantonly struck by driver. *Pittsburg &c. R. Co. v. Donahue*, 20 P. F. Smith (Pa.) 119.

Injury caused by the shouting of train hands, such outcry not being necessary to the performance of their duties. *Cobb v. R. Co.*, 37 S. C. 194.

An overseer to whom was delegated the duty of whipping a slave killed him, in wantonness, and to gratify his malice. *Purveyor v. Thompson*, 5 Hum. (Tenn.) 397.

*Cantrell v. Colwell*, 3 Head. (Tenn.), 471; *Deihl v. Ottenville*, 14 Lea (Tenn.) 191.

Boy maliciously forced from a freight train, while in motion, where there was nothing to show that such a course on the part of the employé was within the scope of his authority. *Bess v. Chesapeake &c. R. Co.*, 35 W. Va. 492.

One who attempted to rob company's till, and was arrested by order of clerk, such arrest being unauthorized. *Allen v. London &c. R. Co.* L. R., 6 Q. B. 65.

## II. Banks and Other Agents for Collection, &c.

By receiving securities or commercial paper and assuming the collection thereof, or to do any act connected therewith, as presentation for acceptance, payment, protesting, etc., a person, whether acting simply as an agent, or a creditor, receiving the same absolutely or qualifiedly to apply on his debt, undertakes to do all that the law and general usage requires. *Smith v. Miller*, 43 N. Y. 17. When the law or usage do not specifically fix the acts to be done, or the diligence requisite to be observed, the care and skill that should be employed, would be such as a man of ordinary care, diligence, and skill would use under the circumstances.

Where a draft is delivered to an agent to be presented for acceptance, only explicit and unequivocal acceptance is permitted, and the agent is liable for damage if, in the absence of such acceptance, he fail to give notice, as in the case of non-acceptance. *Walker v. Bank of State of New York*, 9 N. Y. 582.

Citing 1 R. S. 768, § 6; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 382.

A bank receiving and upon good consideration assuming the collection of a bill or note, is liable for any default of its agents or correspondents in collecting or paying over the proceeds, or in charging the parties thereto, unless there be an agreement to the contrary.

A bank to which a bill is indorsed and transmitted by the owner for collection, and which has a special interest in the draft and proceeds, can sustain an action against an agent employed by it to collect the same for default in paying over the proceeds or in charging the parties.

It is sufficient that the draft was indorsed to such bank, and it agreed with the owner to collect it, to enable it to sustain the action against an agent, employed by it to collect the same. *The Commercial Bank of Pennsylvania v. The Union Bank of New York*, 11 N. Y. 204.

The defendants residing in Buffalo, being indebted to the plaintiffs doing business in New York, and having funds with J. K. P. & Co., in the latter city, drew their bill on the latter firm to the order of the plaintiffs to be presented for payment, and when paid to be applied in payment of the indebtedness. The plaintiffs, instead of insisting upon the money, received therefor the check of J. K. P. & Co. upon one of the

banks in the same city, and delayed for a day to present the same, and meanwhile J. K. P. & Co. failed and check was not paid, although it would have been paid if presented forthwith. *Smith v. Miller*, 43 N. Y. 171; 52 id. 545, aff'g non-suit.

See *Syracuse &c. R. Co. v. Collins*, 57 N. Y. 641.

**From decision.**—"There was no impropriety in the receipt of the check, and as the drawees were entitled to the draft upon payment of it, there is nothing in the case upon which fault could be imputed to the plaintiffs in the surrender of the draft or receipt of the check. *Russell v. Hawkey*, 6 T. R. 12; *Howard Robinson*, 7 B. & C. 90; *Byles on Bills*, 16; *Story on Bills*, sec. 419; *Chitty on Bills*, 433, 434, ed. of 1833. If the check was worthless when given, or became worthless, before it could have been with reasonable diligence presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiff had omitted to notify them in due time of the non-payment of the bill. There would, in such case, be no loss resulting from negligence.

But a check is payable instantly; and as between the drawer and drawee, the latter has, in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of check to present it for payment, when drawn on a bank in the same place where given and received. *Smith v. James*, 20 W. R. 19; *Harker v. Anderson*, 21 id. 372; *Ward v. Evans*, 2 Ld. Ray. 928. But the duty of the plaintiffs to the defendants is not determined by that rule of commercial law. The rule has respect only to the contract, and liability of the parties to the instrument.

When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond the day within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest, whom he represents. If a custom can be shown to exist in law, and does not exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence. \* \* \*

By receiving the securities, and assuming the collection or as here, receiving the bill, and consenting to present the same for payment, a creditor undertakes to do all that the law requires to be done, to obtain payment, and if he fails in the performance of that duty the debtor is discharged. *Cannady v. Allenby*, 1 B. & C. 373; *Story on Bills*, sec. 109. Laches, which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt, for payment of which a bill or other negotiable instrument is transferred. *Story on Bills*, *supra*, and note; id., sec. 419, and note. This was decided in *Kobbe v. Clark* (Selden's Notes, October, 1853, p. 11). If by the acts or omission of the creditor, thus receiving negotiable instruments for collection, a loss occurs, the loss should fall upon him, who is the cause of the loss, rather than upon the distant and innocent debtor. *Bradford v. Fox*, 38 N. Y. 289."

A notary is the agent of a bank, and the latter is liable for his negligence in protesting paper, which it undertakes to do by receiving it for collection. Banks' liability may be varied by general usage, but not by

practice adopted by the bank for its convenience. Direction to protest means to present and demand payment and if unpaid, to give notice thereof to the parties to be charged. The claim of the bank that it could not find maker was unfounded. *Ayrault v. Pacific Bank*, 47 N. Y. 570.

The plaintiff sent the defendant a check for collection, on the second of the month the defendant sent the check to the bank on which it was drawn; it should have arrived on the third. It was lost and the defendant discovered the loss on the 16th and notified the plaintiff on the 18th. Defendant was negligent in not sooner discovering loss and notifying plaintiff. *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485.

See *Mohawk Bk. v. Broderick*, 13 Wend. 133, 138.

Defendant had in its hands certain U. S. bonds belonging to plaintiff; its cashier, in the spring of 1869, for a sufficient consideration, agreed to exchange the same for registered bonds. This the bank neglected to do, and in November, 1869, the bonds were stolen. The defendant was liable. *Yerkes v. The National Bank of Port Jervis*, 69 N. Y. 383, aff'g judgment for plaintiff.

From opinion.—“If the plaintiff had delivered her bonds to the bank for collection, and the bank had agreed to collect them, no one would deny that the agreement would have been valid. If after such an agreement, the bank had kept the bonds for an unreasonable time, until they were stolen, or had lost them, or rendered them worthless by its culpable negligence, it would have become liable to the plaintiff for their value. *Smedes v. Utica Bank*, 20 J. R. 372; s. c., 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; *Walker v. Bank of State of N. Y.*, 9 N. Y. 582; *Montgomery Co. Bank v. Albany City Bank*, 7 id. 459.”

The plaintiff sent the defendant, its correspondent in New York, a sight draft on C. P. & Co., for collection; the same was presented the same day and check given, which was the next day presented and refused as C. P. & Co. had in the meantime failed. The same day the check was returned and the draft received back and payment therefore demanded, and drawer notified of non-payment.

Held (1), That the defendant was negligent in not presenting the check on the day it was received, for, although C. P. & Co.'s account was overdrawn, the bank paid their checks until time of failure. *Allen v. Suydam*, 17 Wend. 368; *Smith v. Miller*, 43 N. Y. 172, and 52 id. 545; distinguishing *Turner v. Bank, etc.*, 4 Abb. (C. A. D.) 434; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Bank of Washington v. Tripplett*, 1 Peters 25; *West Branch Bank v. Fulmer*, 3 Penn. 402; and (2), that nominal damages could only be awarded as it appeared that the drawer was good and that the draft could be collected of him. 1 *Daniel on Negotiable Inst.* sec. 329; *Borup v. Nininger*, 5 Minn.

523; *Allen v. Suydam*, 17 Wend. 368; reversed for error in charge, 20 id. 321; *Dunlap v. Hamilton*, 1 Bell 320; *Chitty on Bills*, 299, 300; *Van Wart v. Woolley*, 5 Dowl. & Ryl. 374; 3 Barn. & Cress. 439. Presumption that drawer is solvent. *Ingalls v. Lord*, 1 Cow. 240; *Allen v. Suydam*, 17 Wend. 368. Reversal was on question of damages. *First National Bank v. Fourth National Bank*, 77 N. Y. 320, rev'g 16 Hun, 332, and judgment for plaintiff.

"A" sent "B" a note payable at the latter's bank by one of its customers, Sunday, July 4th; on July 3d, "B" marked the note paid and sent its draft for same. On July 6th, "B," learning that the customer had failed, notified "A" that the draft had been sent by mistake, received it, presented and protested note and gave the endorser notice. Held, that an action against "B" for negligence in discharging the endorser by sending draft, &c., was proper, and that unless the draft was sent by mistake, of which there was not sufficient proof, the endorser was discharged and a recovery could be had. *Whitmore v. City Bank of Rochester*, 77 N. Y. 363.

The plaintiff sent a note to the defendant for collection and the defendant sent it to the Lowville Bank, where it was payable, and where the maker kept an account; the bank kept it until the next day and then sent its draft on New York in payment and failed the same day, and the draft was worthless and the plaintiff had immediate notice. The sending of the draft to the Lowville Bank was a proper demand of payment by mail (*Heywood v. Pickering*, 9 L. R. [Q. B.] 428; *Prideaux v. Criddell*, 4 id. 461; *Bailey v. Bodinham*, 16 C. B. [N. S.] 295; *Hare v. Henley*, 10 id. 65), and the draft was not such payment and the plaintiff had suffered no damage, as the maker was still liable and the Lowville Bank was not an agent of the defendant (*The People v. The Merchant's Bank*, 78 N. Y. 269). *Indig v. National City Bank*, 80 N. Y. 100, rev'g 16 Hun, 200, and aff'g non-suit.

**From opinion.**—"Where a note is payable at a bank, an entire failure to present it for payment, does not discharge the maker. *Walcott v. Van Santvoord*, 17 J. R. 248; *Green v. Goings*, 7 Barb. 652; *Caldwell v. Cassidy*, 8 Cow. 271. If the maker has not sufficient funds in the bank, the omission to present it is of no consequence. If he has funds, then he can plead it by way of tender, and is relieved from liability only for interest and costs. And even if the bank fails with the funds in its hands, this is no defense to the note. *Ruggles v. Patten*, 8 Mass. 480; *Fenton v. Goudry*, 13 East. 473; *Turner v. Hayden*, 4 Barn. & Cress. 1. The bank is, in such cases, regarded as simply the agent or depositary of the maker of the note, or acceptor of the bill, and he alone suffers by its failure, and his promise to pay is not discharged. In this respect only, a note or bill payable at bank differs from a check. Therefore, if there had been no presentment whatever, and the bank had failed with sufficient funds of the maker in its hands to pay the note, the maker was still liable."

On the second trial of last case there was evidence that a judgment of the court of Pennsylvania to the effect that the acceptance of the check was a payment of the draft and discharged the drawer, and such evidence was received properly and justified recovery against the defendant for the whole amount of the draft. *First National Bank v. Fourth National Bank*, 89 N. Y. 412, mod'g 24 Hun, 241.

A collecting agent is liable for the negligence of an attorney employed by him. *Weyerhouse v. Dun*, 100 N. Y. 150.

*Bradstreet v. Everson*, 72 Pa. St. 124.

On February 15th, C. & W. sent a sight draft "protest waived" to defendant for collection. The drawee accepted it February 21st, and promised to pay the following week, of which the drawers were notified. March 6th the drawer made an assignment. Defendants not liable to drawers for negligence. *Crouse v. First National Bank*, 137 N. Y. 383, rev'g judg't, for pl'ff.

A salesman for a cheese factory received a check for sales, and did not present it until after the failure of the drawer on September 11th. Individual patron had separate action against a salesman for neglect to present check. *Soule v. Mogg*, 35 Hun, 79.

Holders of bonds directed a bank to transmit the bonds to its correspondent with instruction to collect for them and their account. Upon suit by such holders, against the collecting bank for failure to collect full interest, the latter set up lack of privity of contract. It was held that the collecting bank was the holders' agent and not that of the transmitting bank, and was liable to them for such failure. *Kelley v. Phenix National Bank*, 17 App. Div. 496.

A correspondent of a bank to whom a draft had been transmitted for collection surrendered it and took another's draft, presumptively in payment, instead of either getting cash or protesting the draft and returning it to its owner. The draft in receipt not being paid, the bank was held liable for the correspondent's neglect, especially as the former notified the owner that his draft had been paid and the owner acted in reliance thereon. *Kirkhan v. Bank of America*, 26 App. Div. 110; s. c., aff'd, 165 N. Y. 132.

A bank negligently failed to collect a check, returned it to its holder protested, who thereupon without knowledge of the facts took it up. The bank in defense to a suit for recovery thereof set up that the check was deposited for cash. It was held, however, that whether it was deposited for cash or for collection, the bank was liable for its failure to present in time. *Martin v. Home Bank*, 30 App. Div. 498; s. c., aff'd, 160 N. Y. 190.

A bank receiving a note for collection failed to have it properly protested. The owner was permitted to recover the principal, interest and protest fee, but not the expense of a suit to test the liability of the indorser who had been released by the failure to protest. *Hitchcock v. Bank of Suspension Bridge*, 57 App. Div. 458.

Bank receiving from its cashier stock as security for loan to him is not chargeable with his knowledge that he was himself a pledgee and without authority to repledge it. *Brady v. Mount Morris Bank*, 65 App. Div. 212.

A bank, presented with a check for collection, forwarded it in the usual course of business, received the proceeds and notified the depositor that it was all right. Upon subsequent discovery that it had been raised, the bank was allowed to recover the amount checked against it. *Oppenheim v. West Side Bank*, 22 Misc. 722.

A rule, that it acted only as agent for a depositor for collection did not make a bank discounting a draft a mere collector as against an attaching creditor. *American Trust &c. Co. v. Austin*, 25 Misc. 454.

In absence of proof of actual damage only nominal damages are allowed. *Lienan v. Dinsmore*, 3 Daly, 365.

An agent is not liable for an omission to notify the endorser of a note deposited with him for collection, unless he is instructed to do so, or unless he omits to inform his principal of the default. *Bank &c. v. Huggins*, 3 Ala. 206.

One attorney receiving from another a note for collection is liable for remitting proceeds to payee instead of to the other attorney. *Lewis v. Peck*, 10 Ala. 142.

Payee of a note, collected without authority, accepted, with knowledge, part of proceeds and a note in settlement. Collection was ratified. *Hughes v. Neal Loan &c. Co.*, 97 Ga. 383.

Drafts deposited in a bank for collection were sent on to another bank for collection. Drafts which turned out to be worthless were received in return and credited to the depositor before learning of the collecting bank's insolvency. The collecting bank was depositor's agent and the latter had to bear the loss. *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259; aff'g s. c., 58 Ill. App. 61.

A bank, receiving a bill of lading with a time draft attached for collection, in the absence of special instructions, is justified in surrendering the former upon acceptance of the latter. The presumption is that it is a sale upon credit and that the bill of lading is security for the acceptance. *Commercial Bank v. Chicago &c. R. Co.*, 160 Ill. 401.

Defendant received checks for collection for plaintiff's accommodation and forwarded them in its usual course to its nearest correspondent, the drawee's bank, the only one in the place, which was known to plaintiff.



It was held that the collecting bank became the agent of the plaintiff and not of the defendant. *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

Bank forwarded a check received for collection to a bank which was the clearing house for the locality of the drawee. Held, not negligent. *Carlinville Nat. Bank v. Wilson*, 78 Ill. App. 339.

An attorney who received notes for collection was held liable for their conversion by a fellow attorney whom he entrusted with their collection. *Pollard v. Rowland*, 2 Blackf. (Ind.) 22.

An express company receiving a bill of exchange for collection, was held liable for the negligence of a notary, to whom the bill was sent for protest, in protesting it before maturity and discharging indorsers. *American Express Co. v. Haire*, 21 Ind. 4.

A bank, receiving from an indorsee a sight draft for collection, was held liable for failure to present it within a day after its receipt to a drawee living in the same town. Drawee's insolvency was no excuse; nor was the fact that the indorsee had recourse in any event against the drawer, who became insolvent during the delay. *Citizen's Nat. Bank v. Third Nat. Bank*, 19 Ind. App. 69.

Bank was to receive a consideration for collection, but owner knew it had to be transmitted to another bank. Former bank was not liable for latter's default. *Irwin v. Reeves Pulley Co.*, 20 Ind. App. 101; rehearing denied in 48 N. E. Rep. 601.

A bank holding inland draft for collection only, put it in its notary's hands for collection. He was not held its agent as such notary, though he was also assistant cashier. Having exercised due diligence in the selection of a notary, the bank was not liable for his failure to give notice of dishonor. *First Nat. Bank v. German Bank*, 107 Ia. 543.

A bank receiving a check for collection, sent it directly to the drawee bank, when there was another in the same place. The check was held for a day, returned unpaid and the drawee bank suspended. In a suit by holder against maker on the check, plaintiff was compelled to bear the loss. *Anderson v. Rodgers*, 53 Kan. 542; s. c., 27 L. R. A. 248.

Bank received note with instructions to collect and credit. It allowed an officer of the bank at which it was payable to do the collecting. The first bank was liable for his default. *First Nat. Bank v. Craig*, 3 Kan. App. 166.

Bank was authorized by its customers to employ another bank to do the collecting. Latter bank was customer's sub-agent. *Beach v. Moser*, 4 Kan. App. 66.

After presentment and notice of protest and nonpayment, a bank cancelled a check received for collection, taking another payable to order of its cashier, on which payment was refused. Bank was not liable, as no

A bank receiving a note for collection failed to have it properly protested. The owner was permitted to recover the principal, interest and protest fee, but not the expense of a suit to test the liability of the indorser who had been released by the failure to protest. *Hitchcock v. Bank of Suspension Bridge*, 57 App. Div. 458.

Bank receiving from its cashier stock as security for loan to him is not chargeable with his knowledge that he was himself a pledgee and without authority to repledge it. *Brady v. Mount Morris Bank*, 65 App. Div. 212.

A bank, presented with a check for collection, forwarded it in the usual course of business, received the proceeds and notified the depositor that it was all right. Upon subsequent discovery that it had been raised, the bank was allowed to recover the amount checked against it. *Oppenheim v. West Side Bank*, 22 Misc. 722.

A rule, that it acted only as agent for a depositor for collection did not make a bank discounting a draft a mere collector as against an attaching creditor. *American Trust &c. Co. v. Austin*, 25 Misc. 454.

In absence of proof of actual damage only nominal damages are allowed. *Lienan v. Dinsmore*, 3 Daly, 365.

An agent is not liable for an omission to notify the endorser of a note deposited with him for collection, unless he is instructed to do so, or unless he omits to inform his principal of the default. *Bank &c. v. Huggins*, 3 Ala. 206.

One attorney receiving from another a note for collection is liable for remitting proceeds to payee instead of to the other attorney. *Lewis v. Peck*, 10 Ala. 142.

Payee of a note, collected without authority, accepted, with knowledge, part of proceeds and a note in settlement. Collection was ratified. *Hughes v. Neal Loan &c. Co.*, 97 Ga. 383.

Drafts deposited in a bank for collection were sent on to another bank for collection. Drafts which turned out to be worthless were received in return and credited to the depositor before learning of the collecting bank's insolvency. The collecting bank was depositor's agent and the latter had to bear the loss. *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259; aff'g s. c., 58 Ill. App. 61.

A bank, receiving a bill of lading with a time draft attached for collection, in the absence of special instructions, is justified in surrendering the former upon acceptance of the latter. The presumption is that it is a sale upon credit and that the bill of lading is security for the acceptance. *Commercial Bank v. Chicago &c. R. Co.*, 160 Ill. 401.

Defendant received checks for collection for plaintiff's accommodation and forwarded them in its usual course to its nearest correspondent, the drawee's bank, the only one in the place, which was known to plaintiff.

It was held that the collecting bank became the agent of the plaintiff and not of the defendant. *Anderson v. Alton Nat. Bank*, 59 Ill. App. 587.

Bank forwarded a check received for collection to a bank which was the clearing house for the locality of the drawee. Held, not negligent. *Carlinville Nat. Bank v. Wilson*, 78 Ill. App. 339.

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After presentment and notice of protest and nonpayment, a bank cancelled a check received for collection, taking another payable to order of its cashier, on which payment was refused. Bank was not liable, as no

damage resulted from its act and there was evidence from which authority might be inferred. *Citizen's Bank v. Houston*, 98 Ky. 139.

A bank, receiving draft from indorsee, a depositor, with instructions to "collect and credit," was negligent in crediting it to the indorser, another depositor. *Long v. Bank of Commerce*, (Ky.) 38 S. W. Rep. 886.

An express company receiving a draft for collection and neglecting to present it, although having the opportunity to do so, until after drawers' insolvency, are liable for drawers' loss on the draft. *Whitney v. Merchant &c. Ex. Co.*, 104 Mass. 152.

Instructions to a bank to deliver sealed papers pinned to a draft but only upon its payment are not disobeyed by allowing drawee to take them into his hands for examination, which results in his refusal to pay the draft. *People's Nat. Bank v. Freeman's Nat. Bank*, 169 Mass. 129.

A bank cashed and credited forged checks payable "to the order of cash" drawn on plaintiff, which were paid through the clearing house. It made no inquiry as to genuineness of signatures and did not require an indorsement thereof. Held, that it was a *bona fide* purchaser and not liable to plaintiff. *Dedham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 392.

A bank received a certificate of deposit for collection with instructions to forward it to its correspondent at B, who, its customers knew, was the drawer of the certificate and who was regarded as safe. Was not liable for loss. *First Nat. Bank v. Citizen's Savings Bank*, 123 Mich. 336.

Bank sent draft received for collection direct to the drawee's bank. Was liable, though there was no other bank of standing in the community, though it gave notice of nonliability for negligence of its agents, and though such action was customary among banks. *Minneapolis Sash &c. Co. v. Metropolitan Bank*, 76 Minn. 136; rev'g s. c., 15 Bkg. L. J. 468.

A bank holding a draft for collection surrendered it to drawee in exchange for latter's check, on another bank, which was worthless. Erroneous belief that drawee of check was solvent did not relieve collecting bank of liability. *National Bank of Commerce v. American Exchange Bank*, 151 Mo. 320.

Bank sent check for collection, directly to drawee's bank. Was liable, though there was no other bank in the place; and though, had it been sent to third person, the result might have been the same. *American Nat. Bank v. Metropolitan Nat. Bank*. 71 Mo. App. 451.

Suspecting its correspondent's insolvency at S, drawee bank's residence, a bank sent a check received for collection to M, twelve miles

from S. Drawee failed on Saturday, the day the check was received at M. The check was not presented till following Monday. Remitting bank was liable. *Herider v. Phoenix Loan Ass'n*, 82 Mo. App. 427.

Purchase of a certificate of stock is within the scope of the authority of a bank cashier so to charge it with his knowledge of the condition of the stock. *Farmer's &c. Bank v. Loyd*, 89 Mo. App. 262.

Married woman sold her property and directed defendant's cashier to deliver deed upon receipt of the price, which she directed to be placed to her account. Bank was held liable for placing the proceeds to her husband's credit. *Rhinehart v. People's Bank*, 89 Mo. App. 511.

A bank having check for collection sent it to the drawee's bank when there was another bank in good standing in same town. Held, negligence. *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105.

Defendant bank received from plaintiff a draft to "collect and remit," but failed to promptly enforce collection, and returned the draft after having taken a conveyance of all of drawee's property with an agreement to pay debts, not including drawer's. Defendant had failed to perform its duties in good faith and was held liable to plaintiff. *Dern v. Kellogg*, 54 Neb. 560.

A bank, receiving a note for collection, sent it to its correspondent with instructions to credit it, on payment. The latter failed, with its account to the former overdrawn. Former was liable to owner of note. *First Nat. Bank of Omaha v. First Nat. Bank*, 55 Neb. 303.

Once charged with notice through an officer, a corporation continues to be affected thereby, though the officer leave. *U. S. Nat. Bank v. Forstedt*, (Neb.) 90 N. W. Rep. 919.

A draft, indorsed for collection, was collected and credited to forwarding bank before its failure. Maker recovered of the collecting bank. The restrictive indorsement was notice of maker's title. *Boykin v. Bank of Fayetteville*, 118 N. C. 566.

See, also, *Nat. Citizens' Bank v. Citizens' Nat. Bank*, 119 N. C. 307; *People's Bank v. Citizens' Bank*, 119 N. C. 310.

A bank holding notes for collection took drafts instead of cash in payment. Owner was entitled to the draft or cash at his option. Indorsement for collection is notice that no title passed and that possession is for that purpose only. It seems that the relation of principal and agent changes to debtor and creditor after collection or where the bank was to credit the owner upon collection. *National Bank of Commerce v. Johnson*, 6 N. D. 180.

Correspondent bank, receiving notes for collection, knowing of debtor's financial difficulty, did not appraise remitting bank until after its own claims were secured and the notes had matured. Was liable for its

failure to collect. *Commercial Bank v. Red River Valley Nat. Bank*, 8 N. D. 382.

Indorsement for collection does not guarantee the genuineness of drawer's signature nor justify drawee in relaxing any diligence in that respect. Drawee cannot recover amount of forged check presented by indorser "for collection." *First Nat. Bank of Belmont v. First Nat. Bank*, 58 Oh. St. 207.

Custom of sending indorsed check direct to drawee for collection held not unreasonable. *Kershaw v. Ladd*, 34 Or. 375.

A collecting agency, receiving and remitting a claim to its own attorney, who collects the money and fails to pay it over, is liable for his neglect. *Bradstreet v. Everson*, 72 Pa. St. 124.

*Riddle v. Hoffman's Ex'r*, 3 Pa. Rep. 224; *Cox v. Livingston*, 2 W. & S. (Pa.) 103; *Krause v. Dorrance*, 10 Barr. (Pa.) 462; *Rhines v. Evans*, 16 P. F. Smith, 192.

A drawee bank paid the amount of a draft indorsed to another bank "for collection" to the clearing house which applied it to a debt due from the indorsee bank to the clearing house committee. It was not a payment to the owner of the draft and no defense to an action against the drawee bank. *Crane v. Fourth Street Nat. Bank*, 173 Pa. St. 568.

A bank in collecting a check received, instead of money, a check, which became worthless. Was liable for the loss. *Farmer's &c. Nat. Bank v. Cuyler*, 9 Pa. Dist. 539.

Note payable on Sunday was received for collection with instruction to protest in case of non-payment which was done on the Thursday following. Though too late to hold indorser, the bank had used due diligence in view of the statute law in the state, relating to holidays and days of grace. *Morris v. Union Nat. Bank*, 13 S. D. 329.

Custom of bank, receiving draft for collection, to take acceptor's check on another bank to which it presents it the next forenoon, was held reasonable. *Savings Bank v. Nat. Bank*, 98 Tenn. 337.

Bank, receiving checks on a bank in another town for collection after business hours, sent them the next day in its usual course to its correspondent in a more distant town. Was held not negligent. *Givan v. Bank of Alexandria*, (Tenn.) 52 S. W. Rep. 923.

A bank with a draft for collection sent it directly to drawee. Though negligent, it was held not liable, because the result would have been the same if the draft had been sent to a third party. *First Nat. Bank v. City Nat. Bank*, 12 Tex. Civ. App. 318.

Bank was not liable for holding draft received for collection without protest, where that had become the custom of the parties. *First Nat. Bank v. St. Charles Sav. Banks*, (Tex. Civ. App.) 37 S. W. Rep. 768.

A correspondent of a bank receiving a note for collection becomes, in the absence of express authority, the agent of the latter and not of the owner of the note. *State Nat. Bank v. Thomas Man. Co.*, 17 Tex. Civ. App. 214.

**From opinion.**—"The main question in this case is whether a bank receiving paper for collection is responsible for all subsequent agents employed in the collection of the paper." \* \* \* \* "In a majority of the states, including Massachusetts as leader, the liability is denied, the sub-agents being treated as sub-agents of the owner of the paper, and not the agents exclusively of the bank first receiving it for collection. Mechem on Agency, sec. 514, where the states are given and the authorities cited. But in New York and several other states the opposite rule has long prevailed, the bank receiving the paper for collection, nothing further appearing, being treated as an independent contractor, and the subsequent agents as its own and not the sub-agents of the owner. In the Supreme Court of the United States, too, the decisions appeared for a long time to be in conflict; but in the case of *Exchange National Bank v. Third National Bank*, 112 U. S. 276, the question came squarely before that learned court, and, in an able opinion by Justice Blatchford, reviewing previous decisions, the New York rule, which was also the English rule, was finally adopted. The decision of the case at bar was made in conformity to the rule so adopted and we approve it."

See, also, *Schumacher v. Trent*, 18 Tex. Civ. App. 17.

A bank, though doing business in a temporary structure, owing to a fire, undertook collection of plaintiff's notes. Was liable for failure to give notice of dishonor. *Merchant State Bank v. State Bank*, 94 Wis. 444.

### III. Executors, Testamentary Trustees.

An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge. He is only liable for his own acts and not for the negligence or waste of his co-executor or co-trustee (*Ormiston v. Olcott*, 84 N. Y. 339), unless he shall have intentionally or otherwise contributed to it, or unless it appears that he had knowledge of, or assented to, the acts done, or had notice which should excite his suspicion and put him upon inquiry. *Wilmerding v. McKesson*, 103 N. Y. 329; *McKim v. Aulbach*, 130 Mass. 481.

And only in such case where he had the means of preventing or guarding against such waste; but he is bound to exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his associates. *Earle v. Earle*, 93 N. Y. 104.

Where an executor enables by his act funds to go into the hands of his co-executor, but for which he would not have received them, and the latter wastes them, the former is liable; but this does not arise when such executor is merely passive and fails to obstruct the collection or receipts of such funds by his co-executor. *Croft v. Williams*, 88 N. Y. 384; *Darnaby v. Watts*, 13 Ky. L. R. 467.

And so, when he allows his co-executor or a third person to entirely manage the estate, he is liable for their conduct. *Earle v. Earle*, 93 N. Y. 104.

An executor or trustee is liable for loss occurring through violation of a statutory duty, as in the case of an unauthorized investment. *King v. Talbot*, 40 N. Y. 76.

Generally he must use the prudence and diligence that a man of discretion and intelligence would employ in his own affairs. *McCabe v. Fowler*, 84 N. Y. 314.

This would require active diligence in the collection of a debt to the estate. *Harrington v. Keteltas*, 92 N. Y. 40.\*

#### (a). INVESTMENT.

Where the interest upon certain legacies were, by the terms of the will to be applied by the executors, so far as required, to the maintenance and education of the legatees during their minority, and the principal, with any accumulations thereon, to be paid to them severally on their coming of age, and the executors, upon whom the trust was imposed, invested the funds in railway and bank stocks, the legatees, upon coming of age, were not bound to accept such investments, but had the right to call upon the executors to pay over the whole amount of their legacies and interest thereon.

The law, in this state, imposes upon trustees, holding trust funds for investment for the benefit of minor children, to be supported from the income accruing therefrom, the duty of placing them in a state of security, of seeing that they are productive of interest, and of so keeping them, that they may always be subject to future recall, for the benefit of the *cestui que trust*.

The investment of such funds by a trustee in canal, bank, insurance, railroad or other stocks of private corporations, is a violation of his duty and the obligation of his trust.

As to moneys held upon trusts of this kind, it is not according to the nature of the trust, nor within any just idea of prudence, to place the principal of the fund in a condition in which it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked and in which, by the *very terms of the investment*, the principal is not to be returned at all. *King v. Talbot*, 40 N. Y. 76.

The executor in care of the securities, entrusted to him, must use the care, prudence and diligence that a man of discretion or intelligence would, in general, employ in his affairs, and when he left securities with same person, as the testator had done, the executor was not negligent. *McCabe v. Fowler*, 84 N. Y. 314.

**Distinguishing** *Walton v. Walton*, 1 Keyes, 18; 2 Abb. Pr. (N. S.) 423.

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\* NOTE.—As to trustees other than testamentary trustees see post p 67.



Trustee who invests funds beyond his jurisdiction does so at the peril of being held responsible for the security of the investment. *Ormiston v. Olcott*, 84 N. Y. 339.

See, also, *Matter of Denton v. Sanford*, 103 N. Y. 607.

Where executors are by will only made liable for willful default, misconduct or neglect, proof of negligence is not sufficient. Courts will in such case regard with leniency whatever is done in good faith. The complaint charged *negligence* in investing funds. An unpaid tax in real estate is not a violation of prohibition against investing on unincumbered real estate. (*Chesterman v. Eyland*, 81 N. Y. 398; s. c., 74 id. 452.) *Crabb v. Young*, 92 N. Y. 56.

See *Paulding v. Sharkey*, 88 N. Y. 432; *Glacius v. Fogel*, 88 id. 434.

An executor was held liable for the loss of interest in funds invested to accommodate his relatives, in contravention of the classes specified by statute. *Matter of Vandevort*, 8 App. Div. 341.

Executors, vested with discretionary powers, found at the time of their appointment the estate property depreciated in value, and, in the honest and reasonable exercise of their discretion, they held it for a rise. They were not chargeable with a further loss in value or with the expense attending its holdings in the meanwhile. *Matter of Hosford*, 27 App. Div. 427.

See, also, *Matter of Weston*, 91 N. Y. 502.

A life tenant consented to the unauthorized investment by the testamentary trustee. It did not affect the latter's liability to the remainderman therefor. *Matter of Talmage*, 32 App. Div. 10; s. c., aff'd, 160 N. Y. 704.

Executors with a discretionary power as to investment were not required to change the investment to trust securities, and were not liable for losses through investment, where their discretion was not abused but honestly and reasonably exercised. *Lawton v. Lawton*, 35 App. Div. 389.

See, also, *matter of Hall*, 48 App. Div. 488; *Duncklee v. Butler*, 30 Misc. 58.

Executors having mortgages in Minnesota taken by their testator, on which there had been a default in interest, foreclosed them for interest only, instead of for principal and interest, relying on the advice of the testator's confidential agents there and that of their own local counsel. Having acted in good faith, they were not liable for losses resulting from a panic which occurred shortly after. *Matter of Ball*, 55 App. Div. 284.

Executors, finding no opportunity to invest in mortgage securities, entered into an agreement with a bank to purchase bonds for \$121,500, paying \$21,500 thereon and giving note with the bonds as security with an additional agreement for repurchase on the part of the bank. The

interest on the bonds offsetting the interest on the notes. The beneficiaries were not entitled to object to such a transaction where it resulted in shielding the estate from loss. It was also held that they were not chargeable with interest on an amount they kept on open account, not larger than necessary for the purposes of actual administration expenses. *Matter of Johnson*, 57 App. Div. 494; s. c., modified on another point, 170 N. Y. 139.

Executors, directed to convert land and invest the proceeds, were not warranted, after 16 years of increasing value, to hold it still longer for a further increase. *Matter of Fargo's Estate*, 20 Misc. 137.

A temporary administrator failed to deposit funds. Was charged with the interest they would have earned with a trust company. *Matter of Philp*, 29 Misc. 263.

So where conservator of lunatic failed to invest trust funds. *Re Thomas's Estate*, 26 Col. 110.

Trustee, who invested in stocks and bonds of a private corporation and in his own name to avoid the delay of an application to sell them, was chargeable with interest on the funds less dividends received with interest on such investments. Acquiescence by *cestui que trust* did not relieve him of his duty. *White v. Sherman*, 168 Ill. 589; aff'd s. c., 62 Ill. App. 271.

Administrator was not careless in following out testator's desire to continue an investment in bank stock where he failed to withdraw it merely because the bank surrendered its charter as a national bank and became a private one. *Penn v. Folger*, 77 Ill. App. 365.

Executor under a will which provided that the money should be held by him, without giving directions for investment, used it for seventeen years pending time for distribution instead of investing it. Was chargeable with interest. *Re Estate of Young*, 97 Iowa, 218.

Direction to invest and pay interest. Executor not liable for the legal rate, but only such interest as he received. *Fitzgerald v. Paisley*, 110 Iowa, 98.

Executor who held funds subject to payment to legatees and who did not and could not use or make a profit out of them, was not chargeable with interest. *Briggs v. Walker*, 102 Ky. 359.

The investment of trust funds in second mortgages or in notes or shares of a business corporation with no surplus or working capital but working wholly on credit, is not in the exercise of sound discretion. *Mattocks v. Moulton*, 84 Maine. 545.

A testamentary trustee of a fund bequeathed was also the executor of the estate. As executor he sold part of the estate for an exorbitant price taking back purchase money mortgages in which the trust fund was in

vested. The property, not bringing the face of the mortgages, he was liable as trustee for the difference, by reason of his negligence in investing in inadequate security. *Gilbert v. Kolb*, 85 Md. 627.

Trustees were not charged with indiscretion, where, with the proceeds of United States bonds, they purchased bonds of a small road guaranteed by two larger roads which it connected, where such investment was regarded as desirable by intelligent investors and eventually produced a larger income than the original. Nor were they so charged for retaining an investment their testatrix had made, merely because it declined in market value and their judgment as to its ultimate value was at error. *Green v. Crapo*, (Mass.) 62 N. E. Rep. 956.

Honesty is no excuse for irregularity in investments. *St. Paul Trust Co. v. Strong*, 85 Minn. 1.

Funds were invested in a mode not authorized and were depleted. Executors were held liable. *Nyce's Estate*, 5 Watts & S. (Pa.) 254.

See, also, *Leslie's Appeal*, 63 Pa. St. 355; *Estate of Merkle*, 131 id. 584.

Loan was made by authority of the court and with consent of beneficiaries, on their property, which was their home. Testamentary trustee was not chargeable with the depreciation of the property, especially as its sacrifice would deprive them of a home. *Re Old's Estate*, 176 Pa. St. 158; aff'd s. c., 13 Lanc. L. Rev. 98.

Will provided that the testamentary trustee might retain testator's investments if he deemed best. Was not liable for loss resulting from the honest exercise of his discretion in retaining them. *Re Bartol's Estate*, 182 Pa. St. 407.

See, also, *Parker v. Glover*, 42 N. J. Eq. 559; *Pope v. Matthews*, 18 S. C. 444.

Trustee, in pursuance of a family arrangement, invested in land of the beneficiaries' father as a subsequent incumbrance and allowed it to remain for nineteen years. He was not liable for depreciation below first mortgage, especially as it did not appear that the loan could ever have been collected. *Re Lightner's Estate*, 187 Pa. St. 237.

Part of a legacy given to a daughter-in-law in trust for her children was spent for purchase of property on which the family lived and the balance was loaned to the trustee's husband. The executrix and trustee exchanged receipts for nineteen years, no money passing. It was held that the executrix could not be charged with interest on such loan. *Re Watson's Estate*, 189 Pa. St. 150.

Trustee purchasing mortgages made personal examination of the property, which was highly recommended. Others testified that, at the time of the purchase, the property was amply secure. He was not liable for its subsequent depreciation through unknown causes; especially where he sold on demand of *cestui que trust* soon after buy-

ing it in on foreclosure. Nor was he chargeable because the property was out of the state, though in a suburb of his own city. *In re Gouldsey's Estate*, 201 Pa. St. 491.

Trustee invested in third and fourth mortgages. Was chargeable with principal and interest due and unpaid. *Makin's Estate*, 7 Pa. Dist. 126.

Trustee invested funds out of state to secure higher interest. Was chargeable for loss in principal and current domestic rate of interest on legal investments. *Robert's Estate*, 8 Pa. Dist. 303.

Trustee loaned on bond secured by mortgage on land poorly situated and marshy and which mortgage was more than its purchase price, and on note secured by pledge of oil stored out of state. Was chargeable with losses. *Simes's Estate*, 9 Pa. Dist. 31.

Trustee is liable for loss, where he either uses the fund itself, or allows his sureties to have control of it; or loans it upon notes or other personal security. *Wolgammuth's Estate*, 16 Lanc. L. Rev. 229.

Testamentary trustee in contravention of his authority, reconverted funds back into real estate. He was liable for a breach of duty though it might be regarded judicious as a private venture. *Re Horne's Estate*, 28 Pittsb. L. J. (N. S.) 443.

If there is any delay in settling the estate it is the duty of the administrator to invest the fund or seek the advice of the court. *In re McGonnigle's Estate*, 31 Pittsb. L. J. (N. S.) 27.

Citing Bruner's Appeal, 57 Pa. St. 46.

Trustee took a confession of judgment as security instead of a bond and mortgage as directed by the court and prevented the issuance of an execution, whereby lien was cut down to ten years. Was not liable for loss by limitation as his successor could have extended the lien indefinitely. *Rush v. Steele*, 93 Va. 526.

#### (b). COLLECTION.

Where administrators sold the leasehold estate of the intestate and took a promissory note of the purchaser on credit, without security, and purchaser became insolvent before completing payment. *King v. King*, 3 Johns. Ch. 552.

*Ackerman v. Emott*, 4 Barb. 626.

An executor having notice that there is a debt due the estate, is bound to active diligence for its collection; he may not wait for a request of the distributees.

In case the debt is lost through his negligence he becomes liable as for *devastavit*. Williams on Ex'rs. vol. 2, p. 1636 (5th Am. ed.); Shultz v. Pulver, 3 Paige. 184; 11 Wend. 366.

It seems, that if the case is one of such doubt, that an indemnity is proper, he must at least ask for it; and at any rate he takes the risk of showing that the debt was not lost through his negligence.

The statute of limitations does not begin to run in favor of an executor, as against a claim for damages occasioned by his negligence in collecting a debt due the estate from the time of the probate of the will, but at best only from the time of the loss. *Harrington v. Keteltas*, 92 N. Y. 40.

Coon, in 1855, recovered judgment which became a lien on Conover's farm, worth about \$4,000, subject to prior liens for more than this sum. Coon died in 1860; plaintiff, administratrix, put matter in the hands of an attorney, who issued execution and collected small amounts. Liens of prior judgment expired and left Coon's judgment first lien. On accounting, the administratrix was personally held liable for negligence in not collecting judgment. *Hollister v. Burritt*, 14 Hun, 291.

Citing: *Ruggles v. Sherman*, 14 John. 446; *McRae v. McRae*, 3 Bradf. 199; *Shultz v. Pulver*, 3 Paige, 182; 11 Wend. 361; *Redfield's Law & Practice*, 250; *Williams on Ex'rs*, 15, 43. *McLellan's Probate Practice*, 213.

A trustee failed to collect a debt admitted to be due by one apparently solvent, and was so indifferent to his trust that he delivered over the management thereof to others. His executor was required to respond for the amount lost through his negligence. *Davis v. Kerr*, 3 App. Div. 322.

A testamentary trustee failed to collect rents for four years, where the tenants could have been evicted and the premises rented to those who could pay. He was held chargeable therewith; but he was not chargeable with rents uncollected for three months in a vicinity where it was exceedingly difficult to rent and where there was some hope of payment; the latter being a reasonable exercise of his discretionary power. *Matter of McIntyre*, 24 App. Div. 167.

Executors did not attempt to collect a note which it appeared they might have collected. They were required to show that efforts to collect would have been useless and the fact of having relied upon an attorney's advice did not aid them. But it was otherwise where they had exercised some diligence in collecting a portion of other notes and it appeared that the rest probably could not have been collected. *Matter of Hosford*, 27 App. Div. 427.

Executors were held accountable for rent actually received but which they could not have compelled those occupying the premises to have paid. *Brinckerhoff v. Farias*, 52 App. Div. 256; s. c. aff'd, 170 N. Y. 427.

Testator gave property *causa mortis*. Though in advanced age and suffering from disease, there were reasonable grounds for supposing she

had testamentary capacity. Executor was not liable for failure to recover it. *Matter of Hall's Estate*, 16 Misc. 174.

Executor was allowed in full, payment to general creditors by offsetting claims due, pursuant to an agreement with deceased; but only pro rata for other settlements. *Matter of Van Houten*, 18 Misc. 524.

Executrix made no attempt to collect a note of a solvent debtor which she was aware of and which was the estate's main asset. Was chargeable therewith. *Matter of Wilbur*, 27 Misc. 126.

Executor not chargeable with amount of note due the estate from his attorney of which he had no notice, actual or constructive, except so far as in legal theory he is chargeable with his attorney's knowledge. *Matter of Guldenkirch*, 35 Misc. 123.

Neglect to enforce a security given upon a note rendered executor liable. *Willis v. Willis*, 16 Ala. 652.

An administratrix was allowed interest on a mortgage, where the mortgaged lands could not be sold without sacrifice. Was not chargeable with rents which could not be collected. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710.

Reliance on attorney's advice did not excuse breach of duty. *Pryor v. Davis*, 109 Ala. 117.

Executor failed to collect claim while debtors were solvent. An order authorizing a compromise did not excuse him as his neglect caused the necessity therefor. *Fraley v. Thomas*, 98 Ga. 375.

Administrator sold property for more than its value. Was liable for the balance of the purchase price lost through negligence though he had collected its actual value. *English v. Horn*, 102 Ga. 972.

An administrator must not attempt to collect bad debts; but this does not relieve him of the duty to pursue apparently good one though he may know of a possible defense. He should leave that to the debtor. *Egan v. Clark*, 87 Ill. App. 246.

Settlement by administrator of a claim for the death of his intestate without an order of court upheld. *Brink's Exp. Co. v. O'Donnell*, 88 Ill. App. 459.

See, also, *Cogswell v. Railroad Co.*, 68 N. H. 192; *Parker v. Steamboat Co.*, 17 R. I. 376.

Administrator was not chargeable with failure to collect funds in another state, not being under a legal duty to do so. *Purdy v. Purdy* (Ky.) 42 S. W. Rep. 89.

Executor failing to sell notes or enforce a judgment not liable in absence of proof of actual damage to the estate. *Lippert v. Lippert*, 110 Iowa. 550.

Trustee permitted his attorney to collect nine or ten different sums

at intervals in four years without attempting to recover the same from him. Held, that, as such action might be susceptible of explanation, it was error to sustain a demurrer to trustee's answer. *McRoberts v. Carneal*, (Ky) 46 S. W. Rep. 442; s. c. modified, 51 id. 800.

Executors negligently failed to collect a debt owing to decedent by distributee. Was held liable therefor. *Hoffman v. Armstrong*, 90 Md. 123.

Where executors, who are presumed to have the information at hand, report that certain debts are doubtful or desperate, the court cannot hold that they were collectible in the absence of positive evidence of the fact. *Wrightson v. Tydings*, 94 Md. 358.

Where the administrator took confederate money in good faith, in payment of sales of real estate, did not use it for his own purposes and could not pay it out, he was not chargeable. *Moffatt v. Loughridge*, 51 Miss. 211.

See, however, *Webster v. Whitworth*, 49 Ala. 201.

Executrix failing to collect a claim on advice of counsel whose opinion at the time seemed well founded, was held not liable. *Scudder v. Ames*, 142 Mo. 187.

Administrator was not charged with a debt due from him where he was insolvent throughout the administration. *McCoy v. Allen*, 9 Oh. C. C. 607.

Where an executor shows that he received all that a note and mortgage sold by him was worth, he cannot be charged with its face value. *Warren v. Hendricks*, (Or.) 66 Pac. Rep. 607.

Executor is liable, if testator's estate becomes subject to payment of debt for which testator was surety, when diligence would have collected it of the principal debtor. *Chamber's Appeal*, 11 Pa. St. 436.

When debt of co-executor was not secured as directed by testator's will and he died leaving the same unpaid, executor was held responsible. *Meegand's Appeal*, 28 Pa. St. 471.

Executor is answerable when debts are not collected promptly. *Charlton's Appeal*, 34 Pa. St. 473.

*Shaffer's Estate*, 46 Pa. St. 131; *Powell v. Hurt*, 31 Mo. App. 632; *Scarborough v. Watkins*, 9 B. Mon. (Ky.) 540.

An executrix received goods from a debtor to the estate, in payment of an individual debt; was chargeable therewith as her first duty was to the estate. *Re Evans' Estate*, 1 Pa. Super Ct. 37.

Trustee causing delay and expense by willfully settling bad claims and resisting good ones was chargeable with the costs of an accounting. *Moore's Estate*, 15 Lanc. L. Rev. 28.

Trustee never received anything from his predecessor and it was use-

less to attempt to collect anything. He was not liable to account, especially after sixteen years. *In re Wade's Estate*, 18 Lanc. L. Rev. 91.

An executor who paid special legacies out of funds charged with the payment of debts, was chargeable therewith at demand of creditors and with interest from the time the estate should have been closed. *Davis v. Jackson*, (Tenn.) 39 S. W. Rep. 1067.

Executor was not charged with interest on amount collected as executor within the statutory period of settlement, but was charged therewith, on amounts collected individually but never accounted for. *Hill v. Fly*, (Tenn.) 52 S. W. Rep. 731.

It was shown that an attorney of the intestate received a larger sum than the administrator accounted for; but it was not shown that the latter received more than that. Administrator was not chargeable. *Hanlon v. Wheeler*, (Tex. Civ. App.) 45 S. W. Rep. 821.

Administrator entrusted a note to attorney for collection; note ran out and administrator could have made the money out of the attorney but waited until after he was insolvent. He was held liable for the debt. *Mills v. Talleys*, 83 Va. 361.

*Davis v. Chapman*, 83 Va. 67.

Failure of an administrator to seek redress from persons wrongfully withholding property of the estate notwithstanding a bond of indemnity given him by them, renders him liable. *Holmes v. Bridgman*, 37 Vt. 28.

*McCloskey v. Gleason*, 56 Vt. 264.

Executor failed to collect a note and rent which were collectible. He was chargeable therefor. But he was not chargeable with assets he failed to receive and it is not shown he was negligent in respect to. Was allowed expenses of contesting suits where he acted in good faith and by advice of counsel. *Re Hall's Estate*, 70 Vt. 458.

Administrator upon request to sue a controverted doubtful claim, demanded indemnity for costs. Was not chargeable where his demand was not complied with. *Harris v. Orr*, 46 W. Va. 261.

Executor failed to include his own note, due to the estate, in his accounting. Was held chargeable therewith. *Robinson v. Hodgkin*, 99 Wis. 327.

### (c). DISTRIBUTION.

An executor overpaid testator's widow, but as the latter had supported minors who were otherwise unprovided for, at her own expense, which in justice should have been charged against the latter's shares, the matter was adjusted upon an accounting by presuming that such over-payment was properly advanced out of the estate to the widow in payment for such support. *Matter of Braunsdorf*, 2 App. Div. 73.



Executor, who paid claim barred by statute of limitations, and paid discount on loans to pay debts, which was made necessary by payment of legacies, was allowed for neither, and was held personally liable to creditors for the devastavit caused thereby. *Matter of Oosterhoudt*, 15 Misc. 566.

Administrator was allowed for mourning attire for widow and minor daughter as part of funeral expenses. *Matter of Wachter*, 16 Misc. 137.

Beneficiary of a trust paid it to executor under a mistake of law. Latter was not liable after having distributed it to the legatees under the will. *Haynes v. McKee*, 19 Misc. 511.

A creditor was paid more than his share of the available assets. Administrator was liable for the amount above the amount he should have paid with trust company interest added. *Matter of Philp*, 29 Misc. 263.

Executors were not responsible for the honest and reasonable exercise of their discretion in the selection of securities sold to pay debts. *Matter of Fidelity Loan & Co.*, 23 Misc. 211.

The court refused to review the acts of a testamentary trustee who had discretionary powers as to apportionment of the income, in the absence of the abuse thereof. *Clark v. Clark*, 23 Misc. 272.

Administrator of an insolvent estate paid execution in full which was in the sheriff's hands and was a lien upon the property before the intestate's death, though estate was afterwards declared insolvent. Was allowed therefor. *Hullett v. Hood*, 109 Ala. 345.

Lands were ordered sold, part for cash and part on time. Accounts were filed a few months after receipt of the deferred payments. Was not such a delay in accounting as to charge administrator with interest. *Siniard v. Green*, 123 Ala. 527.

Evidence considered insufficient to sustain a charge of negligence in an administrator for not bringing to trial a suit on which final settlement of the estate had depended from the time of the first account, a period of over seven years. *Estate of Marre*, 127 Cal. 128.

An ancillary administrator held funds for less than a year, making no profit on them except that incidental to depositing them subject to check in the bank of which he was president. He was not chargeable with interest especially where he was not requested to distribute. *Dorris v. Miller*, 105 Iowa, 564.

Administrator was not liable for payment of claim out of the prescribed statutory order where there was enough to pay all in full and no one is injured thereby. *Masterson v. Cauble*, 15 Ind. App. 515.

Payment in good faith and on sufficient consideration of small sums though without proper demand was not negligence for which an administrator was chargeable. *Beale v. Barnett*, (Ky.) 64 S. W. Rep. 838.

Executor, who made payments without order of court to legatees, under a will subsequently set aside, was not allowed therefor. *Succession of Heffner*, 49 La. Ann. 407.

Executor is answerable for corrupt negligence in failing to oppose illegal claims against the estate. *Parson's v. Mills*, 2 Mass. 80.

And for negligence in failing to pay funeral expenses of intestate. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526.

Executors, who, within the year made a distribution without taking the required refunding bond, were held liable, notwithstanding confirmation of their accounts, on a judgment obtained ten years thereafter. *Robin's Estate*, 180 Pa. St. 630.

Release by a legatee of a third prevented charges against the executor as to that third being made for the benefit of the other two-thirds. *Hertzel's Estate*, 192 Pa. St. 531.

An executor who had improvidently paid a creditor was allowed *pro rata* out of a dividend. *Taylor's Estate*, 4 Pa. Dist. 691; s. c., 17 Pa. Co. Ct. 166.

Administrator sold property to pay debts subject only to the principal of a mortgage thereon, as the rate of interest was in dispute. He was allowed for the payment of accrued interest when the dispute was settled. *Darrah's Estate*, 6 Pa. Dist. 178.

Executor was allowed for preferred debts paid before notice of adverse claim. *Re Corcoran's Estate*, 27 Pittsb. L. J. (N. S.) 112.

One hundred dollars was a reasonable allowance for a tombstone where the personal property did not exceed \$2,000. Executors, who delivered property to the life tenant without security, were liable to remaindermen for life tenant's waste. *Re Griffiths Estate*, 1 Lack L. News, 311.

Administrator appointed in different states, was not liable to answer to a creditor in one state for a devastavit committed in another state. *Bank of Wayne v. Fulton*, (Tenn.) 49 S. W. Rep. 297.

Executor paid specific legacies without taking a refunding bond, while there were outstanding debts. Were chargeable though he had no notice of them. *McGlaughlin v. McGlaughlin*, 43 W. Va. 226.

#### (d). DISBURSEMENTS.

A guardian is not entitled to compensation for his services to the estate as an attorney, even though done at the request of his co-executor and the legatees and next of kin. *Collier v. Munn*, 41 N. Y. 143.

See, also, *Morgan v. Hannas*, 49 N. Y. 667; *Binsse v. Paige*, 1 Keyes, 87.

The trial court found that an executor employed his partner as an individual to defend claims against the estate. It was held that while the partnership could make no charge for such service, the partner,

if employed as an individual, might do so. *Parker v. Day*, 155 N. Y. 383; rev'g s. c., 12 Misc. 510.

An administrator took a second appeal after the first had reasonably settled the merits of the claim against him. It was held to be an imprudent administration of the estate as it was not reasonably certain that he would thereby relieve the estate of a claim greater than the cost of appeal, and he was refused allowance for attorney's fees. *Gross v. Moore*, 14 App. Div. 353.

Administrator was allowed to charge the estate with costs received by his attorney for collecting a claim, and credit himself therewith, but was not allowed for uncollectible claim paid by him, nor for attorney's services in investigating a relationship irrelevant to the suit. *Matter of Van Buren*, 19 Misc. 373.

Administrator was allowed for reasonable counsel fees on his settlement in court. Was not allowed counsel fees in improperly contested suits. *Prior v. Davis*, 109 Ala. 117.

An executor appearing and successfully contesting a will for the estate, and those interested under it, was allowed fees as an attorney. *Alexander v. Bates*, 127 Ala. 328.

Where attorney's services were rendered in an effort to improperly charge the estate in executor's favor their fees were not allowed. *Noble v. Jackson*, (Ala.) 31 South Rep. 450.

Administrator was charged with interest, where administration was unreasonably protracted for more than twenty-five years. *Jacoway v. Hall*, 67 Ark. 340.

Administrator of an insolvent estate was allowed for the cost of preserving a vineyard, though the estate was mortgaged. *Estate of Smith*, 118 Cal. 462.

Administrator was allowed for the care of stock till it could be advantageously sold. *Estate of Fernandez*, 119 Cal. 579.

For delay in settlement of estate administrator was not held for damages beyond interest on the balance in his hands. *Estate of Armstrong*, 125 Cal. 603.

Administratrix of an estate consisting of an insurance policy, contested by the company, employed counsel without order of the court on a contingent basis, where the fee was higher than it would have been in an unconditional employment. The fee was reasonable, and she was allowed therefor. *Filbeck v. Davies*, 8 Col. App. 320.

Executor believing himself entitled thereto retained fees for his services as attorney. Was chargeable with interest. *Davidson v. Story*, 106 Ga. 799.

Special administrator to defend a claim was not allowed costs and

counsel fees on appeal, where it appeared that he had not acted in good faith or with prudence. *Switzer v. Kee*, 69 Ill. App. 499.

Trustee was not entitled to credit for expenses concerning litigation not necessary for the protection of the principal fund, and was charged with the amount of its depletion. *Nevitt v. Woodburn*, 82 Ill. App. 649.

Where the estate had no interest in the litigation administrator was not allowed expenses therein. *Cullen v. State*, (Ind. App.) 62 N. E. Rep. 759.

See, also, *Harris v. Coates*, (Id.) 69 Pac. Rep. 475.

An attorney employed by an administrator refused to pay over money collected, claiming it for his services. Administrator, having exercised due care in selection of the attorney, was not chargeable. *In re Beam*, 8 Kan. App. 835.

Testamentary trustee, in anticipation of actual income, paid for the support and maintenance of the *cestui que trust* and was allowed reimbursement therefor, but was not allowed attorney's fees for an unsuccessful defense to an action by a creditor until after the debt was paid. *Young v. Bullen*, (Ky.) 43 S. W. Rep. 687.

Where an action should not have been brought in a fiduciary capacity, it was error to allow administrator a counsel fee. *Thompson v. Thompson*, (Ky.) 65 S. W. Rep. 457.

Fees for services of attorneys in suit to contest will were allowed, though will was set aside because made in violation of a prohibitory law. *Fenner v. Succession of McCan*, 49 La. Ann. 600.

Tutor of minor paid expenses in excess of revenue. The payments were not recommended at a family meeting and were repudiated by the minor at majority. The tutor was not allowed for them. *Re Watson*, 51 La. Ann. 1641.

Executor was not allowed counsel fees for contesting the will as it was not a part of his duty to contest it. *Re Johnson's Estate*, 4 Oh. N. P. 156.

Allowance of \$550 in an estate of over \$23,000 for four years' counsel services embracing among other things an abstract of title, two suits and the accounting; was not excessive. *Re Wolfe*, 4 Oh. N. P. 336.

Executrix purchased tombstone without consulting parties interested. Was allowed therefor. *Titlow's Estate*, 5 Pa. Dist. 40.

Executors made payments under mistake of law; were chargeable therewith. *Monroe's Estate*, 9 Kulp, 334.

#### (e). CARE OF ESTATE.

Negligence for administrator of an estate, twelve miles from a bank

to keep money of estate in living rooms back of store, for twelve months. *Cornwell v. Deck*, 8 Hun, 122.

See, also, *Chambersburg Savings Bank v. McLellan*, 76 Pa. St. 203; *Furman v. Coe*, 1 Caines Cases in Error, 96.

The defendant, an administrator, negotiated the sale of the intestate's farm. A deed signed by the heirs was given and the administrator received price and placed it in a bank, which, two months thereafter, failed. The defendant was not acting as administrator and should have paid the money over directly (*Mills v. Mills*, 115 N. Y. 80), and he was not protected by the rule governing trustees and public officers depositing trust funds, without negligence, in a bank of good standing, in which case liability does not attach. (*People v. Faulkner*, 107 N. Y. 477.) *Harlow v. Mills*, 58 Hun, 391; s. c. aff'd, 128 N. Y. 650.

Receipts for payments executed by legatees, though not under seal, reciting that, in consideration thereof, the executors were discharged from liability for claims against the estate, were deemed releases and bound those executing them, especially after the lapse of fifteen years. *Matter of Hodgman*, 11 App. Div. 344; s. c. aff'd, 161 N. Y. 627.

Executors having no power of sale as to lands, their account thereto was as agents of its owners and not executors of the estate. *Matter of Hodgman*, *supra*.

Testamentary trustee, directed to invest, deposited the funds in a trust company, and used a large amount for his private purposes. He was charged with legal interest on all; but was allowed advances for support of *cestui que trust*, made in anticipation of income that was not forthcoming, by reason of the lack of investments. *Matter of Muller*, 31 App. Div. 80.

Trustee compromised a suit for the recovery of a piece of property, which was claimed by another and his title to which he was advised by his counsel was doubtful, and which was of no practical utility, as it had been set aside for a street and would have to be kept open for light and air. His rents from certain properties were small; but the premises were out of condition, in poor locality and it was not probable that any diligence would have increased them. Was not negligent. Nor was he liable for a failure to rent certain premises to other tenants at an advanced price, where he could not do so without purchasing improvements made by the present tenants, when there was no funds of the estate available and the law did not permit him to mortgage; but he was chargeable with a failure to enforce a tenant's covenant to pay taxes. *Gomez v. Gomez*, 33 App. Div. 379.

Testamentary trustee, who was expressly relieved from liability for loss except through gross negligence, granted an extension of a mortgage

without requiring a responsible party to assume the payment of the bonds. He also allowed the party in possession of the mortgaged premises to take the insurance money received, after the premises had been burned, upon the latter's verbal promise to repair. The former was held to be merely an error of judgment, but the latter, gross negligence. *Matter of Olmstead*, 52 App. Div. 515; s. o. aff'd, 164 N. Y. 571.

Executor continued testator's business by his direction. He was liable individually for his servant's negligence. *McCue v. Finck*, 20 Misc. 506.

Administrator deposited estate funds in a bank of which he was cashier, knowing of its coming insolvency. Was chargeable with the loss upon its failure. *Matter of Scudder*, 21 Misc. 179.

Administrators paid estate funds, distributable to next of kin, to the surrogate before judicial settlement of their accounts. There was no warrant or power therefor under the Code of Civil Procedure, section 2537, and the administrators were liable for a loss thereof. *Matter of Te Culver*, 22 Misc. 217.

Sale of stock was deferred on account of the inability to settle the estate. Administrator was not chargeable with its decrease in value. *Matter of Thorp*, 31 Misc. 581.

Administrator allowed funds to remain in a bank, of which he was a stockholder, director and the cashier, on two per cent interest for two years instead of distributing them. No objection having been made till final accounting, and no demand for legacies having been made, he was charged only with the interest the funds had actually earned. *Matter of Sudds*, 32 Misc. 182.

Administratrix was charged with the value and interests of a saloon together with profits, minus the expense of conducting it, where she allowed it to pass under the control of her husband who operated it for her. *Matter of Suess*, 37 Misc. 459.

Executor is liable when through failure to pay the taxes, real property belonging to the estate is lost. *In re Hertemen*, 73 Cal. 545.

Trustee mingled trust funds with his own, using them as his own, without investing them for the estate. Was chargeable with compound interest. *Bemmerly v. Woodward*, 124 Cal. 568.

An administrator was not held liable for the failure of his counsel to take advantage of a technical defect of mortgagee's complaint on foreclosure, nor for paying off a lien on property in the prudent exercise of his duties, though, on a subsequent sale, it brought less than the amount of the lien. *Re Armstrong Estate*, 125 Cal. 603.

Administrator was charged with interest on an investment directed by the court, in absence of proof that interest could not be collected.

Was charged with interest on a portion thereof retained, in absence of proof that it was for the use of estate. *McIntire v. McIntire*, 14 App. D. C. 337.

Negligence, by reason of which money of the estate was stolen from the administrator's person. *Tarver v. Torrance*, 81 Ga. 261.

Administrator who continued decedent's business beyond the time permitted by Ga. Code, sec. 2545, acted at his peril and was chargeable. *King v. Johnson*, 96 Ga. 497.

Heirs set apart a fund for the payment of an annuity provided for by the will. The trustees were not chargeable with failure to properly invest, where the will did not direct them as trustees to do so. *Leslie v. Moser*, 163 Ill. 502; rev'g s. c., 62 Ill. App. 555.

An administrator without authority to invest money, but bound to have it ready for payment upon the demand of the one entitled to it, was not chargeable with interest if he had received none. *Haines v. Hay*, 67 Ill. App. 445; s. c., rev'd on other grounds, 169 Ill. 93.

Executors, in charge of funds, held by their testator in trust to be turned over on the perfecting of a title, refused to turn them over on the perfecting of the title by limitation, but insisted on the execution of deeds or the institution of proceedings to complete the title. They were chargeable with simple but not compound interest. *Mathewson v. Davis*, 191 Ill. 391; rev'g s. c., 91 Ill. App. 153.

An executor *de son tort* is chargeable with the diligence of an ordinarily prudent man. *Rohn v. Rohn*, 98 Ill. App. 509.

Administrator may deposit funds in a bank for a reasonable time while awaiting order of distribution. But, where he receives from the bank a certificate of deposit, payable at a specified time after date with interest, it is a loan and he is liable for a devastavit. *Caruthers v. Caruthers*, 99 Ill. App. 402.

Executor failed to withdraw his entire deposit from his bank based on the apparently well founded assumption that such action would precipitate an immediate suspension. Was exonerated from liability. *Cook v. Barnes*, (Ky.) 43 S. W. Rep. 682.

Insurance company gave "a vacancy permit" for 30 days agreeing to extend it for another 30 days upon application. Executor was negligent in not making the application, and liable for the destruction of the property. *Henderson Trust Co. v. Stuart*, (Ky.) 55 S. W. Rep. 1082.

Trustee is not chargeable with interest where the money was paid out as fast as it was collected. *Doom v. Howard*, (Ky.) 64 S. W. Rep. 469.

Stocks were properly sold by executors at private sale in small lots, as large sales at public auction would tend to depreciate the market value. *Succession of Kaiser*, 48 La. Ann. 973.

It was negligence in defendant, as an administrator, to deposit funds of the estate in a bank, which defendant's president knew was insolvent and of whose financial condition its other officers having the matter in charge had enough information to put them upon inquiry. *Germania Safety Vault &c. Co. v. Driskell*, (Ky.) 66 S. W. Rep. 610.

Administrator was charged with interest at bank rates, where the estate funds were in deposit in his own firm subject to check. *In re Brewster's Estate*, 113 Mich. 561.

Executor was not liable for selling assets at an unpropitious time to obtain necessary funds, nor for bartering assets in payment of debts where he had the approval of the court. *Owen v. Potter*, 115 Mich. 556.

Trustee held money without using it pending judicial determination of the title to it. Was not chargeable with interest thereon. Also discharged mortgage for less than its face value. Was not liable where he realized the full value of the mortgaged property. *Calkins v. Bump*, 120 Mich. 335.

In charging an executor of several estates with interest for using estate funds for itself, the amount was arrived at by deducting the proportion of cash on hand belonging to the several estates from the cash balance due them. *St. Paul Trust Co. v. Kittson*, 62 Minn. 408.

Executor failed to withdraw trust funds from his bank after its resumption of payment, upon the failure of an association in which it was largely interested, but where it was agreed that the bank's creditors should not withdraw. He was not negligent. *Harding v. Canfield*, 73 Minn. 244.

Administrator was not charged for the difference between par value and market value of bonds where it was not shown that sale was for less than the latter. *Ladd v. Stephens*, 147 Mo. 319.

Executor deposited estate funds to his own credit, though he appraised the bank of his relationship. Was liable, upon the bank's becoming insolvent. *Re Estate of Horner*, 66 Mo. App. 531.

Executor failed to keep accounts. On the question of the propriety of a claim, the doubt was resolved against him. *Hetfield v. Debaud*, 54 N. J. Eq. 371.

An executrix failing to keep account of amount realized from sale of property, was charged with inventoried value. *Hunt v. Smith*, 58 N. J. Eq. 25.

Due diligence in selection of an attorney was held to excuse an administrator for the attorney's mistakes. *Sharpe's Case*, 61 N. J. Eq. 601.

Trustees may be sued as individuals for negligence in the management of the estate. *O'Malley v. Gerth*, (N. J. L.) 52 Atl. Rep. 563.

Administrators were not chargeable with property, which came into



their hands, and which was of little or no value, and on which they were unable to realize a profit. *Janes v. Brunswick*, 8 N. M. 105.

Administrator's failure to plead the statute of limitation was in bad faith. Held, liable, though by statute it was left to his discretion. *Perrison v. Montgomery*, 120 N. C. 111.

Trustees, acting within the scope of their authority and exercising such diligence as men of ordinary prudence manifest in like affairs of their own, were not liable for loss of the trust estate. *Miller v. Proctor*, 20 Oh. St. 442.

Administrator transferred funds from a bank giving interest, to his own, where none was given. Was chargeable with loss of interest. *Dick's Estate*, 183 Pa. St. 647.

Executor appropriated a lease of liquor saloon, the good will of the business and the right to transfer of the license without attempting to find a purchaser. Was chargeable with amount it was proved they could have been sold for. *Buck's Estate*, 185 Pa. St. 57.

Executor was not charged with the difference between the inventoried value and the price received on a sale, forced to secure funds. *Semple's Estate*, 189 Pa. St. 385.

Executrix was chargeable with interest, where she mingled estate funds with her own and had the use thereof. *Meyer's Estate*, 13 Pa. Super. Ct. 476.

Executor converted interest-bearing securities, convertible at any time, for the purpose of putting the proceeds in his own bank. Was chargeable with interest thereon. *Dolan's Estate*, 15 Pa. Super. Ct. 20.

Where testator released his sons from liability for loss arising from deciding what was for the best interest of the estate, the court could not scrutinize transactions as long as there was no fraud. *Markle's Estate*, 5 Pa. Dist. 47; s. c., 17 Pa. Co. Ct. 337.

An executor may, in the exercise of his discretion, sell at private sale below inventoried value to prevent greater loss by delay attendant on a public one. Though he did not, immediately upon his appointment sell at public sale, for good reasons. *Orne's Estate*, 7 Pa. Dist. 337.

Executors were not charged for failure to apply rents to pay principal and interest, where they were insufficient to pay the principal and it did not appear that the mortgagee would have accepted less than both principal and interest. *Hall's Estate*, 8 Pa. Dist. 8.

Executor, in honest exercise of his discretion, held investments coming into his hands in hope of a rise. Was not chargeable with loss. *Donnelly's Estate*, 8 Pa. Dist. 182. Executor, under advice of counsel, continued the business with an irresponsible partner. Was chargeable with value shown by the appraisal of testator's interest. *Re Kalb-ell's Estate*, 27 Pitts. L. J. (N. S.) 280.

Depository bank showed no signs of insolvency, though there were rumors to that effect. Executor was not liable for failure to withdraw funds. *Re Seaman's Estate*, 2 Lack. L. News 271.

Administratrix purchased all assets and assumed all debts of deceased partners for the purpose of protecting the estate. Was not liable, having acted with the best judgment at the time. *Atherton's Estate*, 8 Kulp 150.

Order of court gave discretion in sale of cotton. Not liable for depreciation from holding it too long, in the absence of bad faith. *Nicholson v. Whitlock*, 57 S. C. 36.

Stock being low it seemed the best interest of the estate to hold it for a rise. Administrator not liable though it subsequently became worthless, especially as such action was taken at the request of the beneficiaries. Administrator was not responsible for advice of counsel in regard to defending a suit. *Pearson v. Gillenwaters*, 99 Tenn. 446; s. c. *aff'd*, id. 462.

Executor made deposit in a bank, solvent at the time, but which subsequently, without warning, became insolvent. Was not liable. *Ra Kohler's Estate*, 15 Wash. 613.

#### (f). LIABILITY FOR NEGLIGENCE OF CO-EXECUTOR.

If one executor allows his co-executor to receive and waste the estate he is liable; but it is not negligence to entrust co-executor with securities to sell on his promise to pay proceeds into general funds. *Adair v. Brimmer*, 74 N. Y. 541.

See *Sherman v. Page*, 85 N. Y. 128; *Burt v. Burt*, 41 N. Y. 46; *Remington v. Walker*, 99 N. Y. 626.

Where the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond, secured by mortgage on real estate in Ohio, which was guaranteed by the widow, who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, held, that it was the right and duty of the survivor to accept the securities, and that he could not be made personally liable for so doing.

The rule applicable to executors, as such, is that each is liable only for his own acts, and one cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein. *Sutherland v. Brush*, 7 Johns. Ch. 22; *Monell v. Monell*, 5 id. 283;

*Manahan v. Gibbons*, 19 Johns. 427. *Ormiston v. Olcott*, 84 N. Y. 339, rev'g 22 Hun, 270, and aff'g decree of surrogate.

From opinion.—“Nor is the rule more stringent, where executors are also trustees, as claimed in *Bates v. Underhill*, 3 Redf. 365. The decision in that case is rested wholly on the English rule, which is not so rigorously enforced in this country. *Hill on Trustees*, 309, note 1; *Story's Eq. Jur.* § 1280. The authorities in this state do not justify the distinction sought to be made. *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Kip v. Deniston*, 4 Johns. 23; *Kirby v. Turner*, Hopk. Ch. 330; *DeForest v. Fulton F. Ins. Co.*, 1 Hall 130. There would be neither wisdom nor justice in a rule which would practically end in making a trustee a grantor of the diligence and good faith of his associates, and hold him responsible for acts which he did not commit and could not prevent.”

Where an executor receives funds of the estate and delivers them to a co-executor, or does any act by which the funds come to the hands of the latter, and but for which he would not have received them, and he diverts or wastes them, said executor is liable for the loss. *Langford v. Gascoyne*, 11 Ves. 335; *Ames v. Armstrong*, 106 Mass. 18; *Candler v. Tillett*, 22 Beav. 257; *Clark v. Clark*, 8 Paige, 152; *Monell v. Monell*, 5 Johns. Ch. 296; *Williams on Ex'rs*, 1927.

But where an executor is merely passive, not obstructing the collection or receipts of assets by his associate, he is not liable for the latter's waste, unless he assented to it, or having knowledge of a misapplication intended, or in progress, and having the means to prevent it by proper care, neglected to do so. *Sutherland v. Brush*, 7 Johns. Ch. 17; *Adair v. Brimmer*, 74 N. Y. 566; *Williams v. Nixon*, 2 Beav. 472.

Where an executor loaned to his co-executor money, taking his individual note therefor, upon the faith of representations of the co-executor, that he desired to use the money to pay debts of the estate, and where it appeared that it was not so used, held, that the money loaned was not a proper charge against the estate.

So also, where an executor received funds of the estate, which he delivered to his co-executor, who misappropriated them, held, that said executor was liable therefor.

Where, however, two executors, under a power of sale in the will, entered into joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated; held, that in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the co-executor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable. *Williams on Ex'rs*, 1937, note *u*; *Perry on Trusts*, secs. 420, 423. That, at least is the law in this state. *Kip v. Deniston*, 4 Johns. 25; *Monell v. Monell*, 5 Johns. Ch. 296.

Also held, that he was not made liable by acts of negligence on his part, which in no way were connected with or contributed to the loss. *Croft v. Williams*, 88 N. Y. 384, modifying 23 Hun, 102.

Where executors or trustees permit a third party to manage and control the estate, they adopt him as their agent, are responsible for his conduct, and liable for losses occasioned by his improper or negligent management.

*It seems*, that while an executor or trustee is not liable for acts of a co-executor or co-trustee, which he has not the means of preventing or guarding against, or from which he has no reason to apprehend danger to the estate, he is bound to exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his associate; and if he delivers over to him the whole management of the estate, he is responsible for losses which might have been prevented by reasonable diligence upon his part.

The widow of the testator, who was the co-trustee, and held liable jointly with W., was by the will entitled to the income of one-third of the estate during life. The principal had never been in the hands of W. It was treated, however, as a fund in his hands, and he was directed to pay into the U. S. Trust Co. the portion thereof to which the legatees who recovered were entitled to have paid to them on the death of the widow, the interest meanwhile to be paid to her. Held, error; that, as the fund was lost by negligence with which the widow was equally chargeable, she was not entitled to recover of her co-trustee, but should be compelled to contribute the income toward her proportion of the loss; also, that it would be oppressive to require W. to deposit the principal. *Earle v. Earle*, 93 N. Y. 104.

As to liability of executor for debt due from himself to the estate, see *Baucus v. Stover*, 89 N. Y. 11.

The will of W. created among other trusts one for the benefit of the plaintiff, a portion of the fund of which was directed to be separately invested and the income applied to her use during life. The testator was at his death a member of the firm of W. & M. The surviving members of the firm, one of them the defendant G., an executor and trustee under the will, continued the business. G. retained in his possession the books of account, papers, securities, etc., belonging to the estate. Assets realized from the estate were, under the authority of G., paid to the new firm and were, with the knowledge of the defendant, McKesson, a co-executor and trustee, used in its business, the firm paying interest, which was credited in account books of estate to the estate. No portion of the estate was set apart, as the plaintiff's share. The firm failed and the funds of the estate in its hands were lost. McKesson was

liable for allowing the funds to accumulate in the hands of the firm without requiring the same to be invested, as directed by the will; also if he had not actual knowledge of the fact, that the firm was using the funds, he could have ascertained that fact by making inquiries, and was negligent in failing to do so. He should at least have sought to have the funds properly invested. G., without the knowledge of McK., hypothecated securities belonging to the estate to secure loans for his own benefit or for that of the firm. Held, that McK. was not liable for the loss; that the failure to make a separation of the securities, as contemplated by the will, did not render him liable, as this did not induce or cause the spoliation, nor would such a separation have prevented it.

McK. was charged with interest on the losses, computed with annual resta. As there was no wrongful intent on his part, this was error; and the simple interest, at five per cent., was a proper charge. *Wilmerding v. McKesson*, 103 N. Y. 329, aff'g judg't gen. term mod'g and aff'g judg't for pl'ff.

From opinion.—“An executor or trustee is not a guarantor for the safety of the securities which are committed to his charge. \* \* \* The general rule \* \* \* is laid down in *Williams on Executors*, 6 Am. Ed. 1820, as follows: ‘A devastavit by one of two executors shall not charge his companion, provided he has not intentionally or otherwise contributed to it, for the testator having misplaced his confidence in one shall not operate to the prejudice of another.’ For the devastavit of a co-executor or trustee an executor or trustee is not liable, unless it appears that he had knowledge, or assented to the acts done, or had notice which should excite his suspicion and put him upon inquiry. *Sutherland v. Brush*, 7 Johns. Ch. 17; *Sherman v. Parish*, 53 N. Y. 483; *Peter v. Beverly*, 10 Peters, 532; *McKim v. Aulbach*, 130 Mass. 481.”

Several persons, including the defendants, were executors of a will; two of them, “C” and “B,” took charge and possession of the estate and assumed to administer it, and the defendant had no actual connection with it. “C” and “B” were regarded as prudent, reliable business men, but they misappropriated a portion of the estate and failed. The defendant was not liable.

The mere fact that one of two or more executors is passive, and does not participate in the administration or interfere with the acts of his co-executors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts. *Cocks v. Haviland*, 124 N. Y. 426.

Distinguishing *Earle v. Earle*, 93 N. Y. 104; *Remington v. Walker*, 99 id. 626. See, also, *Nanz v. Oakley*, 120 N. Y. 84.

An executor received funds of the estate and voluntarily delivered them over to his co-executor. He was not allowed to relieve himself of responsibility by showing that they were under the latter's sole control and management. *Thompson v. Hicks*, 1 App. Div. 275.

One executor had the active management of the estate, but frequently consulted with the other executor in regard thereto; and no action was taken that the latter either did not or could not have known and given advice upon, and which, therefore, had at least her implied consent. She was held equally chargeable with the other's misconduct as to investments. *Matter of Peck*, 31 App. Div. 407.

It was deemed advisable by all concerned to exclude one of the trustees from the management of the estate except in a few minor ministerial particulars. He was not liable for defaults of his co-trustees where he had no knowledge thereof and the condition of the estate was such as not to excite suspicion. But, where he learned of an act of devastavit by his co-trustee and negligently failed to notify his *cestuis que trust* he was liable for whatever loss they might have averted by proceedings, had they been notified. *Matter of Westerfield*, 48 App. Div. 542.

See, also, *Matter of Westerfield*, 32 App. Div. 324; *id.*, 40 *id.* 610.

An administratrix had no knowledge of the misapplication of the funds of the estate by her co-administrator, and was guilty of no negligence in not discovering it. She was not liable for the latter's defaults. *Matter of Adams*, 51 App. Div. 619.

Testamentary trustee was not liable for loss by his co-trustee who was the sole acting trustee and in charge of all the funds. *Meldon v. Devlin*, 20 Misc. 56.

Negligence of an executor in allowing his co-executors to waste the estate. *Clark v. Clark*, 8 Paige, 152.

Two executors signed a receipt and the money passed into the possession of one of them. Both were liable for it. *Monell v. Monell*, 1 Johns. Ch. 283.

*Mesick v. Mesick*, 7 Barb. 120.

The fact that deceased, while alive, had given to those, who, after his death became his trustees, each different portions of his estate to manage, did not justify them, as trustees, in so dividing the responsibility as to relieve either of the duty of general supervision necessary to the safety of the estate. *Birmingham v. Wilcox*, 120 Cal. 467.

Trustee moved to another city; whereupon his co-trustee managed the estate himself without the other's assistance. Held, it was not an abandonment of his discretionary power or negligence in the supervision of

the trust and he was not liable for his co-trustee's default. *Colburn v. Grant*, 16 App. D. C. 107; s. c. aff'd, 181 U. S. 601.

Administrator was held liable for his co-administrator's waste, where his negligent conduct enabled the latter to commit it. *Whiddon v. Williams*, 98 Ga. 310.

An executor, permitting a co-executor to retain funds for private use instead of turning them over to trustee as directed by the will, was held liable for the latter's mismanagement and for payments to one not properly qualified as trustee though *cestuis que trust* consented. *Grundy v. Dyre*, (Ky.) 48 S. W. Rep. 155; s. c. aff'd, 49 S. W. Rep. 469.

Trustee to sell property authorized his co-trustee to receive the purchase price and consented to the ratification of the auditor's report of distribution. He was liable for his co-trustee's default. *Barroll v. Forman*, 88 Md. 188.

Where two executors united in a joint bond, and one of them embezzled part of the funds, each is liable for the other's acts as to property coming into their joint possession. *Ames v. Armstrong*, 106 Mass. 15.

*Brazen v. Clark*, 5 Pick. 96.

A trustee joined with his co-trustee in the conveyance of trust property, so as to permit mismanagement by the latter; held that, if it could not be collected from the co-trustee, the other would be liable. *Bechtold v. Read*, (N. J. Eq.) 32 Atl. Rep. 694; s. c. modified, 54 N. J. Eq. 407.

Joint executors were to each receive one-half of the estate as trustees from themselves as executors. One held a fund, by mistake included in the account of the executors, but never paid into the estate. His co-executor was not liable to latter's *cestui que trust* for the loss of the fund. *Cassel's Estate*, 180 Pa. St. 252.

Executrix, who renewed liquor license in her own name and continued the testator's business, was chargeable with the good will of the business. Co-executor was not chargeable, as no part of the estate ever came within his control. *Mueller's Estate*, 190 Pa. St. 601; aff'g s. c., 8 Pa. Dist. 70.

Testamentary trustee was held for what he received and not for what he jointly receipted for. *Birely's Estate*, 7 Pa. Dist. 395.

Executor's estate was not charged with his co-executor's default, having received no part of the estate. *Graham's Estate*, 8 Pa. Dist. 479.

Executors, not under bond, are not usually liable for the default of their co-executors. *Swift's Estate*, 6 Northampton Co. Rep. 105.

Co-executor was not chargeable with funds, which it was not shown, were received or lost by him through his negligence. *Ripple's Estate*, 9 Kulp, 66.

## IV. Trustees, Directors, Financial Agents, Assignees, &amp;c.

Trustees, directors and financial agents are bound to exercise the same degree of care, diligence and capacity, that men of common prudence ordinarily exercise under the same circumstances. *Hun v. Cary*, 82 N. Y. 65; *Jones' Appeal*, 8 W. & S. (Pa.) 143; *Waterman v. Alden*, 42 Ill. App. 294; Wharton on Negligence, sec. 517.

The diligence is that of a good and conscientious business man, when possessed of the qualifications of the mandatory in question. Wharton on Negligence, sec. 519.

Therefore the mandatory is not required to put forth extraordinary effort, unless that be specially engaged, but should be uniform in the exercise of the requisite care and capacity. Wharton on Negligence, sec. 519.

Such agents are not liable for mistakes of judgment within the scope of their powers. *Sperings' Appeal*, 71 Pa. St. 11. And when they are invested with the management of funds, according to their judgment and discretion, they are chargeable only for gross negligence and willful mismanagement. *Harvard College v. Amery*, 9 Pick. 446.

Nor are they liable for the acts of those necessarily, or according to usage, selected to assist in the execution of the business committed to them, provided they use due care in the selection of competent and suitable sub-agents, and in the continued employment of them. Wharton on Negligence, sec. 523.

The trustees of a bank are bound to exercise the same degree of care that men of common prudence ordinarily exercise in their own affairs. *Scott v. DePeyster*, 1 Edw. Ch. 513, 543; *Spering's Appeal*, 71 Pa. St. 11; *Hodges v. N. E. S. Co.*, 1 R. I. 312; S. C. 3 R. I. 9; *The Liquidators, etc. v. Douglas*, 11 Session Cases (3rd Series), 12 (Scotch); *The Charitable Corporation v. Sutton*, 2 Atkyns, 405; *Litchfield v. White*, 3 Sandf. 545; Story on Bailments, sec. 182.

A savings bank, while insolvent, built a banking building at an improper cost, and thereafter failed. In an action brought by the receiver of the bank against the trustees for damages caused by alleged improper investments of its funds, the trustees were held liable for reckless extravagance. It was not necessary to join all the trustees. *Hun v. Carey and others*, 82 N. Y. 65, aff'g judgment on cross appeals.

Where the interest, received from the investments of the funds of depositors in a savings bank, exceeded the interest paid, the trustees of the bank were held not to be liable under chapter 371 Laws of 1875, although the expenses of the bank exceeded its earnings and income. In this case no fraud, or other misconduct, or want of ordinary care and skill, was imputed to the trustees. *Van Dyck v. McQuade*, 86 N. Y. 38.

Distinguishing *Hun v. Cary*, 82 N. Y. 65; *Austin v. Daniels*, 4 Den. 300; *F. Ins. Co. v. Jenkins*, 3 Wend. 130; *Butts v. Wood*, 37 N. Y. 317; *Gillet v. Moody*,



3 N. Y. 479; *Robinson v. Smith*, 3 Paige, 222; *Cunningham v. Pell*, 5 id. 607; *Com. Bank v. Union Bank*, 11 N. Y. 203; *Osgood v. Laytin*, 3 Keyes, 521; *People v. Sup'rs*, 4 Barb. 64; *Vanderkar v. R. & S. R. R. Co.*, 13 id. 390.

An assignee for the benefit of creditors is liable for ordinary negligence, or the want of that degree of diligence which persons of ordinary prudence are accustomed to exercise in their own business. He has no right to carry on the business, but must convert the assets. *Duffy v. Duncan*, 32 Barb. 587. *In the matter of accounting of Dean*, 86 N. Y. 398.

See *Litchfield v. White*, 7 N. Y. 438.

The assignee for the benefit of creditors is bound to use the diligence that a person of ordinary prudence would employ in the collection, recovery and application of assets. Devastavit may be charged from neglect, intentional omission, actual misappropriation and positive fraud. Negligent omission to attack a fraudulent transfer was held to be sufficient to hold the defendant liable. *In re Cornell*, 110 N. Y. 351.

*In re Cohn*, 78 N. Y. 248.

If directors, through gross neglect or inattention, suffer corporate funds to be lost or wasted, they are liable therefor. *Brinckerhoff v. Bostwick*, 88 N. Y. 52; rev'g 23 Hun, 237, and ordering judgment for plaintiff.

Same case, 99 N. Y. 185; reversing 34 Hun, 352, s. c., 43 Hun, 458; citing *Robinson v. Smith*, 3 Paige, 222; *Cumb. Coal Co., v. Hoffman Coal Co.*, 30 Barb. 159; *Cunningham v. Pell*, 5 Paige, 607, 613.

An agent loaned principal's money on second mortgages and worthless bonds. The principal, without knowledge of prior liens, received interest; on foreclosure, property sold for less than prior liens. The agent was liable for negligence. *Whitney v. Martin*, 88 N. Y. 535.

See *Heinemann v. Heard*, 50 N. Y. 35; *Story on Agency*, 183; *Story's Eq. Juris.*, sec. 310.

Although a cashier, by the rules, be required to consult other officers or committees in the matter of discounts, it is not negligence not to do so, if they have no meetings and systematically absent themselves. No bad faith was proved. *Second National Bank of Oswego v. Burt*, 93 N. Y. 233.

A broker gratuitously loaned money belonging to another, and received as collateral security certain genuine certificates of stock, which had, however, by forgery been raised so as to represent a larger number of shares than they were issued for, and a loss resulted. The broker advertised himself as a dealer in choice stocks and promised his customers careful attention. Upon proof of the delivery of the money to

the broker to be loaned, and the failure to return the same on demand, the burden was on the broker of proving that he did his duty without negligence or misconduct. It was a question of fact properly submitted to the jury whether it was negligent to take the certificates without examination, but that it was not necessary to make inquiries or present certificates for verification.

Evidence that the broker had loaned a large amount of his own money on similar certificates, and that such certificates had been bought and sold in the street, was proper. *Marvin v. Brooks*, 94 N. Y. 75; *Ouderkirk v. C. N. Bank*, 119 id. 267. *Isham v. Post*, 141 N. Y. 100, rev'g 71 Hun, 184, and judgment for plaintiff.

A director of a corporation is the agent or trustee of the stockholders, and as such has duties to discharge of a fiduciary nature towards his principal, and is subject to the obligations and disabilities incidental to that relation. *Robinson v. Smith*, 3 Paige, 222.

See *Scott v. De Peyster*, 1 Edw. Ch. 513; *Cumberland Coal, &c. Co. v. Sherman*, 80 Barb. 553.

Trustee appointed under a trust deed is liable for failure to collect moneys owing to the estate. *Meacham v. Sternes*, 9 Paige, 398.

Brokers who have peremptory orders to sell under certain conditions, must follow their directions; and are liable for loss incurred for neglect to do so. *Hope v. Lawrence*, 50 Barb. 258.

See, also, *Hanks v. Drake*, 49 Barb. 186.

Directors made an unauthorized dividend; but, to remove any doubt as to the bank's solvency, gave their individual notes. These were held to have been properly applied to the damage caused by their improper declaration of the dividend and impairment of capital. *Dykman v. Keeney*, 10 App. Div. 610; s. c., 16 id. 131; s. c. aff'd, 160 N. Y. 677.

A director, upon personal investigation ascertained that his bank was hopelessly insolvent, but kept it open for deposit, thereby holding it out to the public as solvent. He was held liable to persons who made deposits on the faith of the bank's solvency. *Cassidy v. Uhlmann*, 27 App. Div. 80; s. c., rev'd for exclusion of relevant testimony, 163 N. Y. 380; s. c., on retrial, 54 App. Div. 205; s. c., aff'd, 170 N. Y. 505, where the relations of stockholders, directors and depositors are fully discussed.

Bank director is not liable for error of judgment, not indicating fraud or lack of knowledge necessary for the position. *Godbold v. Branch Bank &c.*, 11 Ala. 191.

Error by trustee in construing the provisions of a trust deed, whereby he failed to equalize the burden imposed on *cestuis que trust*, rendered him liable. He was not allowed for claims paid, which were debts of

honor but not legal charges. Otherwise as to claims compromised which threatened to impair the fund. *Marks v. Semple*, 111 Ala. 637.

Corporation executed a note for a loan intended for it. Its president and secretary were, however, officers of another corporation and the money was applied to the payment of stock in the latter. The former company was liable on its note though the latter received the money. *Allen v. West Point Min. &c. Co.*, (Ala.) 31 South Rep. 462.

Knowledge by officers of street railway, that its rights have been encroached upon by a railroad and that the latter has promised to pay damages is imputable to the corporation which is thereby barred of its ejection and limited to an action for compensation. *Fresno Street R. Co. v. Southern P. R. Co.*, 135 Cal. 202.

Directors were not liable for compensation of receiver where the suit for his appointment was instituted in good faith. *Ephraim v. Pacific Bank*, (Cal.) 69 Pac. Rep. 436.

Trustee held the proceeds of the sale of goods, which were subject of a suit, to await the order of the court. Though they were mingled with trustee's own funds and used for its own purposes, the trustee always had money on hand to meet the demand for said funds. The trustee was required to account for the profits made in the use of said money. *Boston &c. Smelting Co. v. Reed*, 23 Colo. 523.

President of a corporation was not permitted to defend an action by its receiver for his negligence in allowing an agent to get behind in his accounts, on the ground that the directors were fully informed of the facts. As fiduciaries, they had no power to ratify such acts. *New Haven Trust Co. v. Doherty*, 74 Conn. 353.

Directors of bank, in taking notes in payment of stock subscriptions, must at least use ordinary care in ascertaining their value and have reasonable cause for believing them to be worth the amounts for which they were taken. *Coddington v. Canady*, 157 Ind. 243.

Cashier made investment in notes of residents of good standing of another city. Some inquiries were made, but more thorough inquiry would have disclosed the worthless character of the paper. It was held that the cashier had acted in good faith and with reasonable care. *Exchange Bank v. Gardner*, 104 Iowa, 176.

A bank indorsed and guaranteed notes of a third person, when the directors knew that the maker of the notes and the bank were both insolvent. It was held, that the directors' contingent liability, the notes not having matured, was not covered by Gen. Stat. 1889 Par. 406, making directors liable upon receiving deposits, or contracting debts when the bank is insolvent. *Wichita Nat. Bank v. Weeks*, 5 Kan. App. 694.

It is negligence for a trustee having received money, to hand it over

without seeing to its due application; to permit co-trustee to deal with it, without inquiry; or, knowing of a breach of trust, to fail to obtain restitution. *Darnaby v. Watts*, 13 Ky. L. Rep. 457.

A bank president who signed a false publication as to its condition was liable to one to whom he sold shares, who relied thereon. Though her purchasing agent was a director and also signed such statement, he, unlike the president, was not presumed to and, in fact, did not, know of its falsity. *Ward v. Trimble*, 103 Ky. 153.

See, also, *Trimble v. Reid*, (Ky.) 41 S. W. Rep. 319.

Directors, acting in good faith, passed cashier's accounts as all right, when, by slight diligence, they might have discovered large overdrafts. It was not such a representation as to his conduct, as to relieve those who subsequently became his sureties from liabilities for cashier's subsequent permission to overdraw. *Grant County Deposit Bank v. Littell*, (Ky.) 56 S. W. Rep. 669.

Where the president of a corporation received corporate stock in exchange for a stock of goods, his knowledge that he held part of the latter as factor only was not imputable to the corporation. *Wyeth v. Renz-Bowles Co.*, (Ky.) 66 S. W. Rep. 825.

Where property was untenable by reason of lack of repair suffered by trustee while in funds, he was charged with rent. *Whittingham v. Schofield*, (Ky.) 67 S. W. Rep. 846.

Trustees, invested with management of trust according to their judgment and discretion, are to be chargeable only for gross neglect and willful mismanagement. *Harvard College v. Amory*, 9 Pick. 446.

Loan by a guardian without security renders him liable. *Clark v. Garfield*, 8 Allen, 427.

*Lovell v. Minot*, 20 Pick. 116.

Bank loaned to an irresponsible person on inadequate security through lack of prudent investigation on the part of a director and officer, though he acted in good faith. The director was liable to the bank. *Commercial Bank v. Chatfield*, 121 Mich. 641.

Directors of a bank, knowing of its insolvency and holding it out as solvent, were held liable to owner of a draft and bill of lading delivered to vendee without payment. *Wolfe v. Simmons*, 75 Miss. 539.

Plaintiff's brother as her trustee, instead of investing her funds, transferred to her a worthless note for the amount. The transaction was held voidable. *Stokes v. Terrell*, (Miss.) 23 South. Rep. 371.

Directors left the entire management of the bank to the cashier, who loaned to irresponsible parties in excess of the statutory limit. They were responsible for resulting loss, as the statute imposed the manage-

ment of the bank's affairs upon the directors. *Union Nat. Bank v. Hill*, 148 Mo. 380.

Bank directors, who, honestly ignorant of its insolvency, permit a deposit, are not liable under a statute imposing personal liability on directors receiving deposits with knowledge of insolvency. *Utley v. Hill*, 155 Mo. 232.

If a trustee neglects to deposit funds in a mode indicating his representative character, and the funds are lost, he is liable. *Coleman v. Lipscomb*, 18 Mo. App. 443.

*State v. Powell*, 67 Mo. 395; *State v. Moore*, 74 id. 413; *State v. Rubey*, 77 id. 610; *Knecht v. U. S. Sav. Inst.*, 2 Mo. App. 563.

Where it was the duty of the officers to know the bank's condition they were presumed to know it. *Eads v. Orcutt*, 79 Mo. App. 511.

Directors of a corporation were held personally liable for the death of one killed by explosion of an unlawful amount of gunpowder stored in the company's warehouse, when, by the exercise of ordinary care, they could have known that the amount was unlawful. *Cameron v. Kenyon & Co.*, 22 Mont. 312.

The report of an insolvent bank to the comptroller of the currency represented it to be solvent. Directors who attested it, though done without knowledge of its falsity and without intention to defraud, were liable to one purchasing stock in reliance thereon. Otherwise as to one who did not attest it. *Gerner v. Mosher*, 58 Neb. 135.

Funds being once properly invested, it is not negligence *per se* for a trustee to permit his co-trustee to assume actual care of them; nor will he become liable until he has some notice of co-trustee's default. *Dyer v. Riley*, 51 N. J. Eq. 124.

Trustee to deliver bonds in installments upon payment of certain portions of the purchase price was not relieved from liability for delivery without payment by a suggestion from *cestui que trust*, upon learning of purchaser's inability to pay the portion due, to make the best bargain he could. *Danforth v. Moore*, 55 N. J. Eq. 127.

Directors of bank could not set up as a defense to an action for loss from their neglect in failing to examine the cashier's accounts, that they were ignorant of a by-law requiring it, or that such by-law had not been customarily observed, or that they relied on the statements of officers and the examinations of the bank examiners; especially where their attention has been called to an objectionable practice. *Campbell v. Watson*, (N. J. Eq.) 50 Atl. Rep. 120.

President and vice-president were held to the same liability for false statements to the bank's depositors and creditors, as its directors. *Solomon v. Bates*, 118 N. C. 311; *Caldwell v. Bates*, 118 N. C. 323.

Directors permitted declaration of a dividend, when bank was insolvent. Proper attention to their duties would have disclosed its condition. Were liable to a purchaser of stock mislead thereby. *Houston v. Thornton*, 122 N. C. 365.

Cashier failed to see that vault doors were locked; though he believed others under him, having that particular duty in charge, had attended to it. He was liable for loss resulting from such failure. *Kalb v. American Nat. Bank*, 21 Oh. C. C. 1; s. c., 11 O. C. D. 437.

Owner of lands, holding half his interest therein in trust for another, made disbursements on his own responsibility for subsidies for waterworks. He could not charge his *cestui* with any portion thereof, nor for compensation as trustee, where he received income without rendering an account. *Royal v. Royal*, 30 Or. 448.

Directors, although liable for embezzlement or gross inattention, are not liable for mistakes of judgment, if within the scope of their powers, even if such mistakes are absurd and ridiculous. *Spring's Appeal*, 71 Pa. St. 11.

Negligence, as a ground of liability, must be such as enters into the cause of loss; so where bonds of a depositor were stolen by bank teller the bank is not liable for the larceny unless there is proof of its negligence in keeping the teller. *Scott v. National Bank, etc.* 72 Pa. St. 471.

A trustee is not a surety for his co-trustee, nor liable for co-trustee's bad faith or crimes. *Fesmire's Estate*, 134 Pa. St. 67.

*Stell's Appeal*, 10 Pa. St. 149.

Diligence required of a trustee is diligence of a prudent man in his own affairs. *Jones' Appeal*, 3 W. & S. (Pa.) 143.

Trustee permitted his son's access to his security box and the latter forged his father's name to powers of attorney for their transfer. Trustee was held not negligent. *Pennsylvania Ins. &c. Co. v. Franklin Fire Ins. Co.*, 5 Pa. Dist. 323.

Trustee permitted tenant to remain for three years, while paying only a small portion of the rent with prospects of still less, and while the value of the premises was depreciating for lack of repair. He was surcharged with rent. *Manfield's Estate*, 19 Pa. Super. Ct. 26.

Directors held not personally responsible for violation of company's charter due to mistake as to their powers and not to want of ordinary care and prudence. *Hodges v. N. E. Screw Co.*, 1 R. I. 312.

Directors of a bank, relying on the honest management of its officers, failed to ascertain its insolvency. Were not liable in equity at suit of depositors, where bank or its assignee failed or refused to sue. *Deaderick v. Bank of Commerce*, 100 Tenn. 457.

A loan was made of one-third of the bank's capital, but to one who

was the chief merchant in the place and in good standing. It was prudent at the time, in view of the surrounding circumstances. The bank's officers and directors were not liable to the stockholders because it happened to turn out disastrously. *Wheeler v. Aiken &c. Bank*, 75 Fed. Rep. 781.

Directors of a bank failed to discover a default, which examination would have revealed. They failed to examine the books, gave little or no attention to the affairs of the bank and held meetings only at long intervals and then merely to elect officers and declare dividends. They were held liable. *Gibbons v. Anderson*, 80 Fed. Rep. 345.

A trustee, whose only duty was to hold stock and deliver it over upon payment of a sum decreed, could not recover assessments paid thereon, during an appeal from the decree. *Irvine v. Angus*, 84 Fed. Rep. 127.

Lack of knowledge of the facts by a bank president who wrongfully certified checks, was no defense where he willfully refrained from investigating. *Spurr v. United States*, 87 Fed. Rep. 701.

Directors who were merely members of the board were not held liable where, knowing little of banking, they failed to discover defalcations of one whom they had no reason to suspect. Otherwise as to the member of the discount and examining committee, who, with the exception of what was called to their attention by the cashier, made no examination, so as to discover reckless loans and overdrafts made or permitted by the latter. *Warner v. Penoyer*, 91 Fed. Rep. 587; aff'g s. c., 82 id. 181.

Directors were not charged with knowledge of facts contained in the bank's books where they were kept so as purposely to conceal such facts. *Lamson v. Beard*, 94 Fed. Rep. 30.

Directors and officers of a national bank are responsible for using its funds in prospecting for minerals, but not for repairs, which they *bona fide* thought was necessary in fitting a mine, acquired in payment, of a debt for a market. *Cooper v. Hill*, 94 Fed. Rep. 582.

The fact that a statute exists, imposing liability on directors, does not exclude their common law liabilities for negligence. *Great Western Min. &c. Co. v. Harris*, 111 Fed. Rep. 38.

Stockholder was entitled to equitable relief against directors who voted large salaries to insolvent officers who had rendered no services, so as to have the same applied upon their indebtedness to the corporation. *Harrison v. Thomas*, 112 Fed. Rep. 22.

Directors of a bank failed, through lack of proper investigation, to ascertain the mismanagement of its executive officers, to whom they had delegated their authority. Were liable to parties injured thereby. *Warren v. Robinson*, 19 Utah, 289.

Complainant was guilty of laches in seeking to charge a purchaser

as a trustee on the ground that certain sales were a violation of trust when he fails to seek relief for 17 years after their rights accrued, and the purchase was made 50 years before. *Redford v. Clarke*, (Va.) 4 S. E. Rep. 630.

That directors had ceased to be such at time of suit, is no defense to an action for misfeasance while in office. *Boyd v. Mutual Fire Assn* (Wis.) 90 N. W. Rep. 1036.

## V. Public Officers.\*

A public officer, not judicial, is bound to exercise only reasonable skill and care in performance of ministerial duties; *Olmstead v. Dennis*, 77 N. Y. 378; *Slava v. Jones*, 83 Ala. 139; *Fairbanks v. Kitteridge*, 24 Vt. 12; and also administrative duties. *Bassett v. Fish*, 75 N. Y. 303.

He is liable to one sustaining special damage for the commission of a negligent act, or the negligent omission of a duty, (*Robinson v. Chamberlain*, 3 N. Y. 389; *Bennett v. Whitney*, 94 id. 302; *Hover v. Burkhoof*, 34 id. 113) or for a failure to perform an absolute duty, in the performance of which an individual has a special interest. *Clark v. Miller*, 54 N. Y. 548; *Bray v. Bardard*, 109 N. C. 44.

He is not personally liable for the negligence of a board of public officers, of which he is a member, unless he acts for the board, and is negligent. *Bassett v. Fish*, 75 N. Y. 303.

Nor is he liable for the negligence of servants employed by him. *Walsh v. Trustees etc.*, 96 N. Y. 427. See, 62 id. 160; *Almango v. Supervisors*, 25 Hun. 551; *Cardot v. Barney*, 62 N. Y. 81.

Unless the relation of the subordinate to him be something of a personal nature. *Ely v. Parsons*, 55 Conn. 83.

As when they are employed by or under him, voluntarily or privately, and paid by or responsible to him. *Shepherd v. Lincoln*, 17 Wend. 250; *Bassett v. Fish*, 75 N. Y. 311.

But public officers are not liable for non-feasance unless means be at their disposal, enabling them to fulfill the duty imposed upon them, as in the case of highway commissioners and the trustees of an ordinary school district. *Bartlett v. Crozier*, 17 Johns. 439; *Bassett v. Fish*, 75 N. Y. 310.

The relation between the keeper of the county poorhouse and the superintendent, who employs him, is of a public nature and the former cannot be deemed the agent of the latter, within statute of embezzlement. 2 R. S. 678, section 59. *Coats v. The People*, 22 N. Y. 245; reversing *Park*. 662.

A public officer or contractor engaged to perform the duties of a public officer is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof.

In this case a contractor was liable for defective lock gates of which he had notice, and in consequence of which a canal boat was injured.

\*NOTE.—As to the liability of a municipality for negligence of its officers, see "Municipality," post.



A failure to keep a public highway in repair by those who have assumed that duty from the state, so that it is unsafe to travel over, is a public nuisance, making the party bound to repair liable to indictment for the nuisance, and to an action at the suit of any one who has sustained special damage. *Lansing v. Smith*, 8 Cow. 151; *Smith v. Wright*, 24 Barb. 306; *Pierce v. Dart*, 7 Cow. 609; *Shepard v. Lincoln*, 17 Wend. 250; 3 Chit. Cr. Law, 568 (Perk. Ed. of 1841); *Adsit v. Brady*, 4 Hill 630; *Mayor of Lime Regis v. Henly*, 1 Bing. N. C. 222. *Robinson v. Chamberlain*, 34 N. Y. 389, aff'g judg't for pl'ff, and overruling, *Fiske v. Dodge*, 38 Barb. 163.

The fact that the trustee of a charitable or educational corporation does not appear upon call of case, is not *per se* negligence so as to charge him personally with costs. *Slocum v. Barry*, 38 N. Y. 46.

Public officers, not judicial (*Mills v. City of Brooklyn*, 32 N. Y. 489), are amenable to one specially injured by their negligence either by acts of omission or commission.

A commissioner of highways with funds in his hands should use reasonable and ordinary diligence to repair a highway of a defect of which he has notice by circumstances or directly. Actual notice is not necessary, where the circumstances are such that ignorance is in itself negligence. *Hover v. Burkhoff*, 44 N. Y. 113, aff'g judg't for pl'ff.

Distinguishing *Garlinghouse v. Jacobs*, 29 N. Y. 297, where defendant had no funds. (See *Robinson v. Chamberlain*, 34 N. Y. 389, putting *Garlinghouse v. Jacob*, on true grounds, and following *Adsit v. Brady*, 4 Hill 630, although this last case had been doubted in *West v. The Village of Brockport*, 16 N. Y. 168.) Also, distinguishing *Seymour v. Wilson*, 14 N. Y. 567; *Bartlett v. Crosier*, 17 Johns. 440, and following *Adsit v. Brady*, 4 Hill 630; *Hutson v. Mayor*, 9 N. Y. 169; *Robinson v. Chamberlain*, 34 id. 389; *Henly v. The Mayor*, 5 Bing. 91; *Bartlett v. Crosier*, 15 Johns. 250. *Lane v. Cotton*, 1 Salk. 17; *Fulton &c. Co. v. Baldwin*, 37 N. Y. 648; *Sherman & Red. on Neg.* 195.

See *McCarthy v. City of Syracuse*, 46 N. Y. 196; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Barton v. City of Syracuse*, 36 id. 54; *Mills v. City of Brooklyn*, 32 id. 489.

The plaintiff employed the defendant to search for taxes and assessments against land to be purchased. The defendant delivered to the plaintiff a return against taxes, signed by him, and another return against assessments, signed by a third person not employed by the plaintiff, but the defendant took pay for both. The plaintiff afterwards paid assessments not discovered by the search. The defendant was liable. The burden was on the defendant to show that the plaintiff was saved harmless by the warranty against assessments in the deed. *Morange v. Mir*, 44 N. Y. 315, aff'g judg't for pl'ff.

On burden of proof see *Allen v. Suydam*, 20 Wend. 321; *Blot. v. Boiceau*, 3 Comst. 78; *Walrod v. Ball*, 9 Barb. 271.

A municipal officer charged by statute with an absolute and certain duty, in the performance of which an individual has a special interest, is liable to an action, if he refuses to perform it, even though he believe the statute to be unconstitutional.

A supervisor refused to present an assessment of damages in laying out highway to supervisors, as required by law, and was held liable for amount of same, with interest. *Clark v. Miller*, 54 N. Y. 528, affirming 42 Barb. 255; distinguishing *The People v. Supervisors*, 28 N. Y. 112; citing *Commercial Bank v. Kortright*, 22 Wend. 348.

If a person invested with administrative duties of a public nature negligently perform them, he is liable to person injured thereby. *McCarthy v. Syracuse*, 46 N. Y. 194; *Hover v. Burkhoof*, 44 id. 113; *Mersey Dock Trustees v. Gibbs*, 3 Hurl. & Colt. 1043.

Also liable for neglect of those voluntarily or privately acting for him and paid by or responsible to him. *Shepherd v. Lincoln*, 17 Wend. 250.

A trustee of a Union Free School district is not liable personally for the negligence of the board, but the negligence, if any, is that of the corporation, but when a trustee acts for the board and is negligent, then he is liable.

This action was brought against all the members of such a board jointly as trustees, charging them as public officers, not as individuals, with neglect in not keeping the school house in repair, in consequence whereof the plaintiff was injured. It appeared upon the trial, that the board had an arrangement with "F," one of the defendants, that when any small repairs were needed he was to make them, whether upon order or notice first given, or upon his own motion, did not distinctly appear, and it did not appear that the question of his individual liability, distinct from that of the other defendants, was presented to the trial court. The judgment was against all of the defendants jointly. Held, error; and that it could not be sustained against "F" individually in this action.

Also, held, that the complaint could not be amended by striking out the names of the defendants and inserting that of the corporation, as the corporation had not been brought into court, and the court had no jurisdiction of it, nor could the complaint be amended here by striking out the names of all the defendants save "F," and the designation of him as trustee; as it would be a complete change of the theory of the action.

The break in the floor had been there for three months; and it was inferable that it was due to natural wear and tear; two unsuccessful attempts had been made to repair it. The floor of the room was badly out of repair; this was known to the members of the board, and repairs

had been promised by that body. Held, that the evidence authorized a finding that the passage way was negligently out of repair. The action was brought by a school teacher injured by the floor.

Distinction between board of education of Union Free Schools (title 9, chap. 555, L. 1864), and trustees of ordinary school districts pointed out.

In determining the liability of the trustee of an ordinary school district, it must appear that he had command of funds to make repairs. *Bartlett v. Crozier*, 17 J. R. 439. *Bassett v. Fisk*, 75 N. Y. 303, rev'g 12 Hun, 209, and judg't for def't.

A public officer, as a drainage commissioner, is liable for lack of reasonable skill and care in the performance of ministerial duty to one specially interested in the discharge of such duty. *Adsit v. Brady*, 4 Hill, 630; *Clark v. Miller*, 54 N. Y. 528. An officer cannot be compelled to act and will not incur liability by mere omission to do so. *Bentley v. Phelps*, 27 Barb. 524.

This action was to recover of the defendants, personally, damages, which the plaintiff claimed to have sustained from his misconduct and negligence in not discharging public duties under the drainage act. The defendants, as drainage commissioners, borrowed money, under statute, of plaintiff, and by failure of commissioners to properly pursue the requisite proceedings the plaintiff had been unable to obtain payment. The defendants were not liable, as they were not shown to have omitted any duty. *Olmstead v. Dennis*, 77 N. Y. 378.

One, acting gratuitously as a public officer, is not personally liable for negligence of a person necessarily employed in the execution of an order, properly given by him. The superintendent of school buildings, or ward trustees are not liable for an excavation negligently left open by workmen in the absence of personal negligence or of knowledge that the excavation had been left. *Hall v. Smith*, 2 Bing. 156; *Bailey v. The Mayor*, 3 Hill, 538, and cases cited; Story on Agency, sec. 321. *Donovan v. McAlpin*, 85 N. Y. 185.

While chapter 368, Laws of 1851; chap. 301, Laws 1853; chap. 101, Laws 1854; chap. 574, Laws 1871; chap. 112, Laws 1873, vested the board of education in the city of New York, with the general control and care of the school buildings and property, "for the purposes of public education," it committed the especial care and safe keeping of such buildings in the respective wards to the ward trustees, who are also authorized to make repairs, and are not the agents of the board, but independent public officers, and for their negligence the board is not liable.

The defendant was not liable for injuries sustained by plaintiff in

falling into an excavation in the yard of a building occupied as a ward school, the grating to which excavation had been negligently left open, either by the janitor or by masons employed by the ward trustees, in making repairs to the building. *Donovan v. Board of Education*, 85 N. Y. 117.

A public officer is not responsible in a civil action for a judicial determination, however erroneous, or howsoever malicious the motive which produced it, to persons who have not suffered special damage thereby. *East River Gas Light Co. v. Donnelly*, 93 N. Y. 557.

See, *People ex. rel. Francis v. Common Council &c.* 78 N. Y. 33; 34 Am. Rep. 500.

Where an officer has negligently repaired a public street he is liable not for nonfeasance or omission, but for misfeasance (*Robinson v. Chamberlain*, 34 N. Y. 389), and it is not necessary to show funds in his hands.

Statute (sec. 6, title 14, chap. 291, Laws 1867), giving action for willful neglect does not take away common law remedy. Addition of official title was *descriptio personæ*.

One who assumes the duties, and is invested with the powers of a public officer, is liable to an individual who sustains special damage because of a neglect properly to perform these duties.

While the omission of the word "as" is not conclusive, when the body of the complaint plainly discloses an official or representative capacity as the ground of the action, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually. *Bennett v. Whitney*, 94 N. Y. 302.

See *Slocum v. Barny*, 38 N. Y. 46.

Failure on the part of a county treasury to collect a bond and mortgage in his hands; neglect to foreclose same, although interest was, when he came into office, three years in arrears, and delay for sixteen months after is not alone sufficient to create liability against him; facts establishing negligence must be shown, as, that he failed to ascertain insufficiency of property, the insolvency of the mortgagor, etc., and there was no averment that defendant had any knowledge of these conditions. *Woolley v. Baldwin*, 101 N. Y. 688, sustaining demurrer to complaint.

Trustees of the New York and Brooklyn bridge were liable neither officially nor personally for negligence of laborer on the bridge. They represented and acted as agents of the two cities. *Appleton v. Water Commissioners*, 2 Hill, 432; *Bailey v. Mayor*, 3 id. 531; 2 Denio, 433; *Barnes v. District of C.*, 91 U. S. 540; *Ehrgott v. Mayor*, 96 N. Y. 264; *Matter of the Application of the Rochester Water Commissioners*, 66 id. 413.

But the commissioners of public charities and correction, although appointed by municipal authority, are not agents of the city. *Maximilian v. The Mayor*, 62 N. Y. 160. *Walsh v. Trustees &c. N. Y. & B. Bridge*, 96 N. Y. 427.

But, under acts chap. 399, L. 1867; chap. 601, L. 1874; chap. 300, L. 1875, the trustees are agents and the employers are servants of the cities of New York and Brooklyn, so as to charge such cities with their negligence. *Walsh v. Mayor &c.* 107 N. Y. 220; 41 Hun, 299.

Citing *People ex rel. Murphy v. Kelly*, 76 N. Y. 475, 489.

A sheriff replevied coal on a vessel and, pending justification of securities, put a keeper in charge of the coal, and the vessel sank; held (1) that the sheriff was not an insurer; (2) that the sheriff was bound to use more than ordinary care in protecting property in his possession, which was the subject of litigation. *Moore v. Westervelt*, 21 N. Y. 103.

The case came again to the Court of Appeals, and it was held, that the sheriff was bound only to take such steps for the preservation of the coal as a careful and prudent man acquainted with the circumstances would take, if the goods were his own. Ordinary diligence alone is usually required, when sheriff is in possession. Verdict for defendant was sustained. *Moore v. Westervelt*, 27 N. Y. 234; s. c., 1 Bosw. 357; 2 Duer, 59.

Where a sheriff is sued for negligence in allowing the defendant, in his custody under execution, to escape, the judgment on which the prisoner was held is conclusive of the plaintiff's rights. *Richtmeyer v. Remsen*, 38 N. Y. 206.

Defendant, a supervisor of a town, deposited public money, in his hands, with private bankers who subsequently failed and the money was totally lost. The trial judge found that the defendant acted in good faith and without negligence; but it was held that he was liable for the loss nevertheless; public officers having the custody of public funds being insurers thereof, *ex virtute officii*. *Tillinghast v. Merrill*, 151 N. Y. 135; aff'g, s. c., 77 Hun, 481.

Police officer made an arrest for a felony without warrant and without reasonable cause. The fact that it was subsequently discovered that he had carried concealed weapons and was on this charge convicted and punished did not prevent liability for the false imprisonment on the false charge prior to such conviction. *Sneed v. Bonnoil*, 166 N. Y. 325; aff'g, s. c., 49 App. Div. 330.

A sheriff who discharged a debtor on an order which failed to state all the jurisdictional facts, was required to show the existence of the omitted facts in order to justify the discharge. *Seward v. Wales*, 167 N. Y. 538; aff'g, s. c., 40 App. Div. 539.

Sheriff sold goods on execution recovered by defendant, an indemnity bond having been given. Sheriff having been sued for such sale and defeated, sued the bond. Defendant not allowed to allege negligence of sheriff and his attorney in a suit by the owner of the goods, as after notice of such suit to defendant, it was his business to defend it, and the sheriff's defense was gratuitous, and in absence of fraud the defendant was bound by the result of the action. *Howell v. Christy*, 3 Lansing, 238.

If sheriff be guilty of negligence in allowing the escape through entire failure to execute writ of *ne exeat*, action lies without application to court. *Beckwith v. Smith*, 4 Lansing, 182.

Allegation that the head of the building department in the city of New York, whose duty it was to see that all unsafe buildings were made secure, and that he was furnished with means therefor, and that he was notified of such condition of a building and that it fell on another, doing damage, states facts sufficient to constitute cause of action. *Connors v. Adams*, 13 Hun, 427.

*Distinguishing* *Murphy v. Commissioners*, 28 N. Y. 134.

County clerk is only liable for negligence in making a search to the person for whom made.

"O." applied by his agent "W." to clerk for a search, whereon the plaintiff was to loan him money, and did so, relying on search. Clerk omitted a deed and the plaintiff was damaged. No recovery. *Day v. Reynolds*, 23 Hun, 131, *affg* nonsuit.

Citing *Savings Bank v. Ward*, 100 U. S. 195; *distinguishing* *Hover v. Barkhoof*, 44 N. Y. 113, where the plaintiff was said to have been *especially injured*.

Public officers managing a penitentiary, are not liable to convict for injuries arising from negligence of servants. Allegation was that the defendants illegally and negligently made the convict approach a saw, whereby he was injured. Demurrer was sustained. *Alamango v. Supervisors of Albany Co.*, 25 Hun, 551.

Where an assignment of the interest of the owner of a leasehold estate in fee is presented to and left with the clerk of the proper county to be recorded, the failure of the clerk to properly index it, or errors made by him in transcribing it, will not prejudice the rights of the assignee or deprive him of the privilege conferred upon him by the recording acts. *Mims v. Mims*, 35 Ala. 23; *Chatham v. Bradford*, 50 Ga. 327; s. c., 15 Am. R. 692; *Polk v. Cosgrove*, 4 Biss. 437; *Riggs v. Boylan*, id. 445; *Merrick v. Wallace*, 19 Ill. 486; *Bank of Kentucky v. Haggan*, 1 A. K. Marsh. 306; *Payne v. Pavey*, 29 La. Ann. 116; *Swan v. Vogel*, 31 id. 38; *Sinclair v. Slawson*, 44 Mich. 123; *Green v. Garrington*, 16 Oh. St. 548; *Tousley v. Tousley*, 5 id. 78;

Schell v. Stein, 76 Penn. St. 398; Wood v. Brown's App. 82 id. 116; Curtis v. Lyman, 24 Vt. 338; Hunter v. Windsor, id. 327. *Bedford v. Tupper*, 30 Hun, 174.

Following *Mutual Life Ins. Co. v. Dake*, 87 N. Y. 257; *Simonson v. Falihee*, 25 Hun, 570; *Jones on Mortgages*, sec. 552.

A sheriff received from his judgment creditor, or his attorney, notice of an attachment of real estate in the form required by law, and signed by the sheriff and by such attorneys, together with copies of the affidavit and undertaking on which an order of attachment had been made, and the sheriff undertook to file the notice with the clerk the next morning, but neglected to do so for ten days, which enabled the debtor to convey the real estate before judgment could be recovered against him. It was the duty of the sheriff to file the notice with the clerk, and even otherwise, having undertaken to do so, he was liable for the omission. *Lewis v. Douglass*, 58 Hun, 587.

See *Ransom v. Halcott*, 18 Barb. 36; *Hoffman v. Conner*, 13 Hun, 541; *Code of Civil Pro.* sec. 102.

Sheriff takes the risk in levying on goods not specified in the order directing seizure. *Einstein v. Dunn*, 61 App. Div. 195.

A chamberlain was liable for the loss of school taxes in his custody though he acted without negligence. No other city official had power to direct its deposit and relieve him of responsibility. *Johnstown v. Rodgers*, 20 Misc. 262.

Commissioners of charities, etc. in determining whether plaintiff was a veteran and so not liable to discharge, acted in a quasi-judicial capacity, and were not liable for a mere error of judgment. *Nuttall v. Simis*, 22 Misc. 19; s. c., aff'd, 31 App. Div. 503.

That process is regular on its face does not protect city marshal in serving it, where he in fact knows of a fatal defect therein. *Harris v. Gunn*, 37 Misc. 796.

Chief of fire department was held not liable for neglect to have the department out at a fire, where it appeared that there was no means by which the fire might have been extinguished, no mains or hydrants suited to the fire apparatus and no buckets to carry water in from an adjacent well or creek. *Walter v. Meader*, 77 N. Y. Supp. 407.

Negligence of public officer, in respect to ministerial duties, renders him liable. *Eslava v. Jones*, 83 Ala. 139.

County school examiner revoked the license of a teacher without giving him the required statutory notice and re-examination. He was held personally liable. *Lee v. Huff*, 61 Ark. 494.

Sheriff was liable for releasing property on a bond not executed as required by statute. *Fitzhugh v. Hackley*, 70 Ark. 54.

Police officer was liable for false imprisonment, where the party defrauded refused to positively identify the prisoner and the prisoner denied that he was the man and referred the officer to one well-known to the latter, but the officer failed to make the inquiry as to his identity. *Miller v. Fano*, 134 Cal. 103.

County treasurer was held not an insurer of funds, deposited with him, pursuant to statute authorizing such deposit, in trust for heirs of unknown intestate, and, where he used reasonable care in selecting a bank of deposit for such funds, he was not liable because of its unforeseen failure. *Gartley v. People*, 28 Colo. 227.

City treasurer paid warrants in reliance upon an erroneous denial by a court of a writ of mandamus to compel such payment. It was held no excuse for violating a statute as to the order of payment of warrants. *First Nat. Bank v. Arthur*, 12 Colo. App. 90.

Public officer liable for negligence of subordinate, if his appointment be private and discretionary with said officer. *Ely v. Parsons*, 55 Conn. 83.

The approving of an appeal bond by a justice of the peace is rather a ministerial than a judicial act, and, if he has acted corruptly or maliciously, an action will lie. *Legates v. Lingo*, 8 Houst. (Del.) 154.

That township funds were put in a bank considered safe, was held no defense, the township treasurer being an insurer of such funds. *Swift v. Trustees of Schools*, 189 Ill. 584.

Where an officer replevins, he must ascertain the value of the property; he is liable, if he fails to take a bond in sufficient penalty to protect defendant in case a return is awarded. *Mayer v. People*, 92 Ill. App. 123; s. c. aff'd, 190 Ill. 109.

Warden of penitentiary and sureties are insurers of public funds coming to his hands. *Ramsay v. People*, 97 Ill. App. 283.

Board of county commissioners employed contractor, who was negligent in the performance of his work. There was held to be no individual liability on part of the commissioners. *Schnurr v. Huntington County*, 22 Ind. App. 188.

Sheriff may refuse to levy though tendered indemnification for the consequences, where he shows existence of liens on the property to an amount exceeding its value. *Phelps & Co. v. Skinner*, 63 Kan. 364.

Superintendent of police, through an erroneous but honest misinterpretation of the law, compelled plaintiff to close his saloon. He was acting within the scope of his authority and had not abused his discretion. *Lecourt v. Gaster*, 50 La. Ann. 521.

Where it is sought to hold a public officer personally liable, plaintiff must show lack of authority. He cannot be so held for acts done under color of official authority. *Bright v. Murphy*, 105 La. 795.



Officers who honestly seek the enforcement of law and the administration of justice and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages. *Lyons v. Carroll*, 107 La. 471.

Sheriff is liable where he failed to levy while defendant had property and to make return until after return day. *Commonwealth v. Begley*, (Ky.) 66 S. W. 754.

Tender of a drawbridge, appointed by the governor and on a salary, liable for injuries caused by his negligence. *Nowell v. Wright*, 3 Allen 166.

Prisoner in house of correction has no action against the master for neglect to provide sufficient food. *Williams v. Adams*, 3 Allen, 171.

See, also, *Spear v. Cummings*, 23 Pick. 224.

Postmaster not accountable for negligence of a subordinate. *Keenan v. Southworth*, 110 Mass. 474.

An officer arrested a captain of foreign vessel on process from a state court which had no jurisdiction, after being informed of the nationality of the vessel. He was held liable, as, after knowing the facts, he was bound to know the law. *Tellefsen v. Fee*, 168 Mass. 188.

A chief of police was held liable for an arrest made by one of his officers, where plaintiff was detained for fifty hours with the chief's knowledge without being brought before a court and without having a complaint entered against her, the power of discharge resting with the chief. *Martin v. Golden*, (Mass.) 62 N. E. Rep. 977.

The rule, that a ministerial officer is liable for the negligent performance of his prescribed duties, applied to a clerk of a court who had misinformed plaintiff. *Selover v. Sheardown*, 73 Minn. 393.

A police officer, while out with his wife on a wheel, unnecessarily injured plaintiff in attempting to direct movement of latter's rig. It was a question for the jury, whether the officer was acting in his official capacity, and hence, error to dismiss the case as to sureties. *Seitner v. Ransom*, 82 Minn. 404.

The statutory duty of an officer to pay over official funds is, in the absence of any provision to the contrary, an absolute one. *Northern P. R. Co. v. Owens*, (Minn.) 90 N. W. Rep. 371.

Justices of County Court, as trustees of a fund for educational purposes, deposited same with county treasurer for safe keeping. They were not liable for misappropriation by latter. *Anderson v. Roberts*, 147 Mo. 486.

A notary, taking an acknowledgement to a forged deed by one un-

known to him, was held liable for resulting damage. *State v. Ryland*, 163 Mo. 280.

Superintendent of workhouse acting under an ordinance which attempted to confer power in excess of that allowed by the city charter, was liable for false imprisonment in detaining a prisoner, under the guise of discipline, longer than the charter allowed. *St. Louis v. Karr*, 85 Mo. App. 608.

A city treasurer was obliged by law to keep his official funds on deposit. Having used reasonable care in the selection of the bank, and not having been negligent in failing to withdraw it, he was held not liable for loss through bank's failure. *Livingston v. Woods*, 20 Mont. 91; overruling *Commissioners v. Lineberger*, 3 Mont. 231.

County judge ordered administrator to pay money into Court instead of distributing it. Was liable therefor. *Wheeler v. Barker*, 51 Neb. 846.

Sheriff held liable for failure to procure a bond in replevin proceedings whose sureties were sufficient. *Barton v. Shull*, 62 Neb. 570.

Money paid to village treasurer for a liquor license is public money, which he is absolutely liable to account for. *Hrabak v. Dodge*, 62 Neb. 591.

It is no defense that the officer acted honestly and in good faith, when he took insufficient security on a replevin bond as he guarantees absolutely that the surety is sufficient, and it is unnecessary to allege negligence in so doing. *Adams v. Weisberger*, (Neb.) 87 N. W. Rep. 16.

Road overseer was held responsible for disbursements, paid for services in excess of their reasonable worth. *Denver v. Myers*, (Neb.) 88 N. W. Rep. 191.

County treasurer is insurer of the funds coming into his hands officially, and liable therefor though without negligence in depositing them in a private bank. *Thomssen v. Hall County*, (Neb.) 89 N. W. Rep. 389.

Notary was liable for failure to give notice of dishonor of protested paper, in the absence of contrary instructions. *Williams v. Parks*, (Neb.) 89 N. W. Rep. 395.

Negligence of public officer in exercise of public duty, does not give rise to a cause of action in a private individual. *School Dist. &c. v. Burress*, (Neb.) 89 N. W. Rep. 699.

Where the writ is regular and from a court of competent jurisdiction, remedy for the arrest is not trespass for false imprisonment, but case for the malicious motive and want of probable cause. *Calderone v. Kieran*, (R. I.) 51 Atl. Rep. 215.

See *Lisabelle v. Hubert*, (R. I.) 50 Atl. Rep. 837.

Negligence of public officer in respect to ministerial duty renders him

liable. *Ford v. McGregor*, 20 Nev. 446; *Henry v. Sargent*, 12 N. H. 333.

Supervisors of an election check list, willfully and maliciously neglected or refused to place thereon the name of the plaintiff, who was a qualified voter. They were held liable in an action on the case. *Hanlon v. Partridge*, 69 N. H. 88.

For negligent failure to exercise authority prescribed by statute, members of board of county commissioners are liable. *Bray v. Barnard*, 109 N. C. 44.

Erroneous order of commitment for contempt by mayor, sitting as a Mayor's Court, was made through malice though within his jurisdiction. No civil liability. *Scott v. Fishplate*, 117 N. C. 265.

A county commissioner, on constructing a bridge, refused to construct a draw span on the ground that the river was not navigable above that point. Not liable for statutory penalty for intentional and willful neglect of duty to boat owner, in the absence of gross negligence or willfulness. *Staton v. Wimberley*, 122 N. C. 107.

A sheriff, in determining the necessity of calling in military aid, acts in a judicial capacity, but, in the use of that force in performing the duties of his office, he acts ministerially and is liable for the use of excessive and unnecessary force. *State v. Coit*, 8 Oh. S. & C. P. Dec. 62.

Prothonotary failed to indorse upon an execution process a waiver of exemption shown by the record. Held civilly liable, where defendant claimed exemption and nothing was realized. *Wilson v. Arnold*, 172 Pa. St. 264.

Treasurer of school district deposited funds with a bank which was in good repute. Was not liable though the bank failed. *School Dist. v. Stoner*, 16 Montg. Co. L. Rep. 107.

To charge a justice of the county court with liability for negligence in taking an insufficient guardian bond, willfulness and maliciousness must be proven. *McTeer v. Lebow*, 85 Tenn. 121.

See, also, *Boyd v. Ferris*, 10 Hum. (Tenn.) 406; *Spears v. Smith*, 9 Lea, (Tenn.) 483.

State comptroller's and treasurer's accounts were passed without objection. In absence of fraud, the state was bound and they could not be reopened on the ground of ignorance of the law. *State v. Buchanan*, (Tenn.) 52 S. W. Rep. 480.

A county trustee is not liable, where he deposited funds intrusted to him in a bank of good repute, which subsequently failed. *State v. Copeland*, 96 Tenn. 296.

Where the tax proceedings are regular on their face, the tax rolls in due form and issued from the proper authority, the tax collector is not

liable as for an illegal valuation. *Texas Land &c. Co. v. Hemphill County*, (Tex. Civ. App.) 61 S. W. Rep. 333.

Postmaster-general enclosed circular, with warrants for claims due to postmasters, calling attention to statutory provisions and warning them against employment of attorneys for collection of the claims. He was acting within the scope of his employment and was not liable to attorney for sending proceeds direct to claimants. *Spalding v. Vilas*, 161 U. S. 483.

A person, by law authorized to inspect and survey a boiler, was liable for negligent inspection and false certificate. *Bradley v. Hartford &c. R. Co.*, 19 Fed. Rep. 246.

An assessor acts judicially in listing the property for assessment, and, while not liable for honest errors of judgment, he is liable, if an excessive assessment is made through malice and corruption. *Bailey v. Berkey*, 81 Fed. Rep. 737.

Collector of internal revenues is an insurer of public funds coming into his hands; embezzlement by a deputy is no defense. *Pond v. United States*, 111 Fed. Rep. 989.

Disbursing officer was not liable for money stolen from his tent. *Scott v. U. S.*, 18 Court of Claims, 1.

An ordinance by a city counsel having power to regulate the use of streets, prohibiting the moving of buildings thereon without permit, is a reasonable and not an arbitrary exercise of their discretionary powers. *Eureka v. Wilson*, 15 Utah, 53.

An officer, serving a replevin writ, was released from liability for accepting an insufficient bond, where plaintiff discharged a surety against whom the officer had recourse. *Follett v. Shumway*, 68 Vt. 68.

See, also, *Fairbanks v. Kittridge*, 24 Vt. 12.

Collector was not liable to the penalty prescribed for knowingly making an overcharge of mileage, where he guessed at the distance from the best of his judgment and was only a mile out of the way. *Weightman v. Jones*, 73 Vt. 353.

Police commissioners caused an arrest and imprisonment for wearing the official uniform of the police force. They were held liable, as they had no power to act in a quasi-judicial capacity, and the only punishment for the offense was a fine. *Bolton v. Vellines*, 94 Va. 393.

Exercise of ordinary care in selection of bank for deposit of county funds, did not relieve county treasurer from liability for funds lost through the bank's insolvency. *Fairchild v. Hedges*, 14 Wash. 117.

Officers of a town, proceeding carefully within their jurisdiction, are not personally liable for errors of judgment. *Smith v. Gould*, 61 Wis. 31.

*Hamilton v. City of Fond du Lac*, 40 Wis. 47; *Hurley v. Town of Texas*, 20 id. 634; *Alford v. Barrett*, 16 id. 175; *Squiers v. Village of Neenah*, 24 id. 588.

Board of street commissioners, individually liable, when they act in disregard of the charter. *Robinson v. Rohr*, 73 Wis. 436.

*Wallace v. City of Menasha*, 48 Wis. 79; *Uren v. Walsh*, 57 id. 98.

## VI. Receivers and Assignees.

Property placed in the hands of a receiver as such is protected from an action at law founded on negligence in the management thereof, and the receiver is not liable in such an action. But in the absence of evidence that the receiver, in the management of the property, acted otherwise than as an officer of the court, as if he was or held himself out to be a carrier of passengers in his personal capacity, he would be liable for any injury arising from his negligence or that of his servants. *Kane v. Smith*, 84 N. Y. 458.

Trustees of a railroad mortgage, given to secure the bonds of the company, who foreclose the mortgage for bondholders, and who, being directed in the decree of foreclosure to bid off the road at a certain sum, if no equal bid is made by others, do accordingly make the bid, receive a deed from the referee, and operate such railroad for the benefit of their *cestius que trust*, must, as to the public, be regarded as operating the road as owners, and render themselves liable as common carriers of all goods transported over the road under their management.

They are in no sense receivers, or officers of the court, entitled to the immunities from the ordinary liabilities of persons conducting such business, if any, belonging to such officers. *Rogers v. Wheeler and others as Trustees*, 43 N. Y. 589; affirming 2 Lans. 486.

A special receiver or assignee, in bankruptcy, of property of a railway company is not its agent, nor is it liable for his negligence.

Upon a sale by an assignee in bankruptcy of the tracks, fixtures, rolling stock and franchises of a railroad corporation, the corporation, as a legal entity, does not vest in the purchasers, and they do not become stockholders or corporators therein (following *Wellsborough Plank Road v. Griffin*, 57 Penn. 417, and distinguishing *The Commonwealth v. The C. P. R. Co.* 52 Penn. 506, which was decided under a special statute). Nor are the purchasers liable for damages resulting from negligence of those operating the road, intermediate the time of sale and the confirmation thereof by the court. *Metz v. B. C. & P. R. Co.*, 58 N. Y. 61.

See *Ahern v. Steele*, 115 N. Y. 203, 247; *Mayor v. Bailey*, 2 Denio, 433.

The assignee in bankruptcy of a railroad, acting merely as an officer of the court, to whom no personal negligence is imputed, is not liable for negligence of a necessary and proper employe. *Cardot v. Barney*, 63 N. Y. 281, aff'g order granting new trial after verdict for plaintiff.

**From decision.**—"Public officers performing their duties through the agency and with the assistance of subordinate agents employed by them, whether acting gratuitously or for a compensation, are not answerable for the neglects or wrongful acts of their subordinates. When acting for a compensation, they are regarded as being paid for the services rendered, and not for taking the hazard of the acts of those necessarily employed by them. *Lane v. Cotton*, 1 Lord Mansf. 646; s. c., 1 Salk. 17; *Whitfield v. Lord Ledespencer*, Cowp. 754; *Hall v. Smith*, 2 Bing. 156; *Duncan v. Finlater*, 6 Cl. and Fin. 894. Sheriffs are an exception to the rule, for the reason that the poundage and other fees to which they are entitled for acts done by their deputies is deemed a just equivalent for their responsibilities. *Hall v. Smith*, *supra*.

Best, Ch. J., in *Hall v. Smith*, *supra*, says: "The maxim of *respondet superior* is bottomed on this principle, that he who expects to derive advantage from an act, which is done by another for him, must answer for any injury a third person may sustain from it," thus making the benefit and liability reciprocal. The principle was recognized in *Bush v. Steinman* (1 B. & P. 404) and the defendant held liable for the reason that the work was carried on for his benefit. Lord Brougham, in *Duncan v. Finlater*, *supra*, places the liability upon the ground that what is done by the agent being done for the benefit of the principal, and under his direction, he should be responsible for the consequences of doing it. *Scott v. Mayor of Manchester*, 2 H. & N. 204, was distinguished from *Hall v. Smith* by the fact that the corporation derived a profit from the carrying on the works. *Rogers v. Wheeler*, 43 N. Y. 598; *Sprague v. Smith*, 29 Vermont, 421; *Barter v. Wheeler*, 49 N. H. 9, proceed upon the same ground, that the defendants were the owners of the roads, and were bound personally by their contracts; and that the fact was unimportant that they were trustees and acted in a representative capacity. The actions were upon contracts made by the defendants, and, as in the case of executors and administrators, they were held to answer for them. *Ferrin v. Myrick*, 41 N. Y. 315. The legal title to the roads was in the defendants, and they operated them as proprietors, and their liability legitimately resulted from their proprietorship, although the title was in trust for others. Judge Peckham said, in *Rogers v. Wheeler*, *supra*, they were in no sense receivers or officers of the court. They had assumed to operate the roads, and had made contracts with the public in the course of that business, and there was no principle or policy, that would shield them from liability, if they failed to perform their engagements. *Barter v. Wheeler*, *supra*, was decided upon the same views of the position of the defendant. *Ballou v. Farnum*, 9 Allen, 47, and *Lamphear v. Buckingham*, 33 Conn. 237, were actions against trustees and mortgagees in trust for the bondholders in possession of and operating the roads as such trustees and mortgagees, to recover for injuries sustained by reason of the negligence of persons employed by them. The defendants were held liable.

\* \* \* *Blumenthall v. Brainerd*, 38 Vt. 402, was an action upon a contract for the carriage of goods, the defendants being receivers of the road by appointment of the Court of Chancery. \* \* The court regarded the assumption by the defendants of the extraordinary responsibilities of common carriers as not incompatible with their duties and responsibilities as receivers, and held them to their contracts. \* \* *Paige v. Smith*, 99 Mass. 395, without affirming the soundness of the decision of the case last cited, followed it, in an action against a receiver appointed by the Court of Chancery of the same state, on the ground that it was impossible to accord to the defendants an exemption from the ordinary common-law liabilities of common carriers more extensive than they are allowed in the state in which they were appointed."

Property placed in the hands of a receiver as such, is protected from an action at law, founded on negligence, in the management thereof, and the receiver is not liable in such action.

The officer is individually liable for the management of the property voluntarily assumed by him and over which the court has no control. *Kain v. Smith*, 80 N. Y. 458; reversing 11 Hun, 552, and judgment of nonsuit.

*Sprague v. Smith*, 29 Vt. 421; *Barter v. Wheeler*, 49 N. H. 9; *Blumenthal v. Brainard*, 38 Vt. 409; *Paige v. Smith*, 99 Mass. 395; 20 Ohio St. 137; *Ballou v. Farnum*, 9 Allen, 47; *O. & C. Co. v. Davis*, 23 Ind. 553; *Newell v. Smith*, 49 Vt. 260; *Nichols v. Smith*, 115 Mass. 332; *Lamphear v. Buckingham*, 33 Conn. 237; *Klein v. Jewett*, Recr. &c., 26 N. J. Eq. 474.

From opinion.--"Such an officer displaces the directors, and under the direction of the court by which he is appointed, has the sole control of its property and effects, and when authorized so to do, the executive power to use its franchises, (*City of Rochester v. Bronson*, 41 How. Pr. 78), and is responsible for his conduct in all these things to the court appointing him. In such a case also the remedy for injuries resulting from his negligence, or the negligence of those operating a railroad under him, would be by application to the same tribunal, *Noe v. Gibson*, 7 Paige, 513; *Parker v. Browning*, 8 id. 388; *Metz v. Buff.*, Corry and P. R. R. Co., 58 N. Y. 61; *Morse v. Brainerd &c.*, 41 Vt. 541; *Klein v. Jewett*, 26 N. J. Eq. 474, which might itself dispose of the matter by administering justice between the parties, or allow the party aggrieved to bring his suit at law for the alleged injury. Cases above cited.

But this is so when the person charged is acting under color of its authority merely. \* \* There must be 'an absence of evidence that the operator assumed to act otherwise than as an assignee, or that he held himself out as a carrier of passengers other than as an officer of the court.' *Murphy v. Holbrook et al*, Recrs. of the C. P. and L. R. R. Co., 20 Ohio St. 137; *Potter*, Recr. of the A. and G. W. R. Co. v. *Bunnell*, id. 150; *Henderson v. Walker*, Recr., etc., 55 Ga. 481, stand upon the same principle.

So limited, there is no danger that any injury will go without compensation. Damages for injury to the person, whether passenger or employé, for loss of goods in course of transportation, or otherwise, would be chargeable upon, and payable out of the fund in court, the same as other expenses of administration. *Klein v. Jewett*, 26 N. J. Eq. 474; *Morse v. Brainerd &c.* 41 Vt. 551; *Cowdrey v. G. H. and H. R. R. Co.*, 3 Otto, 93 U. S. Sup. Ct. 352."

Liability of receiver for negligence; appointed in suit to remove executors; his duty to use active diligence to obtain personal property from executors, etc. *Clapp v. Clapp*, 49 Hun, 195.

Citing *Litchfield v. White*, 3 Seld. 438, 443; *Matter of Dean*, 86 N. Y. 398; *Stehman's Appeal*, 5 Barr. 413; *Pingree v. Comstock*, 18 Pick. 46; and distinguishing *Lawson v. Copeland*, 2 Brown's Ch. C. 156; *Schultz v. Pulver*, 11 Wend. 362.

An assignee was guilty of such negligence, in failing to collect assets, as would have rendered him liable to removal. But all the assets having

been actually collected before an application for such removal was made, nothing remaining to be done but to account, the court ordered that the fund be paid into court for distribution. *Tompkins v. Sheehan*, 6 App. Div. 76.

Receiver, after being presented with a claim properly stated and a demand of notice of proceedings, made a motion to be allowed to pay a dividend from a fund, without notice, on certain uncontested claims. An order made on such motion was vacated and the receiver required to restore so much of the fund distributed thereunder as would pay such claimant who was entitled to preference. *People v. Family Fund Soc.*, 31 App. Div. 166.

Distinguishing *Willis v. Sharp*, 124 N. Y. 406; *People v. Randall*, 73 N. Y. 416; *Swart v. Central Trust Co.*, 27 N. Y. S. R. 113.

Where property was sold below inventory value, the assignee was charged with inventory value, when that was below market value, in the absence of satisfactory explanation. *Matter of McFarlane*, 65 App. Div. 93; s. c. aff'd, 169 N. Y. 608.

Assignee sold certificates of an insolvent bank, belonging to the estate, to his children at public auction, lending them the purchase money. He was charged with subsequent advance in price of the certificates. *Matter of Sheldon*, 72 App. Div. 625.

In the absence of authority from the court, a temporary receiver has no power to continue business and bind the estate therein. *Appleton v. Welch*, 20 Misc. 343.

Negligence of employes, causing fatal injuries, renders trustee of a railroad, for benefit of bondholders, liable. *Lamphear v. Buckingham*, 33 Conn. 237.

In Illinois, a receiver is liable for injuries caused by the negligence of servants of a preceding receiver. *McNulta v. Lockridge*, 137 Ill. 270.

A railroad company in the hands of a receiver is not liable for injuries resulting from the operation of the road by him. *Ohio &c. R. Co. v. Anderson*, 10 Bradw. 313.

Assignee delayed twenty-seven days after assignment before taking possession, the property being in an adjoining state, whereby an attaching creditor gained priority. Delay was unreasonable. *Forster v. Second Nat. Bank*, 61 Ill. App. 272.

Interest on a fund in the hands of an assignee pending litigation when he was unable to use it was held not chargeable against him. *Emig v. Barnes*, 77 Ill. App. 616.

Assignee, without waiting for an adjudication as to priority, paid in full claim of assignor's *cestui*, where identity of trust fund was in question. Was liable to other creditors. *Seiter v. Mowe*, 81 Ill. App. 346.



Possession of the receiver is not possession of the railroad company; hence, the railroad company is not liable for negligence of receiver's servant. *Ohio &c. R. C. v. Davis*, 23 Ind. 553.

Assignee was not implicated with his fraudulent assignors, by reason of his failure to investigate their condition, where there were no facts at the time of accepting the trust to arouse his suspicion, or put him upon inquiry. *Martin-Brown Co. v. Morris*, (Ind. Terr.) 42 S. W. Rep. 423.

Leave to prosecute receiver for negligence of servants not necessary to jurisdiction of a court of law. *Allen v. Central R. Co.*, 42 Iowa, 683.

*Kinney v. Croker*, 18 Wis. 74. See, however, *Barton v. Barbour*, 104 U. S. 126.

Trustee failed in suit to establish the propriety of an investment, made in violation of statute; application for attorney's fees was denied, he was charged with costs and his commissions were withheld until he made good the loss. *Aydelot v. Breeding*, (Ky.) 64 S. W. Rep. 916.

Gross negligence and failure to keep accounts, cut down commissions. *Ward v. Shire*, (Ky.) 65 S. W. Rep. 8.

Receivers of railways may be sued as common carriers; so, where a carload of hay was destroyed by reason of negligence of railroad's employes, the receivers were liable. *Paige v. Smith*, 99 Mass. 395.

*Ballou v. Farnum*, 9 Allen, 47; *Nichols v. Smith*, 115 Mass. 332.

Where the creditors allow the assignee to continue the business in the name and under the direction of the assignee, they cannot receive and use profits in time of success and yet complain of losses in time of depression. *Quimby v. Uhl*, (Mich.) 89 N. W. Rep. 722.

Assignee, who allowed and paid a claim against the estate to one already indebted to it and in a greater sum, was chargeable for the loss. *In re Excelsior Man. Co.*, 164 Mo. 316.

Admission by receiver that he was operating the railroad at the time of an accident, though another company ran its trains on the same tracks, is binding, in the absence of proof that injury was caused by latter's negligence. *Moling v. Barnard*, 65 Mo. App. 600.

Property, not included in the trust, a receiver takes at his own risk, though acting under order of court. He is personally liable for such a mistake and may be sued without consent of court. *Kirk v. Kane*, 87 Mo. App. 274.

Though an excavation has been filled in by the company of which a receiver has been appointed, he is chargeable with notice of a defect occasioned by negligence in doing the work. *Robinson v. Mills*, 25 Mont. 391.

Liability of receiver for injuries while operating a railroad is tested

by the same rules as in case the corporation were defendant. *Klein v. Jewett*, 26 N. J. Eq. 474.

Receiver paid a dividend to one not authorized to receive it, when, by due diligence, the mistake could have been prevented. Was chargeable with the loss. *Todd v. Meding*, 56 N. J. Eq. 83.

Trustees under a railroad mortgage, having foreclosed and purchased the road, which they hold and operate for the bondholders, are liable as common carriers for goods received. *Barter v. Wheeler*, 49 N. H. 9.

A receiver of an infant's estate will be held accountable, if he makes a loan without taking any security, and loss results therefrom. *State, &c. v. Gooch*, 97 N. C. 186.

Assignee to settle estate sold notes for less than their value on account of his ignorance as to the debtor's responsibility, where, by exercise of ordinary care, he could have known the facts. Was held liable therefor. *Weisel v. Cobb*, 118 N. C. 11.

Receiver, operating railroad, is liable for negligence of himself and his agents, where the company would have been. *Meara v. Holbrook*, 20 Oh. St. 137.

Receiver donated use of opera house for a charitable, benevolent, and social purpose. It was customary so to do to gain the good will of the public, when it could not be otherwise used. Was not chargeable with rent. *McKennon v. Pentecost*, 8 Okla. 117.

Assignee paid claims to persons not entitled under deed of assignment, without direction or authority of court. He was held thereby to have assumed the burden of showing that the payments were legal. *Wright's Estate*, 182 Pa. St. 90.

Assignee was not negligent in rejecting as valueless an endowment policy, without convertible value, having only eight years to run and, in the event of death payable to others than creditors. *Provident Life &c. Co. v. Fidelity Ins. &c. Co.*, (Pa.) 52 Atl. Rep. 34.

Assignee delayed sale until season was over, owing to a mistake of judgment. Was not chargeable. *Wilson's Assigned Estate*, 14 Lanc. L. Rev. 370.

Where there is apparently no reason for not declaring a dividend, the assignee is chargeable with interest. *Morris v. Ellis*, (Tenn.) 62 S. W. Rep. 250.

For negligence, in failing to provide an embankment with sluices sufficient to drain off the water, receivers of a railroad company were liable. *Clark v. Dyer*, 81 Tex. 339.

In Texas, receiver is not liable in damages for death caused by negligence of company's servants. *Texas &c. R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88.

*Turner v. Cross*, (Tex.) 18 S. W. Rep. 578; *Yoakum v. Selph*, 19 id. 145; *Brown v. Warner*, 78 Tex. 543; *R. Co. v. Geiger*, 79 id. 13; *Texas &c. R. Co. v. Thedens*, (Tex.) 21 S. W. Rep. 132; *Campbell v. Davis*, 22 id. 244; *Texas &c. R. Co. v. Collins*, 19 id. 365; *Missouri Pac. R. Co. v. Texas &c. R. Co.*, 30 Fed. Rep. 167.

Receiver allowed animals to remain on a ranch and failed to insure buildings thereon. Was not chargeable with loss in absence of proof of negligence. *Hasum v. Stone &c. Co.*, 13 Tex. Civ. App. 414.

Receiver not liable for injuries sustained before his appointment. *Finance Co. &c. v. Charleston &c. R. Co.*, 46 Fed. Rep. 508.

*Missouri Pac. R. Co. v. Texas &c. R. Co.*, 30 Fed. Rep. 167.

A federal receiver is bound by the laws of the state in which the property is situated, and liable by such laws for negligence of employé having authority over other employés. *Peirce v. Van Dusen*, 78 Fed. Rep. 693.

Assignee failed to make full inventory, but creditors had free access to books and took no objection to a second inventory gotten up at their instance. He failed to bring suit to collect stock subscriptions. The court refused to remove him, as his course was due, not to dishonesty, but to an honest misconception of his duties; especially as the property was not endangered. *Putnam v. Timothy Dry Goods &c. Co.* 79 Fed. Rep 454.

Receiver was not allowed counsel fees for services in obtaining his appointment and in sustaining his charges on an accounting. *Sowles v. National Union Bank*, 82 Fed. Rep. 139.

Receivers were not liable for tort committed by the company before their appointment. *Northern P. R. Co. v. Heflin*, 83 Fed. Rep. 93.

A fund in the hands of a receiver was not chargeable with interest, on a recovery made necessary by a receiver's *bona fide* disallowance of the claim. *Merchant's Nat. Bank v. School District*, 94 Fed. Rep. 705.

Two thousand nine hundred and fifty-two dollars for hotel bills in New York for two years on receivership business, was held an unnecessary outlay and disallowed. *Braman v. Farmers' &c. T. Co.*, 114 Fed. Rep. 18.

Trustees of a railroad for the benefit of bondholders are liable for negligence of employés; but not for negligence of employés of another company, on whose tracks the trains of the first company run. *Sprague v. Smith*, 29 Vt. 421.

Receivers of railroads, in chancery, sustain the character of common carriers; and, if they expressly contract to deliver goods, are liable for negligence of any connecting road in transporting them. *Newell v. Smith*, 49 Vt. 255.

Blumenthal v. Brainard, 38 Vt. 402; Morse v. Brainard, 41 id. 550; Cutts v. Brainard, 42 id. 586; Lyman v. Cent. Vermont R. Co. 59 id. 167; Roxbury v. Central &c. R. Co., 60 Vt. 121.

Receiver allowed a claim to become barred by limitation, thinking that the trustee had extended the lien, where by due diligence he could have discovered his mistake. Was held chargeable. *Rush v. Steele*, 93 Va. 526.

Receiver failed to carry out contract entered into by corporation before his appointment. Was not liable. *Casey v. Northern P. R. Co.* 15 Wash. 450.

Commissions and counsel fees were denied a receiver, who refused to report, filed an imperfect account when personally cited by the court, used estate funds for his own convenience and employed interested counsel at large salaries in unimportant litigation and the statement of his comparatively simple account. *Speiser v. Merchant's Exch. Bank* 110 Wis. 506.

## **BAILMENTS.**

### **I. IN GENERAL.**

- (a) Kinds of bailments.
- (b) When bailment exists.
- (c) Rules of negligence applicable to bailments.

### **II. EVIDENCE.**

- (a) In general.
- (b) Prima facie case.
  - 1. By proof of demand and refusal to deliver.
  - 2. By proof of return in damaged condition.
- (c) Rebuttal by proof of loss or injury consistent with due care.
- (d) Burden of proving negligence on plaintiff.

### **III. HIRING.**

- (a) Duty and risk of bailor.
- (b) Duty and risk of bailee.
- (c) Deviation from contract by bail

### **IV. AGISTOR AND STABLEKEEPER.**

### **V. LOANS.**

### **VI. BANKS—DEPOSIT OF SECURITIES WITH.**

- (a) Gratuitous bailee.
- (b) Pledge.

### **VII. CHEESE FACTORIES.**

### **VIII. SAFE DEPOSIT COMPANY.**

### **IX. WAREHOUSEMAN.**

### **X. INNKEEPERS.**

- (a) Who is entitled to be a guest.
- (b) Nature and extent of liability.
- (c) When the relationship exists.
  - 1. Who is a guest.
  - 2. Who is not a guest.
- (d) What is an inn.
- (e) What is not an inn.
- (f) Limitation of liability.
- (g) Rules and regulations and disobedience thereof.
- (h) Contributory negligence of guest.
- (i) When innkeeper liable as ordinary bailee.
- (j) When liability ends.

### **XI. BANKS—SAVINGS.**

## I. In General.

A bailee should employ the care and skill that an ordinarily good and prudent business man would use under the same circumstances, unless the parties impliedly or expressly contract for a lesser or higher degree of diligence and capacity. This involves all gradations of caution and faculty, from such minor efficiency, as, unobserved, charges the gratuitous bailee for gross negligence, to that highest obligation of prudence imposed upon common carriers of passengers, which, when, not exercised, charges the carrier for slight negligence.\* Common carriers of goods, and innkeepers are primarily insurers.

## (a). KINDS OF BAILMENTS.

A BAILMENT is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. Story on Bailments, sec. 1, p. 4.

A DEPOSIT is a naked bailment of goods to be kept for the bailor without recompense, and to be returned, when the bailor shall require it, and is entirely for the benefit of the bailor, or a third person.

A MANDATE is a bailment of goods without reward to be carried from place to place, or to have some act performed about them, and is entirely for the benefit of the bailor, or a third person.

†Dr. Wharton states that this term also applies to a bailment, where a compensation is payable according to the value of the service, but not fixed at the time of the bailment. Wharton on Negligence, secs. 484-490; *Waterman v. Gibson*, 5 La. Ann. 672.

COMMODATUM, a loan for use, is a bailment of goods to be used by the bailee temporarily, or for a certain time without reward, and is entirely for the use of the bailee. It differs from what is termed *mutuum* in this, that in *commodatum* the goods are lent to be specifically returned, in *mutuum* the goods are to be consumed and are to be repaid in property of the same kind.

A PLEDGE, or PAWN, is a bailment of goods to a creditor, as security for some debt or engagement, and is for the benefit of the parties, or both or one of them and third person.

A HIRING, *locatio-conductio*, is a bailment always for reward or compensation, certain or uncertain, and includes: 1. The hiring of a thing for use (*locatio rei*.) 2. The hiring of work and labor (*locatio operis facienda*). 3. The hiring of care and services to be performed or bestowed on the thing delivered (*locatio custodiae*). 4. The hiring and car-

\* NOTE.—However unsatisfactory in principle the terms "gross negligence" or "slight negligence," they probably, from common use, convey the thought of extremes of care.

† NOTE.—In case of compensation the bailment would be for mutual benefit, and increased vigilance would be required of the bailee.

riage of goods from one place to another (*locatio operis mercium vehendarum*).

Bailments of this kind are for the benefit of the parties, or both or one of them and a third person. Story on Bailments, secs. 4-8, pp. 9, 10.

(b). WHEN BAILMENT EXISTS.

An agreement by producers to deliver goods to a factory, once owned by them, at a certain price and to receive the proportion of the profits, corresponding to the proportion of the goods delivered, was held a bailment and not a sale. *Sattler v. Hallock*, 160 N. Y. 291; aff'g s. c., 15 App. Div. 500, where the authorities are carefully considered.

Mere fact that property came into a person's possession, without proof of some trust respecting it, does not make him a bailee. *Samuels v. McDonald*, 3 J. & S. 211.

The overcoat of one attending a theater was taken from a hook in a private box. Proprietor was not liable. *Pattison v. Hammerstein*, 17 Misc. 375.

See, also, *Bird v. Everard*, 4 Misc. 104; *Schueps v. Sturm*, 25 id. 168.

A bailment for no definite period, though for hire, is only a license and is revocable at any time. *Gleason v. Morrison*, 20 Misc. 4; s. c. aff'd, id. 320.

Restaurant keeper was liable for failing to provide a reasonably safe place for a coat taken by a waiter for safe keeping, as was the custom, in the absence of notice that he would not be responsible therefor. *Appleton v. Welch*, 20 Misc. 343.

Bailee for indefinite period sold out his own business, notifying bailor to remove the goods or arrange with the purchaser as to them. He was not liable for latter's refusal to deliver to bailor. *Emerald &c. Brew. Co. v. Leonard*, 22 Misc. 120.

See, also, *De Lemos v. Cohen*, 28 Misc. 579.

Customer of a tailoring concern left her purse in one room while she was being fitted in another. The concern was held to be bailee of the purse, but the customer was not allowed to recover, on account of her contributory negligence. *McAllister v. Simon*, 27 Misc. 214.

A customer in a restaurant hung his coat on a hook provided near his table, without directing the care of any of the attendants to it. Neither actual or implied bailment nor negligence in general supervision having been shown, there was no liability. *Montgomery v. Ladjing*, 30 Misc. Rep. 92.

Where owner of cotton sent it to be ginned, expecting to pay cus-

tomary storage charges, and it was received to be ginned for hire but nothing was charged for storing and handling, the bailment, as a whole, was one for hire, and the bailee was liable for the lack of ordinary care in not storing it, whereby it was damaged by rain. *Union Compress Co. v. Nunnally*, 67 Ark. 284.

Debtor gave a bill of sale of crops to creditor as security, agreeing to protect and prepare them for market. Debtor was bailee of the creditor. *Boston v. Rabun*, (Ga.) 41 S. E. Rep. 568.

Customer's hat was taken from rack in a barber shop while he was being shaved. Proprietor was liable as a bailee for hire. *Dilberto v. Harris*, 95 Ga. 571.

Money deposited with a firm and a receipt taken, is a debt and not a bailment, where the intention is that the firm shall deposit it in their bank to their own account, and they are liable when the money is stolen before it is so deposited by them. *Geist v. Pollack*, 58 Ill. App. 429.

A restaurant keeper was liable for loss of guest's coat, where waiter took it, saying he would take care of it; though there were notices that the proprietor was "not responsible for hats and coats." *La Salle Restaurant &c. v. McMasters*, 85 Ill. App. 677.

Delivery of cotton to be ginned for a price, is a bailment for hire. *Concord Variety Works v. Beckham*, 112 Ga. 242.

Deposit of grain with warehouseman to be mingled with other grain, sales being made for the mass, is a bailment and not a sale. *Baker v. Born*, 17 Ind. App. 422.

Retail dealer requested wholesale dealer to send samples to be examined by a customer with a view to purchasing. The custody of the retailer was in the nature of a bailment, and he is not liable for loss without his negligence. *Knights v. Piella*, 111 Mich. 9.

Delivery of grain to elevator company for storage, held a bailment, notwithstanding a custom to treat such transactions as sales, unless the custom was known and contract made in reference to it. *Weiland v. Krejnick*, 63 Minn. 314.

See, also, *Weiland v. Sunwall*, 63 Minn. 320.

Transfer of a note for collection only, under circumstance charging transferee with notice of such fact, is a bailment and not a sale of the paper. *United States Nat. Bank v. Geer*, 55 Neb. 462; rev'g s. c., 53 Neb. 67; s. c., 41 L. R. A. 444.

Upon the deposit of a check, the bank becomes a bailee, unless depositor have the right to immediately check against it or apply it on an indebtedness. *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 60 N. J. Eq. 84.

Wheat received for storage at the owner's risk was held a bailment and



not a sale, where the owner expected to sell to the warehouseman or obtain from him the same quality and quantity of grain on demand on payment of storage charges and return of load checks issued for the original grain. *Tobin v. Portland &c. Mills Co.*, (Or.) 68 Pac. Rep. 743.

An agreement to lease at a given sum with the option to purchase, applying the rental as the purchase price, was held a bailment and not a conditional sale. *Cobb v. Deiches*, 7 Pa. Super. Ct. 252.

Storekeeper was liable for articles which might ordinarily be left by a customer in a dressing booth while trying on other clothes, in absence of a printed disclaimer of liability. But not such articles as a diamond ring. *Hunter v. Reed*, 12 Pa. Super. Ct. 112.

Defendant ordered a scale, agreeing to pay a sum monthly for a certain period, at the end of which he was to return it or purchase it by adding an extra sum. It was held to be a bailment and not a sale. *Stimpson Computing Scale Co. v. Schetromf*, 13 Pa. Super. Ct. 377.

Furniture was left with bailee to be kept by him without charge. He was a gratuitous bailee, and, upon his death, the bailment was terminated, and no trust followed the goods into the hands of his widow. *Morris v. Lowe*, 97 Tenn. 243.

Proof of lack of due care with proof of possession merely, does not make a *prima facie* case, the duty of due care must be shown. *World's Columbian &c. Co. v. Republic of France*, 91 Fed. Rep. 64; rev'g s. o., 83 Fed. Rep. 109.

#### (c). RULES OF NEGLIGENCE APPLICABLE TO BAILMENTS.\*

(1) In the absence of negligence on his part contributing to the result, either at the time it happened or theretofore, a bailee is not responsible for loss resulting from inevitable accident, as by lightning or storms, by the perils of sea, by inundations or earthquakes, or by sudden death or illness, the inroads of a hostile army, or pirates. Story on Bailments, sec. 25.

Nor for robbery by force, either in the highway or from the breaking open of a house, and the assaulting of the inmates thereof (Story, sec. 27), nor for losses by private or secret theft. Story on Bailments, sec. 27. *Sturm v. Boker*, 150 U. S. 312.

(2) DEPOSITUM.—Where the bailment is entirely for the benefit of the bailor, or of a third person, and is without compensation, the bailee will only be liable for such lack of care, as is termed gross negligence, which Chancellor Kent describes as that want of care, which every man of common sense, under the circumstances, takes of his own affairs.

\* NOTE.—These rules are not given as applicable to common carriers or innkeepers; as regards such occupations examine those topics.

Kent's Commentaries, vol. 2, sec. 560; Wharton on Negligence, sec. 476; *Illinois Central R. Co. v. Tronstein*, 64 Miss. 834.

It is also expressed that the bailee must exercise that ordinary diligence and care which a usually prudent man takes of his own property of a like description. *Mark v. Hudson R. Bridge Co.*, 103 N. Y. 28.

A gratuitous bailee is only responsible for gross negligence. *Edson v. Weston*, 7 Cow. 278; *Beardslee v. Richardson*, 11 Wend. 25; *Spooner v. Mattoon*, 40 Vt. 300; *Smith v. N. & L. R. Co.*, 7 Foster (N. H.), 86; *Knowles v. R. R. Co.*, 38 Me. 55; *Briggs v. Dearborn*, 99 Mass. 50; *Sodowsky v. McFarland*, 3 Dana, 204; *White v. Bank*, 4 Brewster (Pa.), 234; *Grill v. G. & C. Co.*, L. R., 1 C. P. 600.

A trunk left in the possession of an employ  after employment has ceased, is a "deposit," wherein bailee is liable as for gross negligence. Loss, by reason of employ 's failure to tag it before taken away by expressman, did not render employer liable. *McKay v. Buffalo Bill's Wild West Co.*, 17 Misc. 396.

Notes were deposited with a gratuitous bailee to be held until payment of a sum to him, and the surrender of a receipt by him, when they were to be returned to the owner. Bailee was liable for improper surrender to third person, through forgetfulness. *Serry v. Knepper*, 101 Iowa 372.

Beans were left in storage; but bailee's premises were not a warehouse and he made no charge therefor and did not expect to make any. He was a gratuitous bailee and loss was sufficient to excuse their return unless gross negligence was shown. *Dinsmore v. Abbott*, 89 Me. 373.

Consignee refused to receive goods. Bailor requested the company to hold them, till further notice. They were destroyed through the explosion of a lamp. It was a gratuitous bailment and bailee not liable without proof of gross negligence. *Hapgood Plow Co. v. Wabash R. Co.*, 61 Mo. App. 372.

Gross negligence of a delivery to one personating depositor was for the jury. *Lancaster Bank v. Smith*, 62 Pa. St. 47.

Railroad company permitted storage of wool as accommodation in its car. It was not liable in absence of gross negligence. *Texas C. R. Co. v. Flanary*, (Tex. Civ. App.) 50 S. W. Rep. 726.

Dr. Wharton classifies deposits as follows:

(a) "Those in which deposits are made with persons *not in the habit of receiving* such deposits," where "the depository is only liable for gross negligence, that is, for the lack of the diligence *non specialists* show in such matters."

(b) "Where the deposit is made with persons *accustomed to receive such deposits*, in which case the diligence shown must be determined by

the usage of good business men of the particular class, in respect to such duties—diligence and care which such men, under such circumstances, are accustomed to exhibit.” Wharton on Negligence, sec. 457, etc.

(3) **MANDATUM.**—“A mandatary, whether with or without pay, who accepts and undertakes to perform a trust or mandate, must exhibit *diligence appropriate to what he undertakes*. If he claims to be a business man, *experienced in a specialty*, he must employ the diligence a good business man in such specialty is accustomed to show. If he disclaims having such special business capacity, he is liable only for the lack of the diligence which a good non-expert in such cases is accustomed to show.” Wharton on Negligence, sec. 510. See, also, secs. 498 and 500.

But this rule is further modified to this extent, that while such bailees are only obliged to exercise the care and skill of good and conscientious business men, when possessed of the qualifications of the mandatary in question (Wharton on Negligence, sec. 518), yet, if the bailee possess certain peculiar aptitudes and capacities, *which he offers to another*, he must, in the service of the other, diligently employ such faculties. Wharton on Negligence, sec. 517.

Dale v. See, 51 N. J. L. 378; Melbourne v. Louisville &c. R. Co., 88 Ala. 443; Isham v. Post, 141 N. Y. 100; rev'g 71 Hun, 184; Sprangler v. Eicholtz, 25 Ill. 297; Rutgers v. Lucet, 2 Johns. Cas. 92; Saunders v. Hartsook, 85 Ill. App. 55; Maury v. Coyle, 34 Md. 235.

(4) **COMMODATUM.**—Where the bailment is for the use of and benefit of the bailee, such bailee is bound to bestow “on the thing loaned to him the care which a good business man, versed in the use of such particular thing, would, under the particular circumstances, exhibit, and this would involve special diligence on his part and make him responsible for slight neglect.” Wharton on Negligence, sec. 668. Union Compress Co. v. Nunnally, 67 Ark. 284; Mehle v. Vensel, 39 La. Ann. 680; Knights v. Piella, 111 Mich. 9.

(5) **A PLEDGE OR PAWN.**—The bailee must exercise the diligence of a good business man under the same particular circumstances. Wharton on Negligence, sec. 670; Cornell Man. Co. v. Louisville &c. Power Co., (Ky.) 44 S. W. Rep. 637; McMahon v. Philadelphia, (Pa.) 41 W. N. C. 527.

(6) **HIRING.**—The bailee is liable for the lack of the special skill and diligence, which a person ought to have and exercise, in undertaking to do any work requiring *special qualifications*. Wharton on Negligence, sec. 713.

This liability may arise not merely *in doing the work carelessly*, but in *entering on the work without due skill*; unless his judgment be super-

seded by the judgment or direction of his employer, or unless the employer, at the time of the employment, knew that the bailee did not possess such skill. Wharton on Negligence, secs. 721, 722.

(7) The foregoing rules of liability may be modified by special contract diminishing or enlarging the skill or care, or liability, of the bailee for lack thereof, in all cases where, *by the policy of the law, such contract is regarded as binding*. Wharton on Negligence, secs. 466, 467; *Sturm v. Boker*, 150 U. S. 312; *Allen v. Williamsburg Savings Bank*, 2 Abb. N. C. 342; *Butler v. Greene*, 59 Neb. 280; *Standard Brewery v. Malting Co.*, 171 Ill. 602; *aff'g s. c.*, 70 Ill. App. 363; *Tindall v. McCarthy*, 44 S. C. 487.

(8) It is no defense that a depositary bestowed the same care on the subject of the bailment that he did upon his own property, although evidence thereof is proper on the question of his negligence. Wharton on Negligence, secs. 461, 462; Story on Bailments, secs. 63, etc.

(9) The assent of the bailor to any act or omission or conduct, of the bailee, is binding upon the former. *McKay v. Hamblin*, 40 Miss. 472.

(10) A bailor cannot recover for injury by third person to property being used within scope of the bailment where the bailee's negligence contributed to the injury. *Illinois C. R. Co. v. Sims*, 77 Miss. 325; *s. c.*, 49 L. R. A. 322.

(11) Where a bailee, under a special or implied contract for a specific use of property, or for the length of time that it should be used or kept, or for any other conduct respecting the same, violates such agreement, or any instructions concerning it, he is liable for any loss which may happen, usually irrespective of his negligence contributing thereto. *Collins v. Bennett*, 46 N. Y. 490; *McCullough's Lead Co. v. Strong*, 3 J. & Sp. 21; *Ross v. Southern Cotton Oil Co.*, 41 Fed. R. 152; *Keller v. Grath*, 45 Mo. App. 332; *Fidelity Investment Co. v. Carico*, 1 Col. App. 292; *Russell v. Roberts*, 3 E. D. Smith 318; *Anderson v. Foreman*, 1 Wright (Ohio) 598; *Farcas v. Powell*, 86 Ga. 800; *Welch v. Mohr*, 93 Cal. 371; *Murphy v. Kaufman*, 20 La. Ann. 559; *Wilcox v. Hagan*, 5 Ind. 546; *Fox v. Pruden*, 3 Daly, 187; *Lockwood v. Bull*, 1 Cowen, 322.

(12) Bailee for hire is liable for the negligence of his servants, or those under his control. *Sinclair v. Pearson*, 7 N. H. 219. *Hall v. Warner*, 60 Barb. 98; *Smith v. Read*, 6 Daly, 33.

As, if a horse be ridden immoderately by a servant, or the servant negligently leaves open the stable door and theft results; or if the bailment be furniture and the same be injured by bailee's servants, children, guests or boarders, or if injury be done to the property by the negligent acts of the sub-agents of the bailee, the latter is liable. (Story on

Bailments, 89). *Salem Bank v. Gloucester Bank*, 17 Mass. 1. *Dansey v. Richardson*, 25 Eng. L. & Eq. 90; 3 El. & Bl. 722; *Coggs v. Bernard*, 2 Lord Raymond, 909, 910.

Gratuitous bailee was liable for gross negligence of his servants. *Rivara v. Ghio*, 2 E. D. Smith (N. Y.), 264.

SUMMARY.—It will be seen from the above that the rule is practically uniform, *that the bailee must discharge the trust or contract with the prudence and skill which good business men, under the circumstances, exercise*; and whatever refinements may be superadded to this, courts and juries will usually hold the bailee to such care. Hence, the question of a bailee's negligence will be measured by his relation to the bailment, the skill or care that he claimed to have, or held himself out as ready to bestow; or that the law required of him as a public agent, the nature and value of the bailment, the benefit given or received, the usages of business, the custom of the bailee to receive such bailment, the particular conduct of the bailee in the care of the property, the peril attending the execution of the trust; and any special agreement increasing or diminishing his liability. Wharton on Negligence, secs. 468, 473, 476, 501.

In Story on Bailments (8th ed.) sec. 62, after stating that *reasonable care must be taken of the bailment*, it is said that "what is reasonable care must materially depend upon the nature, value, quality of the thing, the circumstances under which it is deposited, and sometimes upon the character and confidence and particular dealings of the parties."

## II. Evidence.

### (a). IN GENERAL.

It is a general rule that the burden is upon the owner to prove that an injury to the subject of the bailment was caused by the failure of the bailee to exercise due care and diligence. *Clafin v. Meyer*, 75 N. Y. 260, and the cases there fully considered. *Harrington v. Snyder*, 3 Barb. (N. Y.) 380. *Buchanan v. Smith*, 10 Hun, 476; Story on Bailments, secs. 397, 399; *Wood v. Remick*, 143 Mass. 453.

See, however, *Logan v. Matthews*, 6 Pa. St. 417; *Fox v. Pruden*, 3 Daly, 187; *Newton v. Pope*, 1 Conn. 109.

### (b). PRIMA FACIE CASE.

#### 1. BY PROOF OF DEMAND AND REFUSAL TO DELIVER.

Proof of failure to deliver on demand makes a *prima facie* case of negligence against bailee. *Fairfax v. New York &c. R. Co.*, 67 N. Y. 11; *Onderkirk v. Central &c. Bank*, 119 N. Y. 263.

A demand is not necessary, unless it be to put the burden of explanation on the bailee. *Clafin v. Myers*, 75 N. Y. 260, 262; rev'g s. c., 11 J. & S. 1.

Proof of deposit for hire with a warehouse company and failure to return, makes out a *prima facie* case against the bailee. *Lockwood v. Manhattan Storage &c. Co.*, 28 App. Div. 68.

Proof of demand and refusal before action brought is necessary in case of naked bailee. *Brown v. Cook*, 9 Johns. 361; *Phelps v. Bostwick*, 22 Barb. 314.

Formal demand of baggage of innkeeper is not necessary. *Cheeseborough v. Taylor*, 12 Abb. Pr. (N. Y.) 227.

Proof that a guest delivered a baggage check to a hotel porter, but could get neither the baggage or the check on demand from the hotel proprietor, makes out a *prima facie* case. *Carhart v. Wainman*, 114 Ga. 632.

Proof of failure to deliver upon rightful demand, constitutes *prima facie* evidence of negligence. *Clark v. Shrimski*, 77 Mo. App. 166.

See, also, *Ross v. Clark*, 27 Mo. 549; *Donlan v. Clark*, 23 Nev. 203.

## 2 BY PROOF OF RETURN IN DAMAGED CONDITION.

Bailee for hire of a wagon, horse and harness returned them in a damaged condition. Plaintiff, having proved the fact, a presumption of negligence arose, which the burden was upon the defendant to rebut. *Rutherford v. Krause*, 55 App. Div. 210.

See, also, *Lyons v. Thomas*, 34 Misc. 175.

In action for conversion for misuse of bailment, the bailor was held not to have made out a *prima facie* case by proof of delivery in good condition and return damaged. In such cases liability for loss is not dependent on want of ordinary care, but is absolute. *Cartlidge v. Sloan*, 124 Ala. 596.

Burden of proof is on bailee to show absence of negligence, where the property is injured while in exclusive custody of himself or agents. *Pusey v. Webb*, 2 Pennewill (Del.), 490.

A *prima facie* case is made by proof of delivery to a warehouseman in good condition and re-delivery damaged, or of the refusal or neglect to re-deliver at all. *Parry v. Squair*, 79 Ill. App. 324.

See, also, *Saunders v. Hartsook*, 85 Ill. App. 55; *Hudson v. Bradford*, 91 id. 218.

A bailor makes a *prima facie* case by proof of delivery in good condition and a return damaged. *Holt Ice &c. Co. v. Arthur Jordan Co.*, 25 Ind. App. 314.

See, also, *Rayl v. Kreilich*, 74 Mo. App. 246; *Crawford v. Cashman*, 82 id. 554.

Proof of return in a damaged condition throws on bailee burden of showing absence of negligence. *Logan v. Mathews*, 6 Pa. St. 417.

(c). REBUTTAL BY PROOF OF LOSS OR INJURY CONSISTENT WITH DUE CARE.

Warehouseman must show loss of goods, consistent with due care, when plaintiff must show that this happened through want of requisite care. *Clafin v. Meyer*, 75 N. Y. 260.

(See opinion in this case, Evidence, post, 130.)

Failure to deliver raises a presumption of negligence; but, being *prima facie*, it is rebutted by proof of loss by that which is apparently an accident, and the burden which continues throughout the trial is on the bailor to show negligence. Building partially destroyed, collapsed while being repaired. It was held error to charge that, on proof of defendant's failure to return the goods, the burden was upon him to show that he acted as a prudent man. *Kaiser v. Latimer*, 9 App. Div. 36.

On a retrial of this case, however, it was held that, while, when loss is accounted for by proof of accident or crime, it is necessary for the bailor still to prove negligence; that proof may be furnished by the character of the accident itself, and the rule *res ipsa loquitur* applied in this case. *Kaiser v. Latimer*, 40 App. Div. 149.

Fire is not such an event as is ordinarily attended with negligence and consequently does not raise a presumption thereof. *Liberty Ins. Co. v. Central &c. R. Co.*, 19 App. Div. 509.

But evidence that a stove was in such a bad condition that live coals had dropped out of it on the floor; that the fire originated about the stove and the freight agent had been notified of such condition, was sufficient proof of negligence to require a submission to the jury. *Grieve v. New York &c. R. Co.*, 25 App. Div. 518.

And evidence that locks of doors of a warehouse were missing or broken, without other proof of robbery or forcible entry, was not proof of a loss under circumstances not ordinarily attended with negligence so as to rebut the usual presumption arising upon proof of failure to deliver. *Lichtenstein v. Jarvis*, 31 App. Div. 33; s. c. aff'd, 164 N. Y. 401.

See, also, *Hoffman v. Coughlin*, 26 Misc. 24.

When delivery of goods by express relieves bailee, see *Rhind v. Stake*, 28 Misc. 177; *Stearns v. Farrand*, 29 id. 292.

Possession as a depositary for hire creates the obligations for care. *Titsworth v. Winnegar*. 51 Barb. 148.

Loss of cotton in defendant's possession by theft and fire was ad-

mitted. No presumption arose that the loss was due to his negligence. The burden was upon the plaintiff to establish negligence. *James Orrell*, 68 Ark. 284.

Grain was delivered to bailee to be threshed. Upon bailor's proof of loss, burden was upon the bailee to show due diligence. *Massillon Engine & Co. v. Akerman*, 110 Ga. 570.

Cotton was sent to be ginned, for hire. It being lost, the burden was upon the bailee to show due diligence. *Concord Variety Works v. Beecham*, 112 Ga. 242.

Proof of loss of bonds deposited for safety without hire, is insufficient. *Levy v. Pike*, 25 La. Ann. 630.

Fact of loss of bonds deposited with a bank for safe keeping without hire, is insufficient to establish negligence where inference of due care might be drawn. *Smith v. First National Bank*, 99 Mass. 605.

See, also, *Foster v. Bank*, 17 Mass. 478.

Samples were sent to bailee for inspection with a view to purchase. No presumption of negligence arose from proof of loss by theft and the burden was upon the bailor to show negligence. *Knights v. Piella*, 1 Mich. 9.

On proof of failure or refusal to deliver on demand bailee must show not only loss but such diligence in their keep as the nature of the bailment required. *Davis v. Tribune & Co.*, 70 Minn. 95.

Where grain in a warehouse was lost through collapse of the building due to a "phenomenal" rise in the Mississippi River, the burden of showing negligence was upon the bailor. *American Brewing Assn. v. Talbot*, 141 Mo. 674.

Bailee of cotton was not *prima facie* liable for the loss of same by fire. *Bryan v. Fowler*, 70 N. C. 596; *Henderson v. Bessent*, 68 id. 22.

Evidence merely of abstraction by an officer of the bank is insufficient. *Foster v. Bank*, 17 Mass. 478; *Giblin v. McMullen*, L. R. 2 P. C. App. 317; unless bank knew the true character of the employé and neglected to remove him. *Scott v. Bank & Co.*, 72 Pa. St. 471.

And so fact that bonds were stolen without bank's fault. *DeHorne v. Kensington Bank*, 81 Pa. St. 95.

Upon admission of possession by a bailee, the burden is upon him to show a re-delivery and acceptance. *Emmerling v. First National Bank*, 97 Fed. Rep. 739.

Property in exclusive possession of bailee was returned damaged in such a way as would not ordinarily occur without negligence. Burden was on bailee to show absence of negligence. *Hildebrand v. Carroll*, 10 Wis. 324.



## (d). BURDEN OF PROVING NEGLIGENCE ON PLAINTIFF.

Although a failure to deliver goods on demand to a bailor raises a *prima facie* case of liability against the bailee, (*Fairfax v. N. Y. C. R. Co.*, 67 N. Y. 11; *Wisner v. Chelsey*, 53 Mo. 547), yet the latter may rebut the presumption by showing that the loss was occasioned by some accident not within the control of the bailee (*Clafin v. Meyer*, 75 N. Y. 60; *Mills v. Gilbreth*, 47 Maine 320; 74 Am. Dec. 487), and then the burden is upon the bailor to prove that this was chargeable to the bailee's negligence. *Russell Mfg Co. v. N. H. S. Co.*, 50 N. Y. 121; *Heinemann v. Heard*, 62 id. 448; *Blant v. Barrett*, 124 id. 117; *Stewart v. Stone*, 27 id. 500.

See, also, *Schwerin v. McKie*, 51 N. Y. 180; *Burnell v. New York Cent. & Co. R. Co.*, 5 N. Y. 184, 189; *Schmidt v. Blood*, 9 Wend. 268; *Steers v. N. Y. C. & Co. R. Co.*, 45 N. Y. 184; *Clafin v. Meyer*, 75 id. 262; *Arent v. Squire*, 1 Daly, 347; *Fox v. Pruden*, id. 187.

Burden of proof is on owner to show that the negligence of hirer of horse was the cause of the injury to the same. *Harrington v. Snyder*, Barb. 380; *Newton v. Pope*, 1 Cow. 109.

Bailor makes a *prima facie* case by proof of delivery to a warehouseman and injury. Bailee rebuts the presumption of negligence by proof of injury by acts not usually attended with negligence. The burden is then upon the bailor to show negligence notwithstanding. *Mautner v. Terminal Warehouse Co.*, 25 Misc. 729.

See, also, *Higman v. Camody*, 112 Ala. 267; *Pusey v. Webb*, 2 Penn. (Del.) 490.

The burden, first is upon bailor to show refusal to deliver upon demand, then the bailee must show excuse therefor, as of a loss, whereupon the bailor must show loss was by lack of due care. *Dinsmore v. Abbott*, 89 Me. 373.

The burden is on the bailee to show loss by theft to excuse failure to deliver; but on proof thereof, the burden is upon the bailor to show lack of due care. *Knights v. Piella*, 111 Mich. 9.

## III. Hiring.

Any damage befalling a chattel while in the hands of a bailee, without his misconduct, and while the chattel is employed in the use for which it was bailed, must be sustained by the bailor. So, if a horse be hired to go a journey, and, during the due prosecution of the journey, without any ill treatment by the hirer, become lame, the hirer is not answerable for damages. *Millon v. Salisbury*, 13 Johns. 211.

Not error to charge that the jury are to decide whether defendant,

hirer of a horse, had used due care; *what is due care is for the court* *Rowland v. Jones*, 73 N. C. 52.

(For Rule of Negligence, see *ante*, p.103, Rule 6.)

(a). DUTY AND RISK OF BAILOR.

While the burden of proof rests upon a bailor charging negligence against the bailee where goods in his hands have been injured by accident, proof of the nature of the accident may afford *prima facie* proof of negligence, so as to require proof from him to counteract its effect.

Where, in an action for services and materials furnished to defend ant's yacht, the latter alleged damage to have resulted from plaintiff's negligence in the performance of a contract to take care of the yacht while out of commission, held, that proof of the condition of the yacht when delivered to plaintiff, the nature of injuries, subsequently sustained, and that they were not the result of ordinary wear and tear, made out a *prima facie* case of negligence against the bailee.

Testimony of an expert as to whether injuries shown to have been sustained by the yacht were the result of ordinary wear and tear was competent evidence. *Wintringham v. Hayes*, 144 N. Y. 1.

The plaintiff hired a horse of this defendant, and in reply to his inquiry if the animal was all right, was told, that he was "just a little 'skeery.'" After proceeding about one and a-half miles the horse shied, started up, turned around, and ran down a hill, until the plaintiff checked him, thereupon he turned around again and upset the wagon. The defendant admitted that he knew the horse would shy and turn around. He was legally liable for damages to the plaintiff, and for failure to impart his knowledge of the vivacious propensities of the horse. *Kissam v. Jones*, 56 Hun, 432.

A foundry company was not liable for the destruction of patterns by fire having exercised due care in the absence of a special agreement to insure. *Coldwell-Wilcox Co. v. Sullivan*, 3 App. Div. 359.

Plaintiff sought to recover of defendant from whom he hired a saddle, for injuries sustained, by reason of the saddle's being improperly adjusted and in dangerous condition to ride. But, it appearing that he had notice of the fact and attempted to readjust it, his proceeding on his ride after failing to remedy the defect was contributory negligence, by reason of which he could not recover. *Wilson v. Dickel*, 7 App. Div. 175.

One who takes a horse on trial, with a view to its purchase, and returns it in a damaged condition, is liable for the injury, unless he can account for the injury which caused it and show that it was without fault on his part, or that he used such ordinary care that the proper inference would be that the injury was unavoidable.

Defendant, who wanted a horse, took a horse from plaintiff on trial, and returned it with a fractured leg. In an action for his value, defendant testified that the horse was excited and would rear when he met bicycles, that, notwithstanding this, he rode him for about sixteen miles, and jumped him over a fence, that he became lame when near home and that defendant then dismounted and led him; that it was not his way to take a horse off on a side road when he became frightened at bicycles, but he would conquer the horse or be conquered by him, and that he did not recollect of the horse injuring himself. There was also evidence to show that a horse might sustain wounds or fractures in the hands of a careful driver who might not know or perceive it at the time. Whether the defendant used ordinary prudence in riding and managing the horse was for the referee. *Nichols v. Balch*, 8 Misc. 452. (New York Superior Court.)

Bailor hired a coach to a club when it was in an unsafe condition. Was liable to a guest of one of its members. *Glenn v. Winters*, 17 Misc. 597.

Lessor of a bicycle in a dangerous condition, was liable for injuries caused thereby within the period of bailment. *Moriarty v. Porter*, 22 Misc. 536.

An owner of a horse known to be breachy should contract for greater diligence, if he desires to have more than ordinary care bestowed on him. *Mansfield v. Cole*, 61 Ill. 191.

Owner of horse cannot recover for its death, when hirer overtasked it to accomplish only what owner contracted for it to perform. *Ruggles v. Fay*, 31 Mich. 141.

#### (b). DUTY AND RISK OF BAILEE.

A bailee is liable for any neglect of such care as is usual with good and careful hostlers, or owners of horses. Wharton on Negligence, sec. 715, note 3.

It is negligent to use a horse which refuses its food from fatigue. Wharton on Negligence, sec. 715, citing *Bray v. Mayne*, 1 Cowen, 1; *Eastman v. Sanborne*, 3 Allen, 595; *Edwards v. Carr*, 13 Gray, 234.

A hirer of a horse is liable to its owner for damage caused by improper harnessing by a hostler, to whose care hirer committed him. *Hall v. Warner*, 60 Barb. 198.

A tailor was not allowed to recover for labor performed on defendant's garments, destroyed by fire, while in his possession, after date agreed for delivery, though the fire occurred without his negligence. *Cohen v. Moshkowitz*, 17 Misc. 389.

See, also, *Kafka v. Levensohn*, 18 Misc. 202.

An agreement by bailor to send for the goods bailed does not change the bailee's common law duty to return, save to impose the condition of notice. *Gleason v. Morrison*, 20 Misc. 320; aff'g s. c., 20 Misc. 4.

Request to forward did not relieve bailee from failure to deliver, where it was not properly complied with. Statement by bailor that a certain express company went her way, was no authority to accept its receipt limiting its liability. *Rhind v. Stake*, 28 Misc. 177.

Forwarding by the only express available, was a compliance with bailor's directions to send the goods by express, and relieved bailee of responsibility. *Stearns v. Farrand*, 29 Misc. Rep. 292; aff'g s. c., 59 N. Y. Supp. 384.

Delivery of goods bailed for custody to, or suffering a third person to take the same, is a conversion. *Lockwood v. Bull*, 1 Cowen, 322.

But after tender to owner, gratuitous bailee lawfully removed goods into a public highway. *Roulston v. McClelland*, 2 E. D. Smith, 60.

Gratuitous bailee cannot sell property without notice to bailor for non-removal of same, but should, within a reasonable time after notice to remove, store it at bailor's risk. *Dale v. Brinckerhoff*, 7 Daly, 45.

Nor may he charge the bailor an extravagant price for keeping same. *Hazeltine v. Weld*, 73 N. Y. 156.

Bailee was negligent in using a barge after discovering that it leaked dangerously, without repairing it or notifying the bailor, and was liable to the bailor for the resulting damages. *Higman v. Camody*, 112 Ala. 267.

Delivery of certificates to a bank to be delivered over upon payment to it of a price, was not a gratuitous bailment but a lucrative one, in which the bailee was liable for the loss of such certificates through the lack of ordinary care. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520.

Plaintiff left his horse to be shod. Shoer permitted one employed in an adjoining shop as a wheelwright, but with sufficient experience in shoeing, to do the job. Injury was due to the horse's restlessness, suddenly and without warning jumping while in the act of having her feet trimmed. Defendant was not negligent. It would be otherwise, however, it seems, had the injury been due to the assistant's incompetence. *Pusey v. Webb*, 2 Pennewill, (Del) 490.

If a hirer of a horse continues to use him after he knows him to be sick, he is liable for injuries sustained. *Thompson v. Harlow*, 31 Ga. 348.

Bailor directed the delivery of his cattle by the bailee, a stockyard company, to his purchaser; delivery to one recognized by the latter to be such, was not negligence. *Union Stockyard &c. Co. v. Mallory Co.*, 157 Ill. 554; rev'g s. c., 54 Ill. App. 170.



Bailee receiving grain to be malted was not liable for loss by fire, which was not due to any lack of due diligence. *Standard Brewery v. Hales &c. Malting Co.*, 70 Ill. App. 363; s. c. aff'd, 171 Ill. 602.

A bailee for hire must comply with the conditions of the bailment. In failure to comply, a promise to perform puts him in no better position than a refusal to perform. *Kansas Elevator Co. v. Harris*, 6 Kan. App. 89.

Bailee of horse to train so used it that it died. Was liable for the lack of ordinary care. *Kimball v. Dahoney*, (Ky.) 38 S. W. Rep. 3.

The hirer of a horse is liable for its full value, if it becomes sick by reason of improper care; and if owner used reasonable care in the selection of a surgeon, he is not defeated in his action because the surgeon was unskillful. *Eastman v. Sanborne*, 3 Allen, 594; *Edwards v. Carr*, 3 Gray, 234; *Mooers v. Larry*, 15 id. 451. See *Strong v. Connell*, 115 Mass. 575.

Dressmaker made up a dress from a customer's material, wrong side out. Was liable for the negligence though she received no instructions. *Lincoln v. Gay*, 164 Mass. 537.

A printer to whom plates had been delivered to print left them lying on the window sill in the shop from which they were stolen. Was liable for negligence. *Davis v. Tribune &c. Co.*, 70 Minn. 95.

A person who hires a barge is not liable for its destruction by ice, unless such liability is expressly set forth in contract of hire. *McEvers v. Mangamon*, 22 Mo. 187.

Hirer of a team failed to use ordinary care in its use. Was liable. *Turnell v. Minor*, 49 Neb. 555.

A hirer of a horse is not liable to the owner for injuries caused by immoderate driving, where owner sent his own driver. *Hayes v. Boyer, Watt* (Pa.) 556.

Bailees of goods for storage took out insurance on them and collected upon their destruction by fire. Was liable to the owner therefor. *McDonald v. Palmer*, (Tenn.) 48 S. W. Rep. 338.

It is not negligence as matter of law to drive a horse after it has become sick or exhausted. *Spencer v. Shelburne*, 11 Tex. Civ. App. 521.

Lessee of a soda fountain failed to properly pack and crate it, whereby it was injured in transportation. Was liable. *Phillips v. Hughes*, (Tex. Civ. App.) 33 S. W. Rep. 157.

Where goods loaned for exhibition, at which fees for admission were charged, were destroyed by fire while on storage after the exhibition had closed, the bailor did not recover for the loss through the failure to provide a fire extinguishing apparatus, without showing the duty to

maintain it. *World's Exposition Co. v. Republic of France*, 91 Fed. Rep. 64; rev'g s. c., 83 id. 109.

As to the validity of a provision in the exhibition regulations exempting the company from liability for loss of exhibitor's goods, see *World's Columbian Exhibition v. Republic of France*, 96 Fed. Rep. 687.

(c). DEVIATION FROM CONTRACT BY BAILEE.

Where plaintiffs had hired out their barge to be used only as a *receiving* barge in the dock, and it was used by the defendants as a *transporting* barge, and was thereby sunk, held, that the defendants were liable in an action in the nature of trover for the value of the barge, independently of any question of negligence. *Beach v. Raritan & Delaware Bay R. Co.* 37 N. Y. 457, rev'g judg't for pl'ff.

Bailee for hire used horse contrary to instructions and burden was on him to show that defect arose without negligence on his part. *Collins v. Bennett*, 46 N. Y. 494.

Citing Story on Bailments, secs. 406, 411; *McDaniels v. Robertson* 26 Vt. 340; *Roberts v. Riley*, 15 La. Ann. 103; *Kennedy v. Ashwaft* 4 Bush. (Ky.) 530; *Howard v. Babcock*, 21 Ill. 259; *Buchanan v. Smith*, 10 Hun, 474.

Lessor of a bicycle in a dangerous condition was liable for injuries caused thereby only within period of bailment. *Moriarty v. Porter*, 2 Misc. 536.

Where one used oxen, loaned for a specific purpose, for another purpose, he was liable for injury, and the *presumption was that the injury arose during the improper use*. *Buchanan v. Smith*, 10 Hun, 474.

Keeping horse loaned beyond contract time and after demand, makes bailee liable for conversion. *Fox v. Pruden*, 3 Daly, 187.

As to value of use when article is by oversight not returned. See *Russell v. Roberts*, 3 E. D. Smith, 318.

Where bailee hired horse to go eight miles and went further, and horse died returning, he was liable in trover. *Disbrow v. Tenbroeck*, 4 E. D. Smith, (N. Y.) 397.

Bailee borrowed a mare for light work and used her for heavy work. It was not a hazardous task and was done in a careful manner. He was not liable for negligence notwithstanding the deviation; but he was liable for a conversion, though there was no negligence. *Cartledge v. Sloan*, 124 Ala. 596.

A bailee of a mare to drive three miles, drove instead twelve or fourteen miles, and the mare died the next morning. He was liable, unless he could show that the death was due to other causes than his improper use. *Kennedy v. Ashwaft*, 4 Bush. (Ky.) 530; *Howard v. Babcock*, 21 Ill. 259.

Where defendant received a mare under implied promise to use her and return within a reasonable time, and failed to comply, he should be sued for breach of contract, not in tort. *Wilcox v. Hagan*, 5 Ind. 546.

See, also, *Collins v. Bennett*, 46 N. Y. 490; *McCullough's Lead Co. v. Strong*, 3 J. & Sp. 21; *Ross v. Southern Cotton Oil Co.*, 41 Fed. Rep. 152; *Keller v. Grath*, 45 Mo. App. 332; *Fidelity Investment Co. v. Carico*, 1 Col. App. 292; *Bradley v. Cunningham*, 61 Conn. 485; *Farcas v. Powell*, 86 Ga. 800; *Welch v. Mohr*, 93 Cal. 371; *Murphy v. Kaufman*, 20 La. Ann. 559.

If a hirer of horses violates the contract of hire, he will be liable for their loss; so where horses hired to go to "A" were driven beyond "A," to "B," and lost, hirer was liable. *Murphy v. Kaufman*, 20 La. Ann. 559.

Bailee of a horse for light work only was liable for lack of care in letting it to another who killed it by over driving. *Pelton v. Nichols*, 180 Mass. 245.

Where bailee, to carry bank notes for another, used the same, substituting other money therefor which was stolen, he was liable. *Anderson v. Foreman*, 1 Wright, (Ohio) 598.

Bailee was liable for the death of a horse driven beyond the distance for which she was hired, though he had used due diligence. *Evertson v. Frier*, (Tex. Civ. App.) 45 S. W. Rep. 201.

Bailee was liable for the death of a horse kept beyond the time for which he was hired; though otherwise he was guilty of no negligence. *Cochran v. Walker*, (Tex. Civ. App.) 49 S. W. Rep. 403.

#### IV. Agistor, and Stable Keeper.

Agistor, not knowing that the pasture, previously occupied by Texan cattle, would infect native cattle pastured there, is not liable for negligence in receiving such cattle for pasture. *Gibbs v. Coykendall*, 39 Hun, 140; s. c. aff'd, 116 N. Y. 666.

An agreement by the plaintiff to pasture the defendant's cattle is no defense to an action for trespasses committed by the cattle in the plaintiff's garden and oatfield, unless the agreement is shown to be one to pasture them in the garden and oatfield, or unless it is shown that the cattle strayed to those places through some fault of the plaintiff. *Myers v. Parker*, 74 Hun, 129.

A mare, left with the owner of a stallion for the purpose of breeding and incidentally for pasturage, was injured by a barbed wire fence. The question of whether ordinary care had been used was left to the jury. *Saunders v. Hartsook*, 85 Ill. App. 55.

An agistor of cattle received them in good condition, but returned them damaged. Negligence was presumed and the burden was upon him to show due diligence. *Hudson v. Bradford*, 91 Ill. App. 218.

The burden of proof is upon the owner of cattle to show that death or injury to same arose from the negligence of the bailee. *Wood v. Remick*, 143 Mass. 453.

An agistor is liable for only ordinary care in preventing the escape of cattle. *Rayl v. Kreilich*, 74 Mo. App. 246.

During the removal with due care of cattle from one pasture to another on account of the failure of water, a steer was struck by lightning. Agistor was not liable as he is not an insurer. *Crawford v. Cashman*, 82 Mo. App. 554.

A person keeping cattle for another must furnish reasonable and ordinary feed, and use reasonable and ordinary care to protect them. *Calland v. Nichols*, 30 Neb. 532.

An agistor turned a cow requiring attention into a wood lot, wherein she hid and died from lack of attention. Held negligent. *Deyer v. Ackley*, 6 N. J. L. J. 283.

Agistor must use ordinary care. *Morgan v. Crocker*, 3 S. C. 301.

An agistor is bound to maintain a legal fence about a pasture. *Lucia v. Meech*, 68 Vt. 175.

#### STABLE-KEEPER.

A stable-keeper should use the care and diligence of an ordinary bailee for hire. See Wharton on Negligence, sec. 693, and cases cited.

Stable-keeper in charge of horses should, when they become sick, give them proper treatment, or at once notify the owner. *Hexamer v. Southall*, 49 N. J. L. 682

### V. Loans

Evidence as to the dangerous character of a ram and of its owner's knowledge of it was conflicting, but the plaintiff and her son knew that the ram, which had been loaned them and allowed by them to run at large, was usually kept tied. The court erroneously refused to leave the question of the plaintiff's contributory negligence, in the care of the ram, to the jury in an action for personal injuries. *Barlow v. McDonald*, 39 Hun, 407.

An association was liable for the loss of an animal loaned to it for exhibition, which escaped through lack of care in caging it. *Moeran v. New York Poultry &c. Asso.*, 28 Misc. 537.

Borrower must exercise care of most prudent persons in the management of their own affairs. Burden of proof is on the borrower to show



that a loss resulted notwithstanding such care. *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5.

Defendant was gratuitously intrusted with money to be loaned. He failed without excuse to take security or collect it when it became due. Such action was gross negligence for which he was liable. *Samonset v. Mesnager*, 108 Cal. 354.

The borrower of a horse is bound to greater care than a hirer. *Howard v. Babcock*, 21 Ill. 259; *Bennett v. O'Brien*, 37 id. 250.

A bailment for sole benefit of bailee imposes upon him responsibility for slight neglect. *Wilcox v. Hogan*, 5 Ind. 546.

If article loaned perish, or is lost or is damaged without fault of borrower, owner must bear the loss; as, in case of plaintiff's mare dying while in defendant's charge, question of defendant's negligence is for the jury. *Woods v. McClure*, 7 Ind. 155.

More than ordinary care is required by law in the case of a loan. *Green v. Hollingsworth*, 5 Dana (Ky.), 173.

No recovery for conversion of a chattel borrowed, on proof of mere failure to return the article; a demand must be shown. *Ross v. Clark*, 27 Mo. 549.

The borrower is liable in damages for a chattel stolen from him, nothing being shown to excuse him. *Chiles v. Garrison*, 32 Mo. 475.

Servant of borrower was injured by a defect in brackets gratuitously loaned, of which the lenders were ignorant. The lenders were not liable. *Gagnon v. Dana*, 69 N. H. 264.

The owner of an exhibition building failed to provide fire extinguishing apparatus. It was not an insurer; such failure was not lack of due care, and it was not liable to one losing by fire goods loaned for exhibit. *World's Col. Exhibition Co. v. The Republic of France*, 91 Fed. Rep. 64, rev'g s. c., 83 id. 109.

Pledgee of stock was not negligent in failing to make arrangements with the corporation issuing it whereby the pledgor lost the benefit of the latter's reorganization. *Griggs v. Day*, 21 App. Div. 442; s. c. rev'd on another point, 158 N. Y. 1.

Pledgee's attorney upon selling the stock pledged, sent the pledgor a newspaper clipping of the auctioneer's advertisement of sale, containing a list of certain securities among which the pledgor's was included without other identification than their designation as "53 shrs. United States Printing Co.," with a mark in ink opposite it. Held, not a compliance by the pledgee with his duty to notify the pledgor before selling the goods pledged. *McCutcheon v. Dittman*, 23 App. Div. 285; s. c. aff'd, 164 N. Y. 355.

A bank to whom transfers of land certificates had been sent by a

pledgee to deliver to another, on collection of debt for which they were collateral, lost them through the lack of ordinary care. Pledgee's failure to have such transfers recorded as required by statute did not prevent his recovery against the bank. *First National Bank v. First National Bank*, 116 Ala. 520.

By false personation, a party procured goods which he induced defendant to take as security for a loan, under circumstances which put the latter upon notice. Defendant did not make reasonable inquiry and was not a *bona fide* purchaser. *Morning Star v. Sterne*, 124 Ala. 512.

Pledgee of a promissory note without authority, compromised with its maker. He was held liable to the pledgor for the true value of the note. *Union National Bank v. Post*, 64 Ill. App. 404, 407.

Exemptions from liability for loss by fire in pawn ticket must be considered in estimating pawnbroker's liability. *Oberman v. Reece*, 95 Ill. App. 645.

Pledgee was held liable for interest on neglected security, which, but for his negligence, might have been collected. *Mansur-Tebbetts Implementation Co. v. Carey*, 1 Ind. Terr. 572.

Pledgee was not liable for failure to protect his pledgor's interests by watching debtor to prevent fraud, as the pledgor was not precluded from protecting it. *O'Kelly v. Ferguson*, 49 La. Ann. 1230.

Makers of a note pledged were insolvent at such time as it should have been collected. Pledgee who had lost the note was not chargeable with failure to collect it. *Spencer v. Plano Man. Co.*, 79 Minn. 35.

Where pledgee sells stock for the best price that can be obtained, which is the full market value thereof, he has discharged his duty. *Hewitt v. Steele*, 136 Mo. 327.

Pledgee failed to obtain security for notes pledged that could have been obtained. The omission was waived by their acceptance by pledgor without objection. Pledgee was not responsible for delay, as pledgor could have obtained security without their possession. *Silvey v. Axley*, 118 N. C. 959.

Pledgee was not responsible for lack of due diligence in realizing on securities which were never put in his possession or control. *Dean v. Church*, 3 Lack. L. News, 224.

Pledgee of notes collectable at a distant point through incidental legal proceedings, was not liable for the negligence of his attorney, where he exercised due diligence in the latter's selection. *Plymouth County Bank v. Gilman*, 9 S. D. 278.

Pledgee of a note, whose maker had conveyed his property to a *bona fide* creditor, surrendered it in exchange for one apparently more valuable. There was no negligence making him liable to the pledgor. *Hanover Nat. Bank v. Brown*, (Tenn.) 53 S. W. Rep. 206.

Owner, failing to reserve title or lien, vendee pledged goods on the representation that they were his, and paid for. Pledgee was not put on inquiry as to pledgor's title by knowledge of the latter's insolvency gained by his willingness to borrow at usurious rate. *Fischer v. Lee*, 98 Va. 159.

Pledgee must be diligent, in preventing outlaw of the security. But is not bound to foreclose security upon non-payment of one of several notes, where that would curtail his ability to provide for the rest. *Northwestern Nat. Bank v. Thompson &c. Man. Co.*, 71 Fed. Rep. 113.

Pledgee was not liable for selling stock at a price, pledgor, neither knowing the possibility of an enhancement, had previously stated would be satisfactory. *Smith v. Lee*, 84 Fed. Rep. 557.

A payee of note, by releasing, without the consent of makers, a judgment pledged as collateral, becomes liable for the value thereof as payment upon the note. *Brown v. First National Bank*, 112 Fed. Rep. 901.

Creditor is liable if loss results from allowing notes given for collateral security to become barred by the statute of limitations. *Farm Inv. Co. v. Wyoming &c. School*, (Wyo.) 68 Pac. Rep. 561.

## VI. Banks—Deposit of Securities with.

### (a). GRATUITOUS BAILEE.

If a banking corporation, organized under the "national currency act" of 1864 (13 U. S. Stat. at Large, 99), has authority to assume the duties and obligations of a naked bailee of property, either gratuitously or for hire (as to which, *quaere*), it is outside of its ordinary business, and it is not within the scope of the general powers or apparent authority of its executive and ministerial officers to bind the corporation by a contract for such a bailment.

In the absence, therefore, of proof that special authority has been delegated by its board of directors, or has been exercised with their sanction or knowledge or of evidence that it has been the habit and practice of the corporation to receive property for safe keeping, it is not responsible for property so received by its cashier.

Neither a corporation nor an individual is responsible for neglect in protecting property of which he, or it, has not assumed the custody or any relation of duty or trust in regard thereto.

A circular, issued by such a corporation inviting the correspondence of other banks and offering to buy and sell securities for them, is no evidence of a consent, on its part, to become a general bailee and depository of such securities for its correspondents.

*There is no distinction between a deposit for safe keeping of United*

*States bonds and a deposit of other valuable property* and the provision of said national currency act (secs. 31, 32), authorizing the association organized under it to keep one-half of the required "lawful money reserve" in cash deposits in the city of New York, do not authorize the deposit, or the receipt by a national bank in the city of New York, of such bonds as a part of such reserve.

A gratuitous bailee is only liable for gross negligence. He is not bound to resort to any special or extraordinary measures for the security of the property intrusted to him.

In an action for the loss of property intrusted to him, evidence of independent acts of negligence not connected with the loss, is inadmissible.

So, also, evidence is improper tending to show that the property was exposed to loss from some unusual cause, of which he had no knowledge. He is only called upon to protect it against risks known or of which he had notice.

In an action against a national bank, as *gratuitous bailee of property* which had been stolen by burglars, a witness, who had testified to conversations with defendant's president, in which he notified him of attempts by burglars to enter the bank and of indications of an intended robbery, and urged upon him the necessity of greater care, was permitted to testify, under objection that the president, after the burglary, requested him not to mention such conversations. Held, error; that the evidence was only material as an admission of culpable negligence on the part of the president; and that his acts and declarations after the transaction and when not acting within the limit of his authority, were not binding upon and could not affect the defendant. *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278; distinguishing, *Van Leuven v. First National Bank*, 54 id. 671.

**From opinion.**—"Whatever may be the extraordinary or incidental powers of the corporation under its charter, power to bind the corporation can only be presumed to exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties. *Life and Fire Ins. Co. v. Mech. Fire Ins. Co.*, 7 Wend. 31; *Minor v. Mech. Bank of Alexander*, 1 Pet. 46; *Hoyt v. Thompson*, 1 Seld. 320; *Leggett v. N. Y. Manf. Co.*, Sandf. Ch. 541.

The powers of the corporation defendant are banking powers only, with such incidental powers as may be necessary to carry on the business of banking, with the privilege of buying and selling exchange, coin and bullion. This does not necessarily include the business of a safe deposit company, or business of receiving for safe-keeping, and storing for hire, or without compensation, jewelry and valuables, or property of any kind. If the power exists in the corporation as part of its franchise it is only as an incident of its principal business. The duties of the executive officer of a banking corporation who is ordinarily the cashier are very well understood, and while those of the president are not so well defined



he is but the executive agent of the board of directors, to perform such duties as may be devolved upon him, and is not the corporation, and cannot take the place of the governing board, and make contracts or incur liabilities outside of the ordinary business of the bank without special authority. The corporations formed under the currency act are banks of deposit as well as circulation. They are authorized to issue their own notes for circulation and to receive from others their money and circulate it. Money so received from others is termed a deposit, although it has none of the qualifications of a bailment. There is no trust or promise to redeliver the same money. By the deposit the money becomes the property of the bank, and the relation of debtor and creditor is created between the depositor and the bank. *Commercial bank of Albany v. Hughes*, 17 Wend. 94; *Marine Bank v. Fulton Bank*, 2 Wallace, 252. This is the character of the deposit which, by the currency act, the defendant was expressly authorized to receive, and in receiving such a deposit the cashier would be acting within the scope of his authority, and the bank, by his act, would become a debtor to the depositor.

The principal attributes of the bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money. Per *Spencer, J.*, 15 J. R. 390; *N. Y. Firemen's Ins. Co. v. Fly*, 2 Cow. 673, 710. \* \* \*

The deposit of these bonds cannot be distinguished from a deposit of jewelry or plate, or other valuable property, and was a special transaction not within the ordinary course of business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducements to burglars and robbers from without, and might prove of greater temptation to dishonesty, on the part of the clerks and employes within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation by the executive officers, or without the special authority of the board of directors, and a single transaction was without the general scope of the powers and duties of the executive officers of the institution.

*Giblin v. McMullen*, L. R. 2 P. C. Cases, 327, was an appeal from the Supreme Court of Victoria. The defendant represented the Union Bank of Australia, and no question was made as to the authority of the manager of the bank to receive the special deposit; and it is expressly said that the railway debentures, which were stolen by the cashier, were placed in the defendant's care by a customer, in the ordinary course of their business as bankers. The case turned upon the liability of the bailee for a theft by the officers of the bank, and the court following *Foster v. Essex Bank*, 17 Maas. 479, held the defendant not liable. *Foster v. Essex Bank* was a special deposit of coin, and the bank was held to be the depositary, rather than the cashier or other officers, although not held liable in the action, on the ground of a general recognition and authorization of the practice by the directors, and *Parker, C. J.*, places the responsibility of the defendant solely on that ground; and applying the principles of master and servant, and deducing the relation of bailor and bailee, says: 'Not so, if the servant secretly, and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties.'

*Scott v. National Bank of Chester*, 72 Penn. St. 471, followed the case last cited,

in principle. A case very analogous to, if not in all respects like this principle was *Lloyd v. West Branch Bank*, 15 Penn. St. 172, and it was adjudged that the cashier had no authority to receive, as a special deposit, a sealed package of small notes, issued by a corporation, without authority of law, and that if so received, without the permission of the directors, or their knowledge of any usage or practice to receive such packages on deposit, the law would not imply a contract on the part of the corporation with the depositor for the safe keeping of the package. Coulter, J., says, that, 'It was never designed by the provisions of the statute that the bank should be converted into a kind of pawnbroker's shop.' The case turned upon the point as expressed by the court, that there was 'no evidence that the bank made any contract with Oliver (the depositor) express or implied.' The whole tenor of authority is in favor of holding corporations for the acts of their officers, especially executive officers and general agents within the general scope and apparent sphere of their duties, and not holding them for acts done without special authority in cases without such general scope and sphere of duty. The cases are all reconcilable and sustainable on this principle and no other. Courts and judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations for the acts of their officers and agents, in the absence of an expressed authority to do the particular act, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties. Such are presumed to be by authority of and within the knowledge of the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business. The duties of the cashier are well understood, and as recognized judicially, are restricted to the care and management of the property and fiscal concerns of the bank, and the conduct of its business as a bank, in the usual and ordinary way. Story on Agency, sections 114, 115; *Badger v. Bank of Cumberland*, 27 Maine 428; *Merchants v. State Bank*, 10 Wallace 604; *Bank of Genesee v. Patchin Bank*, 3 Ker. 309. The president and cashier of a bank cannot assign the choses in action of the corporation to its creditors as a security for the payment of a precedent debt, without authority from the board of directors. They can do no act outside of their ordinary duties in the conduct and management of the banking business, unless by authority, either express or implied from the fact that they have been permitted to do the like acts without objection. *Hoyt v. Thompson*, 1 Seld. 320. Judge Wayne, in *United States v. City Bank of Columbus*, 21 How. U. S. 356, says: 'The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives, directly or through the subordinate officers of the bank, all the money and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank when they have been deposited, and, as the executive officer of the bank, transacts most of the business.' After this summary of the duties and powers of the cashier, the same judge says that he may not make any contract involving the payment of money not loaned in the usual or customary way, or purchase or sell property, or create any agency of any kind for the bank,

essly authorized by those to whom has been confided the power to business of the bank, both ordinary and extraordinary. Judge Story authority of bank officers, to bind the corporation, to acts and con- in the ordinary sphere of their duties, and the scope of the ordinary Minor v. Mech. Bank of Alexandria, 1 Peters 46, 70; Fleckner v. ited States, 8 Wheat. 338; see, also, Fulton Bank v. New York and al Co. 4 Paige 127. The doctrine of estoppel may give effect to the officers of a corporation as against the corporation, as in other cases and agent. Farmers and Mechanics' Bank v. Butchers and Drovers' Y. 125. But there is no question of estoppel in this case.

cases were cited by the learned counsel for the plaintiff, which do rectly bear upon the question under consideration. They are those tatutory power has been conferred and has been executed, apparently terms and in the manner and by the agents prescribed by statute, mption has been allowed in favor of those who have in good faith the apparent compliance with the statute and the terms of the cases are circumstantially different, but all may be brought within principle, and they do not conflict with the views before advanced. rs of Knox County v. Aspinwall, 21 How. 539; Royal British Bank , 5 E. & B. 248; s. c., 6 id. 327; Commonwealth v. Pittsburgh, 34 6; Farmers' L. & T. Co. v. Curtis, 3 Seld. 466, are among the cases nsel, and illustrate the principles governing all. They do not touch e upon which this branch of the present appeal rests.

l principle was decided in Van Leuven v. First National Bank of t N. Y. 671. By a divided court it was held that the contract in nder the peculiar circumstances, was the contract of the corporation, individual contract of the president. The question now under con- as not considered by the learned commissioner, and does not appear a made in the action.

errestly and ably urged upon the court by the counsel for the plain- e corporation was liable as a wrongdoer or tort feisor within the Philadelphia, Washington and Baltimore Railroad Company v. How. (U. S.) 202, and other cases which were cited, in which the s applied under different circumstances. The difficulty with this , that there was no wrong by the corporation, and could be none, s no contract. If there was no bailment to the corporation it duty, and was guilty of no negligence. The whole duty of a bailee contract, and if there was no contract there was no duty. Neither n or individual can be called upon to pay that which he or it does d neither is responsible for want of care or for neglect in protecting which he or it has not assumed the custody, or any relation of t in respect to it.

rrived at the conclusion that if the power of the corporation to as- osition of bailee, with its responsibilities and obligations, be con- was no evidence of the delegation of the power to the executive rior officers of the bank, and that for that reason the judgment eversed and a new trial granted. it is unnecessary to consider the ck of it as to the power of the corporation itself in that direction. sition not free from difficulty, but can be more satisfactorily con- n it becomes (if it shall) necessary to a judgment."

The last case came a second time to the court of appeals, and the following is the decision:

Bonds were received by a national bank and placed in a safe, the door of which was sometimes open, and became thereby exposed to persons from the street and was not always kept in view of the bank employees. No account was given of the disappearance of the bonds, but they, together with some belonging to the bank, were stolen. The question of the bank's negligence was for the jury.

National banks have power to receive special deposits gratuitously or otherwise, and when received gratuitously they are liable for their loss by gross negligence. When a national bank has habitually received such deposits this liability attaches to a deposit received in the usual way. The term "special deposits" includes money, securities and other valuables delivered at the bank to be specifically kept and re-delivered, and is not confined to securities held by banks as collaterals to a loan.

The fact that property of the bank was stolen from the same place, at the same time, was not conclusive against the charge of gross negligence. *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Griffith v. Zipperwieser*, 28 Ohio St. 388; *Tracy v. Wood*, 3 Mason 132; *Wilson v. McIntosh*, 1 Stark (N. P.) 237; *Bank v. Gorham*, 79 Pa. St. 106.

As to whether, assuming the receipt of special deposits to have been beyond the legal power conferred upon the defendant, yet having in fact received plaintiff's property into its custody, it could set up its own want of corporate power as a defense, *quaere*. *Pattison v. The Syracuse National Bank*, 80 N. Y. 82, aff'g judgt for pl'ff, distinguishing *Lloyd v. W. B. Bank*, 15 Penn. St. 172; distinguishing and limiting *F. N. Bank v. O. N. Bank*, 60 N. Y. 278; and disapproving *Wiley v. F. N. Bank*, 47 Vt. 546; 50 id. 389.

**From opinion.**—"In the leading case upon the subject, *Foster v. Essex Bank*, 17 Mass. 479, A. D. 1821, where a special deposit had been made with the defendant, of a cask containing gold coin, it was shown that it had been the practice of the bank to receive special deposits of money and other valuable things, but there was no regulation or by-law or provision of the charter upon the subject. \* \* \*

The court held that the practice of the bank having been to receive such deposits, and its building and vaults having been allowed to be used for that purpose, and its officers employed in receiving into custody the things deposited, the corporation must be deemed the depository, and not the cashier or other officer, through whose particular agency the property had been received into the bank.

The next case on the point is *Lloyd v. The West Branch Bank*, 15 Penn. St. R. 172, decided in 1850. It was there held that the power to receive deposits conferred on the bank by the Pennsylvania banking law, referred to deposits of current money received as such, and not to special deposits. But the court, although indulging in some strong expressions, indicative of an opinion that



did not intend to confer power, states the question to be, whether any such *general custom or practice of the cashier of the bank to voluntary bailee without regard, as to make the bank liable for his decision rests upon the want of evidence to make any such practice.* was undoubtedly correct in holding, as it expresses itself, that it intended that banks should be turned into pawnbrokers shops, or reposes on deposit. But the case is not an authority for the proposition that a bank is in the habit of receiving on deposit coin or other valuables as usually the subject of special deposits in banks, it will not be the act of its officers in receiving them.

In other cases in the same state, the doctrine of *Foster v. Essex Bank* is recognized, and applied to national banks. In *Lancaster Co. Bank v. Smith*, 62 Penn. St. R. 47, where a special deposit of United States bonds had been made with the bank by delivering them to the teller, the teller had subsequently delivered them to a third party, supposed to be a thief, but without ascertaining his identity, the bank was held liable. In *Lloyd v. West Branch Bank* was referred to, but the power of the bank to bind itself by receiving the deposit was not disputed, and it was held that it was a question for the jury whether the bank had been guilty of negligence.

In *Wells v. National Bank of Chester Valley*, 72 Penn. St. R. 471, the facts were identical with those in *Foster v. The Essex Bank*. A special deposit of bonds for safe keeping had been made with the defendant by one of its officers, and the bonds were stolen by the teller of the bank, but *no negligence on the part of the bank was established and a verdict for the defendant was sustained.* The receipt of the bonds was not claimed to be a receipt for the bonds.

In *First National Bank of Carlisle v. Graham*, 79 Penn. St. R. 106, the plaintiff claimed for the loss of United States bonds claimed to have been delivered to the bank, and relied upon a receipt for the bonds, signed by the cashier of the bank, in which he acknowledged that she had left the bonds in the bank for safe keeping. It was admitted that *government bonds were deposited by the bank for safe keeping, with the knowledge of the president, the cashier, and the teller, and without compensation.* A verdict and judgment having been rendered for the plaintiff, it was reversed on exceptions to ruling on questions of negligence, and to some portion of the charge in submitting to the jury that the bank was negligent, but on the point of liability of the bank, *the doctrine of Foster v. Essex Bank was emphatically reiterated,* and it is stated that the doctrine has been uniformly applied in the supreme court of Pennsylvania in cases involving the rights and duties of national banks.

In *Smith v. First National Bank of Keokuk*, 26 Iowa 562, the liability of the bank for a special deposit of bonds was also recognized. *Smith v. First National Bank of Westfield*, 99 Mass. 605, was also a case of a special deposit of bonds with a national bank, and the bank was held to be bailee of the bonds, and liable only for want of ordinary care. To the same effect is *Giblin v. L. R.* (2 P. C.) 317.

In *Shochochee National Bank v. Schley*, 58 Ga. 369, the court after reviewing some of the cases, which have been cited, and also to the recent case of *First National Bank v. Ocean National Bank*, 60 N. Y. 278, and *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546, summarizes its view of the

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existing law as follows: 'By habitually receiving through its cashier special deposits to be kept gratuitously for mere accommodation, a national bank incurs liability for gross negligence in respect to any such deposits, received in the usual way.' This I adopt as a concise and accurate statement of the result of the decisions to which I have referred.

The only adjudication to be found in conflict with this doctrine, are the cases of *Wiley v. First National Bank*, 47 Vt. 546, followed by the same court in 50 Vermont 389, where it was held, in direct opposition to all the cases I have cited, that when a special deposit is received by a national bank, *even in accordance with usage, and with the knowledge and acquiescence of the directors of the bank, the bank is not liable for its loss, even by gross negligence*; and this was put upon the ground that the bank has no corporate capacity to receive such deposits for safe keeping, and consequently cannot empower any of its officers to incur liability in its behalf by so doing.

There are some cases in which the Vermont cases are referred to with approval, by the judge writing the opinion (*Third Nat. B'k of Baltimore v. Boyd*, 44 Md. 47, and *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278), and there is no other adjudication to the same effect. In the case in 60 N. Y. the opinion expressly states that it is unnecessary to consider the question of the power of the bank, that it is a question not free from difficulty, but can be more satisfactorily considered when it becomes necessary to a judgment. The opinion proceeds upon the ground that the receiving of special deposits was not shown to be part of the ordinary business of the bank. That there was an entire lack of evidence that it was the habit or practice of the defendant to receive such deposits. That no authority to the cashier or the assistant cashier to receive special deposits had been shown, and that, whatever might be the incidental powers of the corporation, the power of its officers to bind it can be presumed only to exist within the scope of its ordinary business and their ordinary duties. It is upon this distinction between the facts in the case before the court and those in *Foster v. Essex Bank* that the opinion proceeds, and not upon a rejection of the doctrine of that case."

A bank, pursuant to directions of a correspondent, to deliver a draft and receive a note together with specified securities of a certain amount, accepted them after glancing at their backs to verify the amount and without inspecting the inside, which would have revealed their spurious character. It had complied with the custom of banks in such transactions and was held not liable. *Clinton Nat. Bank v. National Park Bank*, 37 App. Div. 601; s. c., aff'd, 165 N. Y. 629.

Plaintiff deposited certificates with a bank to be delivered to a third party upon the payment of a certain sum. Bank was liable where they were lost through the want of ordinary care. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520.

#### (b). PLEDGE.

Securities deposited with a bank as collateral to a note disappeared. The bank was bound to account for such disappearance and to use ordinary care to prevent it. It was proven, as an item of negligence,

resident was accustomed to use securities for his personal and that he and the manager conducted the bank with little from the trustees. The bank was held liable. *Cutting v.* N. Y. 454, aff'g, 17 Hun, 573, and judg't for def't. Dis- g, Foster v. Essex Bank, 17 Mass. 479; Jenkins v. Bank of um, 58 Me. 275; Giblin v. McMullen (L. R.) 2 P. C. Appeals v. Bank of Cherry Valley, 12 Penn. 471.

ar customer of defendant deposited bonds with it as collateral or discounts. Discounts and renewals upon the security of s were obtained by plaintiff, during a period of four years. last note so discounted was paid, defendant's cashier, at his sation, delivered to plaintiff a receipt signed by him as cashier, g the receipt of the bonds as collateral and stating that, aving been paid, the bonds were retained for future like use or g, subject to the plaintiff's order. Defendant thereafter, as e before, paid the coupons falling due on the bonds to plain- October, 1887. In February, 1888, plaintiff demanded a re- e bonds, but was informed, that they could not be found; no n was afforded him, in respect to the circumstances attending ppearance, or the mode by which they had been removed, if n the possession of the bank. There was evidence tending to it was its custom to return securities, held as collateral, to upon payment of loans; that, while held, they were kept valuable securities belonging to defendant in a steel box in- an iron safe; that the safe and box had combination locks, the on on the box being known to the defendant's president and one, and the latter alone having the key. It was also proved ashier had been in the defendant's employ for many years, borne a good reputation until December, 1887, when he was for the alleged reason that he was a defaulter. All the s officers, except said cashier, testified that they had no knowl- s possession of the bonds, or of the place where they were kept loans were paid, and that they, respectively, had not abstracted defendant's by-laws provided for the appointment by its presi- at least in every three months, of a committee, consisting of ers of the board, who with the president and cashier, should a committee of examination, and they were required to ex- matters "pertaining to the affairs of the institution" and re- same. Examinations were only made once in six months by miners, and were confined to the securities owned by defend- those it held as collateral for unpaid loans. The reports account of such collaterals or of special deposits. Defendant omed to receive special deposits from its customers for safe

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keeping, which were usually kept in the vault, but were not entered upon its books, and no subsequent examination, inspection or report in relation thereto was ever made or provided for. No other evidence was given as to the disappearance of the bonds. Defendant's cashier was not called as a witness. Held, that defendant was not a gratuitous bailee, but the bailment was made one for mutual benefit, and it was liable, at least, for failure to exercise ordinary and reasonable care and diligence in the custody of the bonds; that it was within the authority of the cashier to make the agreement on its part to continue as custodian of the bonds, for the purposes for which they had theretofore been used.

The burden of showing the circumstances of the loss rests upon the bailee, and unless the evidence shows the exercise of due care by him according to the nature of the bailment, he will be held responsible for the breach of his contract to return the property bailed. *Caldwell v. Mohawk Bank*, 64 Barb. 333; *Collins v. Bennett*, 46 N. Y. 490; *Cutting v. Marlor*, 78 id. 454; *Russell M'fg Co. v. N. H. S. Co.*, 50 id. 121. *Ouderkirk v. C. N. Bank*, 119 id. 263; affirming, 52 Hun, 1, and judg't for pl'ff.

The defendant, to secure a debt to the plaintiffs, delivered to them a warehouse receipt for certain wet, salted calf skins. The plaintiffs gave no personal attention to the skins, while in the warehouse, and exercised no supervision over them, but the defendant had free access to them and frequently examined the same. They were injured by the heat of those in the center and this did not appear upon the surface of the pile. The defendant discovered this and advised that they be resalted or tanned, which the plaintiffs declined to do, but, to the proposition of the defendant that they be taken to his warehouse and treated, the plaintiffs did not consent, but suggested that the defendant pay the debt and take the skins.

The legal title to the property was vested in the plaintiffs, and the warehousemen were their bailies, yet the defendant had at least an equal interest in the preservation of the property, and it was not the duty of the plaintiffs to cause the skins to be handled over and inspected, nor to permit the defendant to take them to his own warehouse; and whether any action on their part, for the purpose of preservation, was necessary was a question for the jury. *Willetts v. Hatch*, 132 N. Y. 41, aff'g, judg't for pl'ff.

If the plaintiffs had taken the actual custody of the property, a different question would have arisen. 2 Kent's Com. 587; *Wheeler v. Newbould*, 16 N. Y. 392; *G. F. & M. Ins. Co. v. Marr*, 46 Penn. St. 504; *Hanna v. Holton*, 78 id. 334.

See *Hamilton v. McPherson*, 28 N. Y. 72.



## VII. Cheese Factories.

plaintiff and his assignors agreed with the defendant that the plaintiff should manufacture cheese and butter from milk delivered at his place the former, and to sell the same and distribute the proceeds. The property was destroyed by fire and a quantity of the material and property was lost. The defendant was bound to use ordinary care to protect the property, and the burden was upon the plaintiff to show a breach of duty, as no presumption of negligence arose from the fact that the loss resulted from fire. *Stewart v. Stone*, 127 N. Y. 500, aff'd 137 N. Y. 487. (Citing, *Whitworth v. Erie R. Co.*, 87 id. 413.)

## VIII. Safe Deposit Company.

A person with a search warrant demanded admission to a box of property deposited with the defendant, which having been accorded to the plaintiff, the officer took securities not described in the warrant. The defendant was negligent in permitting removal of property not described in the warrant.

Property, in the custody of a bailee for hire, is demanded by a creditor. If, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender it; if it is not, he has the right and duty to refuse to surrender it; also to offer such resistance to the taking and to adopt such measures for reclaiming it, if a prudent and intelligent man would, if it had been demanded, under a claim of right, without legal process.

A bailee may excuse himself for permitting the property of the owner to be taken by a stranger, by showing that he yielded to the legal process, a seizure under such a process, after the bailee had not previously allowed the property to pass into the hands of a trespasser, is not a protection to him in an action by the owner.

A levy, therefore, of an execution or attachment upon property of a debtor, while in the possession of the tortfeasor, is not a defense, as a defense or in mitigation, in an action against the tortfeasor.

If it can be shown that the bailee has had the benefit of the property, an application through regular legal proceedings upon a judgment against him, this will go in mitigation of damages. *Roberts v. Safe Deposit Company*, 123 N. Y. 57; reversing 49 Hun. 413.

*Wright v. Boston Storage Warehouse Co.*, 149 Mass. 454; *Simmour*, 126 Ind. 322; *Waller v. Parker*, 5 Cald. 476; *Edson v. Cowen* 278; *Labenstein v. Pritchett*, 8 Kan. 213.

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Owner of safety deposit vaults is a bailee for hire and is not exonerated from the exercise of ordinary care by the fact that the depositor had the key. Clerk admitted two strangers without other identification or appearance of authority than the possession of the key and what purported to be a power of attorney without taking the name of the notary therefrom. *Mayer v. Brensinger*, 180 Ill. 110; aff'd s. c., 74 Ill. App. 475.

### IX. Warehousemen.\*

A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property, in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur, without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. *Collins v. Bennett*, 46 N. Y. 490, rev'd judg't for pl'ff.

Plaintiff's goods, while upon defendant's wharf, were destroyed by fire occurring in the nighttime, originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. Evidence was given tending to show that no apparatus or means for extinguishing fires were kept there. A private watchman was left in charge, with some colored men, but neither he nor any of them were produced as witnesses, nor did it appear that he was at his post, or that any person was upon the wharf when the fire broke out. Held, that the evidence was such as to require the submission of the question of negligence to the jury, and that a direction of a verdict for defendant was error. *J. Russell Manufacturing Co. v. New Haven S. Co.*, 50 N. H. 121, distinguishing *Lamb v. The Camden and Amboy R. R. Co.*, 4 N. J. 271.

Action was for non-delivery of goods; defense was loss of goods by burglary. Held (1) Warehouseman must show to a reasonable certainty that goods were lost by theft, burglary, or fire, as the case may be. The burden is then on the plaintiff to show that this happened through such want of care on the part of the bailee, as a prudent man would take, under similar circumstances, of his own property. *Claffin v. M. Co.*, 75 N. Y. 260, rev'd judg't for pl'ff.

**From opinion.**—"Examining the case under this rule of law we find there was no proof tending to show when the warehouse was entered, whether in the night or daytime. It was, it seems during a large portion of the twenty-four hours in the custody of the government janitors. It does not appear nor is it found whether access to the warehouse was gained through the side or roof or by the ordinary entrances, whether the thieves got in by stealth or broke out through the roof or broke in through the roof. The evidence was

\* NOTE.—As to when common carrier is liable as warehouseman, see post p. 322.



of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the key; but as I have before stated, it is unnecessary to define the precise nature of the contract, or to give it a name. The defendant assumed the obligation of ordinary care and prudence in keeping the goods, and that is sufficient to sustain the charge of the judge."

See *Sherman v. Commercial Printing Co.*, 29 Mo. App. 31.

In the absence of a definite term for their bailment, a cold storage warehouseman must maintain a proper temperature as long as the goods remain on storage, or give the customer notice to remove his property. *Southerland v. Albany Cold Storage Co.*, 171 N. Y. 269; *rev'd s. c.*, 55 App. Div. 212.

A trunk containing goods of a husband and wife placed in storage and a receipt given therefor reciting "this receipt must be delivered on receipt of the goods." The trunk was, however, delivered to the husband, and without demanding the return of the receipt. Bailee was liable to the wife for conversion as to goods of hers in the trunk. *Markoe v. Tiffany & Co.*, 26 App. Div. 95; *s. c. aff'd*, 163 N. Y. 565.

The president of a warehouse company signed a receipt, reciting the possession of goods in storage, and, upon inquiry, its superintendent so stated. Company was liable to one advancing money on the faith of such representations. *Corn Exchange Bank v. American Dock &c. Co.*, 14 App. Div. 453; *s. c. rev'd* on another point, 163 N. Y. 332.

Warehouseman, to whom apples had been delivered for cold storage, who fails to maintain the proper temperature whereby the fruit became damaged, becomes liable for the damage. *Wilson v. Linde Co.*, 47 App. Div. 327.

In an action to recover for goods returned by a warehouseman, damaged, proof of their delivery to his predecessor in good condition makes a *prima facie* case. *Isler v. Linde Co.*, 33 Misc. Rep. 465.

If liable for goods injured, warehouseman continues liable, although they be thereafter destroyed without negligence on his part. *Powers v. Mitchell*, 3 Hill, 540.

Is liable for negligent delivery to unauthorized person. *Willard v. Bridge*, 4 Barb. 361.

Must use that reasonable and ordinary care that a person of ordinary prudence would employ in performing the same duty. *Smith v. Simms*, 51 How. Pr. 305.

Warehouseman failed to remove perishable goods from wharf in freezing weather. Was sufficient evidence of negligence to go to the jury. *Leber v. Campbell Stores*, 62 N. Y. Supp. 1124; *s. c. aff'd*, 64 N. Y. Supp. 464.

Delivery of dressed poultry for storage to one known as keeping a "cold storage" room does not render the proprietor liable for damage



from temperature usual in a "cold storage" room, but too  
"freezer," in which such goods are usually stored. *Allen v.*  
3 Conn. 355; s. c., 52 L. R. A. 106.

tion by incendiary fire, though without negligence, not within  
of an agreement to deliver, "damage by elements ex-  
*Pope v. Farmer's Union & Milling Co.*, 130 Cal. 139.

warehouse receipt stated that loss by leakage was at owner's  
as error to charge in respect to liability for lack of ordinary  
dless of the stipulation. *Taussig v. Bode*, 134 Cal. 260.

one taking grain for storage to be mixed with other grain  
er on demand grain of the same quality and quantity. *Baker*  
7 Ind. App. 422.

*Snydaecker v. Blatchley*, 176 Ill. 506.

useman not liable for taint from rooms; where owner had  
portunity of judging its effect on the goods. *Parker v. Union*  
o., 59 Kan. 626.

as stored at owner's risk who knew of custom to mix it with  
n of like quality. Recovery could not be had for loss by fire  
ound that the identical wheat had been sold where sufficient  
ality to make delivery was at all times kept on hand. *Moses*  
(Kan.) 67 Pac. Rep. 526.

usemen were not liable for goods received for sale, where they  
otified of owner's interest before the proceeds were turned over  
ors. *Fields v. Blanc*, (Ky.) 37 S. W. Rep. 850.

useman was liable, where he paid proceeds of goods consigned  
ring no other identification than his own representations.  
*helps*, (Ky.) 45 S. W. Rep. 659.

in a receipt from a cold storage company relieving it from  
or loss due to variation of temperature arising from accident  
ery or other unforeseen causes, construed not to cover varia-  
o negligence or oversight in storage. *Marks v. New Orleans*  
*age Co.*, (La.) 31 South Rep. 671.

amaged condition of goods returned by warehouseman was ac-  
or by the fall of the warehouse, burden was held to be on plain-  
y negligence of warehouseman. *Willett v. Rich*, 142 Mass. 356.

of warehouseman to whom goods were delivered, took them  
m whence they were lost or stolen. Verdict for plaintiff was  
*Bagley Elevator Co. v. American Exp. Co.*, 63 Minn. 142.

goods stored were not properly protected from taint, it was held  
, and not within an exemption, to the effect that warehouse-  
ld not be liable for "loss to perishable property at owner's  
*unter v. Baltimore Packing &c. Co.*, 75 Minn. 408.

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Warehouseman allowed temperature to rise and melt the ice which dripped on the goods. The damage was deemed the result of negligence and not within an exception in the contract to the effect that goods were at owner's risk of any loss or damage from water. *Minnesota Butter &c. Co. v. St. Paul Cold Storage &c. Co.*, 75 Minn. 445.

Certificate of deposit of flour at a mill, reciting toll due on presentment, made exemption of liability for loss by fire. No recovery was allowed for loss by fire. *Wells v. Pointer*, (Mo.) 69 S. W. Rep. 282.

A warehouseman is not liable for damage caused to goods stored, from unprecedented rainfall. *Cowles v. Pointer*, 26 Miss. 253.

A wharfinger is liable for loss in the sale of cotton resulting from mistake in forwarding to the wrong party. *Thompson v. Gwyn*, 48 Miss. 522. See, also, *Archer v. Sinclair*, 49 Miss. 343.

Warehouse was well constructed with a solid foundation, but a flood caused the ground to sink and the building collapsed. There was no negligence in failing to remove grain stored in upper rooms where there was no intimation of the disaster. *American Brewing Asso. v. Talbot*, 141 Mo. 674.

Limitation of liability for negligence by charter of a warehouse corporation, to matters stated in its receipts, is in contravention of a constitutional provision forbidding exclusive privileges. *Motley & Co. v. Southern Finishing &c. Co.*, 122 N. C. 347.

Knowledge by bailor of ignorance of bailee of the proper handling of property stored, does not relieve the latter of liability for lack of ordinary care in the construction and management of his warehouse. *Motley & Co. v. Southern Finishing &c. Co.*, 126 N. C. 339.

Duty of warehouseman is not that of an insurer; and he is not liable for loss by fire without negligence. *Walker v. Eikleberry*, 7 Okla. 599.

Goods delivered in good condition and re-delivered decayed and mouldy from dampness in warehouse, raises a presumption of negligence. *Leidy v. Quaker City &c. Co.*, 180 Pa. St. 323.

Bailee of goods for storage took out insurance upon them, and after their destruction by fire, collected the insurance. Held liable to the owner for money collected. *McDonald v. Palmer*, (Tenn.) 45 S. W. Rep. 338.

A warehouseman must use the reasonable and ordinary care that a person of ordinary prudence would employ in performing the same duty. *Galveston, H. & S. A. R. Co. v. Smith*, (Tex. Civ. App.) 24 S. W. 668.

Insurance policy covered goods stored; but settlement only covered the warehouse. Warehouseman not liable in absence of contract to insure. *Pittman v. Harris*, (Tex. Civ. App.) 59 S. W. Rep. 1121.

A railway company, receiving cotton for through shipment with privilege of stoppage in transit for compression and reshipment, was held

edge of a bill of lading for delivery from compress without bill of lading to one not entitled to receive it. *Southern Atlantic Nat. Bank*, 112 Fed. Rep. 861.

### X. Innkeepers.

an innkeeper is bound to receive all travellers and wayfaring persons and to provide them for a reasonable compensation, if they can be accommodated. *Waters v. Fethers*, 61 N. Y. 34.

An innkeeper is liable for such property of his guest, whether the same be in his possession or in his special keeping. *Wilkins v. Earle*, 44 N. Y. 172; *Smith v. Wilson*, 36 N. Y. 111; *Mason v. Thompson*, 9 Pick. 280; *Clute v. Wiggins*, 14 Johns. 417.

Liability does not arise unless the relation of innkeeper and guest exists. *Wood v. Wood*, 33 N. Y. 577.

If no relation exists the innkeeper may be liable as an ordinary bailee of property deposited with him.

The relation of innkeeper and guest is not distinguished by the mere fact that there is a special agreement as to time and price. *Hancock v. Rand*, 11 N. Y. 111; *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Cushman*, 417.

Under certain circumstances may establish that the alleged guest was but a lodger under a special contract as to time and price. *Vance v. Throckmorton*, 468; *Bush*, (Ky.) 41; *Pollock v. Landis*, 36 Iowa, 651; *Lusk v. Belote*, 468; *Johnson v. Reynolds*, 3 Kan. 257.

Although provided with food, drink and lodging he did not sustain the relation of guest. *Gastenhoper v. Clair*, 10 Daly, (N. Y.) 265; *Common v. Moore*, 145 Mass. 244; *Fitch v. Casler*, 17 Hun, 126.

An innkeeper may limit his liability in the same way as common carriers of goods; such limitation is frequently provided by statute. Such limitation must be strictly observed both by the guest and the innkeeper. *Coleman*, 21 N. Y. 111; *Hyatt v. Taylor*, 42 N. Y. 258; *Ramaley v. Taylor*, 3 N. Y. 539; *Bendetson v. French*, 46 N. Y. 266; *Porter v. Gilky*, 57

must conform to the reasonable rules and regulations of inns, and negligence contributing to loss of his property is a matter of defense to the innkeeper. The innkeeper's liability ends when the guest has had a reasonable opportunity to remove his goods at the expiration of the relation.

### WHO IS ENTITLED TO BE A GUEST.

Persons or persons undertaking this public employment are bound to receive and to provide for all travelers and wayfaring persons, and to enter into a contract for a reasonable compensation, if by any possibility they could

Y. Laws 1893; Chap. 693 Penal Code of New York, sec. 383, sub-divisions 1 and 2

WHO—

a citizen of this state, by reason of race, color or previous condition of servitude, from the enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, owners, managers or lessees of theatres or other places of amusement, or by teachers and principals of common schools and public institutions of learning or by cemetery associations, or by any person who aids or incites another to deny to any other person because of race, creed or color full

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be accommodated. *Mowers v. Fethers*, 61 N. Y. 34, rev'g, 6 Lansing 11 and judg't for plaintiff. (See opinion post p. 143.)

Where plaintiff had stolen from his room money which the clerk refused to keep for him, the fact that he had, previous to such refusal, occupied the room with a disreputable woman, did not deprive him of his rights as a guest. *Lucia v. Ormel*, 46 App. Div. 200; s. c., 53 id. 641.

An unlicensed peddler held entitled to be a guest. *Cohen v. Manu* 91<sup>st</sup> Me. 274; s. c., 40 L. R. A. 491.

One who by reason of intoxication, is obnoxious to the other guests is not entitled to be a guest. *McHugh v. Schlosser*, 159 Pa. St. 480.

An innkeeper has the right to eject a person not a guest who enters the house to drum up business for his employers. *State v. Steele*, 10 N. C. 766.

#### (b). NATURE AND EXTENT OF LIABILITY.

An innkeeper, is an insurer of property, committed to his custody by a guest, unless the loss be due to the culpable negligence or fraud of the guest, or to the act of God, or the public enemy.

The rule that the landlord shall be held responsible for goods entrusted to him for safe keeping by the traveler, and subject to detention for his charges, is founded in considerations of public policy.

The statute enables him to require the observance of appropriate precautions by the guest; but it does not absolve him from his obligation to respond for losses caused by the negligence of himself or his servants or by the depredations of knaves or marauders, within or without the curtilage.

Held, accordingly, that the innkeeper is responsible for the loss of the goods of his guest by fire, the cause of the fire being unknown, and the guest being free from negligence. *Hulett v. Swift*, 33 N. Y. 571.

**From opinion.**—"In cases of loss, either the innkeeper or the guest must be the sufferer; and the common law furnishes the solution of the question, on which of them it should properly fall. In the case of *Cross v. Andrews*, the rule was tersely stated by the court. 'The defendant, if he will keep an inn, ought, at his peril, to keep safely his guests' goods.' Croke's Eliz. 622. He must guard them against the incendiary, the burglar and the thief; and he is equally bound to respond to their loss, whether caused by his own negligence or by the depredations of knaves and marauders, within or without the curtilage.

This doctrine is too well settled in the English courts, to be shaken by the exceptional case on which the appellant relies. *Calve's case*, 8 Coke. 32; *Cross v. Andrews*, Croke's Eliz. 622; *Richmond v. Smith*, 8 Barn. & Cress 803; *Cashill v. Wright*, 37 Eng. Law & Eq. 175."

enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement, is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars nor more than five hundred dollars "

urts of this state, it has always been held that the innkeeper, rier, is, by the common law, an insurer. *Purvis v. Coleman*, 11, 112, 117; *Wells v. Steam Navigation Co.*, 2 Comst. 204, . Libby, 36 Barb. 70, 74; *Ingallsbee v. Wood*, id. 458; *Washes*, 14 id. 193, 195; *McDonald v. Edgerton*, 5 id. 564; *Taylor* 4 Duer 117; *Stanton v. Leland*, 4 E. D. Smith, 94; *Grinnell* Hill 488; *Piper v. Many*, 21 Wend. 282, 284; *Clute v. Wighns*. 175.

as recognized by us, is sanctioned by the leading authorities r states. 1 Pars. on Cont. 623; 1 Smith's Lead. Cas. (Hare Ed.) 307; *Shaw v. Berry*, 31 Me. 478; *Sibley v. Aldrich*, 33; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 427; *Mason* n, 9 Pick. 280; *Towson v. Havre de Grace Bank*, 6 Harr. ; *Thickston v. Howard*, 8 Blackf. 535, 537; *Kisten v. Hilde* Monr. 72.

of doubt has, at times, been thrown over the question, by the language of elementary writers and especially by the sugges- ge Story, in his treatise on the law of bailments, that the ould exonerate himself from liability by proving that he was f actual negligence; and this view seems to have been adopted he Vermont, and one of the English, cases. *Story on Bail*- 472; *Dawson v. Champney*, 8 Adolphus & Ellis, N. S. 164; *Claghorn*, 23 Vt. 177; *McDaniels v. Robinson*, 28 id. 337.

No degree of diligence or vigilance on the part of the inn- d absolve him from his common law obligation for the loss t, unless traceable to one of these exceptional causes. *Shaw* d Me. 478; *Sibley v. Aldrich*, 33 N. H. 553. \* \* \*

rine of these cases is opposed to the general current of Eng- merican authority, and evidently had its origin in a misap- of the rule as stated by the judges in Calve's case. It is ne liability of the innkeeper. by the custom of the realm, was ed and absolute, and that the loss of the goods of the guest presumptive evidence of the default of the landlord. But nption could only be repelled by proof that the loss was e to the negligence or fraud of the guest, or to the act of God lic enemy.

rs are still insurers of the safety of the property of their withstanding the act of 1855 (chap. 421, p. 774); the only at statute being to so far modify their common law liability s not extend to money, jewels or ornaments not deposited in rovided for that purpose, where the innkeeper has complied rovisions of the act on his part.

ility is not limited to such an amount of money as may be

reasonably necessary for the traveling expenses of the guest, but covered whatever amount may be received and deposited by the innkeeper in the safe.

The plaintiff, being a guest at the defendant's inn delivered a package, containing \$20,000, to a young man in charge of the office, to be deposited in the safe. It was enclosed in a sealed envelope, and the name of the guest was written in pencil on the outside; but no indorsement indicated its contents or value. The notices posted in the rooms of the inn required that valuable packages should be "properly labeled." The plaintiff was asked what the envelope contained, and replied "money." It was received and placed in the safe, and was subsequently stolen therefrom. Held, that the defendants were liable for the full amount of the moneys so deposited. *Wilkins v. Earle*, 44 N. Y. 172, rev'g. 3 Rob. 352.

**From opinion.**—"Is there any basis in principle or in the authorities for the distinction made by the defendant, to wit, *that an innkeeper is liable only for such an amount of money as is necessary for the reasonable expenses of the guest*." This distinction is sought to be maintained upon the analogy to the case of a carrier of passengers, who is liable only for money or articles convenient to the traveler on his journey, and not for goods or merchandise as such. I will cite a few among the many cases reported in the English courts, as well as in those of this state, to show that this distinction cannot be maintained. I think it will appear that the innkeeper is liable to the guest for the value of all his property lost, whether it be intended for his personal convenience, or for traffic, or for any other general or permanent purpose.

"The law was correctly laid down by Lord Coke in *Calve's case*, more than 200 years since. 8 Co. Rep. 203, 32a. That case contains an abstract of the law touching the liabilities of innkeepers. 'It was resolved *per totam curiam* the following term. 1. That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to be put to pasture, which is done accordingly, and the horse is stolen, the innholder shall not answer for it. 2. The words *eorum bona et catalla infra hospitium*, and because the horse which, at the request of the owner is put to pasture, is not *infra hospitium*, the innholder is not bound by law to answer for him if he be stolen out of the pasture \* \* \* but it was holden that if the owner doth not require it, but the innholder *of his own head*, puts the guest's horse to grass, he shall answer for him if he be stolen. \* \* \* 5. Although the words *eorum bona et catalla* do not, of their proper nature, extend to charters and evidences concerning freehold, or inheritance or obligations, or other deeds or specialties, being things in action; yet, in this case, it is expounded by the latter words to extend to them; and therefore, if one brings a bag or chest, etc., of evidences into the inn, as obligations, deeds, or other specialties, and by default of the innkeeper they are taken away, the innkeeper shall answer for them, and the writ shall be *bonorum et catallarum* generally, and the declaration shall be special.'

"In *Bennet v. Mellor*, 5 T. R. 273, the case was this: The plaintiff's servant had taken a quantity of goods to market to sell. Being unable to dispose of them, he went with them to defendant's inn, and asked the defendant's wife



ve the goods there till the next market day, the week following. that she could not tell, for they were very full of parcels. The sat down, had some liquor, and put the goods on the floor immediate him. When he got up, after sitting a little while, the goods were gone. It will be observed that the subject here was merchandise, which had taken to market, and which he wished to store until the next market. It had none of the quality of baggage or of articles of personal

v. Shuchard, 2 B. & Ad. 803, the head note is, 'An innkeeper is responsible for money belonging to his guest.' The plaintiff and his wife were lodged at the defendant's inn. The wife left her reticule, containing money, on the table, and returning for it in a few minutes, it was gone. The report does not state the amount of the money lost. On the trial it was urged, on behalf of the defendant, that he was responsible for goods and chattels only, and not for money. A verdict was given for the plaintiff. \* \* \* The court sustained the verdict.

v. Tyler, 1 Ad. & Ellis, the horse and gig of the guest were taken in the defendant's hostler, who placed the gig in the open street. The gig was stolen, the innkeeper was held responsible.

d v. Smith, 8 B. & Creswell 9, was a recovery against the innkeeper for the loss of certain packages of silk which the plaintiff had and exposed for sale. A defense was attempted on the ground that the plaintiff had taken the packages into his own protection in his private room. \* \* \*

same character are the reports in our own state. Clute v. Wiggins, 5 Wend. 55, was this: The plaintiff came to the defendant's inn with a load of wheat and barley, and was received as a guest for the night. The horses were put into the stable, and his sleigh with its contents into a wagon-house, which was usual for the defendant to receive loads of that description. The next morning it was discovered that the wagon-house had been broken open, and the wheat and barley stolen. The innkeeper made two points. 1. That the wheat had not been delivered into his special custody. 2. That he derived no benefit from keeping the wheat. The recovery for the value of the grain was granted.

enbake v. Fish, 8 Wend. 547, the plaintiff stopped with his horse at the defendant's inn, and upon calling for his horse, his saddle and bridle could not be found. The plaintiff brought trover for the saddle and bridle. The court held, that in trover, he must prove an actual conversion, and that the conversion was not sufficiently proved. They say, that upon the facts there could be no doubt that an action on the case upon the custom, would lie against the defendant.

v. Many, 21 Wend. 283, the plaintiff, with his horses and a sleigh, stopped at the defendant's inn. A portion of his butter was melted during the night. The defendant endeavored to protect himself on the ground that the butter was not brought within the inn, but was left in the wagon. The court held the defendant liable.

as the year 1865, in Hulett v. Swift, 33 N. Y. 571, a similar case occurred. The plaintiff's servant, with his horses, wagon, and a load of goods, stopped for the night at the defendant's inn. A fire occurred during the night, by which the property was destroyed. It did not appear how the fire originated, and there was no evidence of negligence on the part of the defendant. The defendant was held to be responsible.

"On the general principle, see, also, Story Com. secs. 480-1; 2 Bl. Com. 430; Kent's Com. 593.

"The cases cited, show that the distinction contended for by the defendant's counsel cannot be maintained. I am not aware of a single reported case which sustains it, nor of any elementary writer, who gives countenance to it."

Sheep put to pasture under direction of a guest are not *infra hospitium* and innkeeper is not liable for their loss in absence of negligence. *Hawley v. Smith*, 25 Wend. (N. Y.) 642.

Servant of innkeeper admitted a fellow guest to a guest's room, simply because she had seen the former in the room with the latter conversing about the goods in question. Proprietor was liable for theft. *Jacobson v. Haynes*, 14 Misc. 15.

Delivery of a boarder's trunk to an unknown expressman who simply showed a slip of paper with her name on it and without requiring it being given up or ascertaining his name or license number, without other warrant than such boarder's statement that she would send an expressman for the trunk, was held to be gross negligence. *George v. Depierris*, 17 Misc. 400.

A special agreement as to price per week for room at a hotel for an indefinite time does not alter the relation of innkeeper and his liability for the loss of goods. *Metzger v. Schnabel*, 23 Misc. 698.

Guest hung up his coat at a place in the office usually used for that purpose, in the presence of one apparently in charge. It was held to be "specially intrusted" to the hotel keeper's care and custody within N. Y. L. 1883, ch. 227, sec. 2. *Bradner v. Mullen*, 27 Misc. 479.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for loss of the same. *Fowler v. Dorlon*, 24 Barb. 384.

Goods are within possession of innkeeper although not delivered into his special keeping. *Clute v. Wiggins*, 14 Johns. (N. Y.) 175.

Under sec. 1859 of Cal. Civ. Code, providing that an innkeeper is liable for the loss of personal property of guest's placed in his care, unless caused by "irresistible superhuman cause," an innkeeper is liable for loss occasioned by an accidental fire unless started by lightning or some superhuman agency. *Fay v. Pacific Improvement Co.*, 93 Cal. 253. Compare *Chicago & C. R. Co. v. Sawyer*, 69 Ill. 285; *Moore v. Development Co.*, 87 Ala. 483.

After innkeeper has accepted money according to notice and deposited it in his safe, and it has been stolen, he cannot object as to the kind and amount so taken. *Pinkerton v. Woodward*, 33 Cal. 557. See *Mateer v. Brown*, 1 id. 221.

In law there is an implied contract with a common innkeeper to secure his guests' goods in his inn; and loss of an overcoat deposited



on the shelf at direction of servant is chargeable to the innkeeper. *Rockwell v. Proctor*, 39 Ga. 105.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for the loss of same. *Johnson v. Richardson*, 17 Ill. 302; *Eden v. Drey*, 75 Ill. App. 102; *Hulbert v. Hartman*, 79 Ill. App. 289.

Hotel keeper, to whom checks were given by a guest, employed an expressman to bring the baggage to the hotel. Was liable for its loss by the expressman, though it never reached the hotel. *Williams v. Moore*, 69 Ill. App. 618.

Innkeeper was liable for not only such baggage as is usually carried by a traveller but for articles of merchandise also. Liability began with their receipt at the hotel, though owner was only a prospective guest. *Eden v. Drey*, 75 Ill. App. 102.

Innkeepers are not insurers of goods of a guest, but *prima facie* are liable for the loss of the same. *Laird v. Eichold*, 10 Ind. 212.

Is liable for the theft of goods, theft of valise containing valuables. *Bovell v. De Wald*, 2 Ind. App. 303.

Money in trunk of guest for loss of which landlord is sued, should be such an amount only as would be convenient to meet his traveling expenses. *Simon v. Miller*, 7 La. Ann. 360.

A horse belonging to a guest at an inn and stabled in the inn's hostelry was injured; the court held, that while innkeepers were not insurers of goods, they are nevertheless responsible for the well and safe-keeping of them; and an instruction that the defendant was not liable, if he was found to be without fault, was error. *Shaw v. Berry*, 31 Me. 478.

See Story on Bailments, sec. 472; *Bennett v. Miller*, 5 Term. R. 273; but see, if guest's servant, or companion makes way with the goods. *Burgess v. Clements*, 4 M. & Sel. 306; see, also, *Clute v. Wiggins*, 14 Johns. N. Y. 175; also, *Shultz v. Wall*, 134 Pa. St. 262.

Innkeepers are insurers of goods, except for loss caused by act of God, the public enemy, neglect or fault of owner or his servants. So, innkeeper is liable for loss of guest's overcoat hung in a place allotted for that purpose. *Norcross v. Norcross*, 53 Me. 163.

Loss of cow taken by innkeeper for safe keeping over night chargeable to him. *Hilton v. Adams*, 71 Me. 19.

Plaintiff, a guest in defendant's inn, cannot recover for valuables left in bath-house apart from the inn, and kept by defendant for convenience of persons bathing in the sea. *Minor v. Staples*, 71 Me. 316.

Under statute limiting the liability of an innholder for losses of "wearing apparel, articles worn or carried upon the person to a reasonable amount, personal baggage and money necessary for traveling expenses and personal use," an innholder is liable for the loss of a gold

watch, a pair of gold bracelets, a gold thimble, some gold rings and gold neckpin, carried by a female traveler in her trunk and stolen therefrom at the defendant's inn. *Noble v. Milliken*, 77 Me. 359. See, *Noble v. Milliken*, 74 Me. 225.

Delivery at a livery stable at innkeeper's direction is delivery to him for safe keeping, though the stable is not connected with the inn. *Cohens v. Manuel*, 91 Me. 274.

Money in trunk of guest, for loss of which landlord is sued, should be such an amount only as would be convenient to meet his traveling expenses. *Treiber v. Burrows*, 27 Md. 130.

See *Wilkins v. Earle*, 44 N. Y. 172, ante p. 138.

Innkeeper is liable for theft of horse and chaise belonging to a guest. *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woolen Co. v. Proctor*, 61 Mass. 41.

Innkeeper held not liable for loss by accidental fire. *Cutler v. Bonner*, 30 Mich. 259.

Innkeeper was liable for loss of \$500 kept in a belt upon guest's person. *Smith v. Wilson*, 36 Minn. 334.

Valuables gratuitously received for safe keeping by innkeeper impose liability for gross negligence only. *Wiser v. Chesley*, 53 Mo. 549.

Whether a guest deposits money on the credit of the inn or not is for the jury; if he deposits it on the credit of the inn, the innkeeper is liable for its loss. *Houser v. Tulley*, 62 Pa. St. 92. *Sneider v. Geiss*, 1 Yeates (Pa.) 34.

Innkeeper is liable for money of guest stolen while in defendant's inn. *Shultz v. Wall*, 134 Pa. St. 262; *Houser v. Tulley*, 62 Pa. St. 92; *Walsh v. Porterfield*, 87 Pa. St. 376.

No recovery was allowed for loss of horses by fire where the fire was the work of an incendiary. *Merritt v. Claghorn*, 23 Vt. 177.

An innkeeper's guaranty as an insurer, extends to the acts of his servants in case of theft by one of them. *Cunningham v. Bucky*, 42 W. Va. 671; s. c., 35 L. R. A. 850.

#### (c). WHEN THE RELATIONSHIP EXISTS.

The liability of an innkeeper as an insurer, presupposes the relationship of host and guest.

He is not responsible, except as an ordinary bailee for hire, for the safe keeping of a horse left at the inn stable for the night, by one who is neither a lodger nor a guest.

The innkeeper was not liable for the loss of the horse, by a fire which consumed the stable, the proprietor being free from negligence. *Ingalls v. Wood*, 33 N. Y. 577. aff'd 36 Barb. 452, disapproving. *Mason v. Thompson*, 9 Pick. 280.

**From opinion.**—"As there was no negligence on the part of the intestate, he was not liable for the loss, unless he was an insurer of the property. There was no express contract of insurance, and none can be implied, unless it sprung from the relation of innkeeper and guest. No such relation existed between the parties. The horse was left at the stable by one who was not, and did not expect to be, a guest at the inn. There was no contract, either express or implied, except for the keeping of the animal for the night; and this created no other or greater liability than if the intestate, instead of being an innkeeper, had been the proprietor of a livery stable. The liveryman, like the agistor, has no lien on the property committed to his charge. *Grinnell v. Cook*, 3 Hill 486, 492; *Fox v. McGregor*, 11 Barb. 41; *Wallace v. Woodgate*, 1 Car. & Payne, 575; *Jackson v. Cummins*, 5 Mees. & Wels. 342. \* \* \*

"The theory of the appellant, that one who contracts for the stabling of his horse by an innkeeper, is constructively an inmate of his house, is supported by a case reported in Massachusetts, but we think that decision was made under a misapprehension of the law. *Mason v. Thompson*, 9 Pick. 280. Its correctness has since been questioned by the court in which it was pronounced. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 425-6. The authorities, on which it rests for support, were fully considered in the able opinions delivered by Judge Bronson, in the case of *Grinnell v. Cook*, and by Judges Potter and Bockes in the present case in the court below, and we think their reasoning conclusive against the doctrine, that an innkeeper can be held as an insurer of property, received from one who is neither traveler nor guest."

Owner of stallion for certain days hired a stall at an inn; the price of oats and meals was reduced, but there was no agreement as to lodging, hay or use of stall. The plaintiff kept the horse under lock and took care of him. Defendant was not liable as innkeeper, hence as insurer, for accidental fire. *Mowers v. Fethers*, 61 N. Y. 34, rev'g, 6 Lansing, 112 and judg't for pl'ff.

**From opinion.**—"An innkeeper at common law, has been said to be the keeper of a common inn for the lodging and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation. 5 Bacon Abr. (Inns, etc.) 228; Story on Bailments, § 475. The person or persons undertaking this public employment were bound to take in and receive all travelers and wayfaring persons, and to entertain them for a reasonable compensation, if by any possibility they could be accommodated, and the innkeeper was bound to guard the goods of his guests with proper diligence. 5 Term. R. 274; 2 Barn. & Ad. 285; 1 Carr. & K. 404; 7 Carr. & P. 213; 4 Exch. 367. The common-law rule has been generally followed by the courts in this country, save so far as it has been modified by statute. The duties, rights and responsibilities of an innkeeper are in most respects kindred to those of a common carrier, but in order to enforce the strict common-law liability of an innkeeper, the technical relation of guest and innkeeper must be established, and the question is, whether it existed in the present case. I think it did not, for reasons now to be suggested. \* \* \*

"He is doubtless bound to receive and entertain a strolling peddler, and securely guard his pack of trinkets if brought *infra hospitium*, so long as he remains a mere guest. So, also, would he be bound to receive and entertain

a wayfarer, encumbered with a stallion, but under no obligation as an innkeeper to allow his curtilage to be turned into an asylum for the breeding horses. It is very manifest in this case that the sojourn of the plaintiff, Eggner, with the horse, at the defendant's inn, was not that of an ordinary traveler. The purpose and object was entirely different, and the defendant, as an innkeeper, was under no common law obligation to receive and entertain the plaintiff, Eggner, and his horse for such a purpose, and where he is not bound to receive and entertain the person as his guest, the strict rule of common law liability for the preservation of his property does not obtain. The obligation to respond to injury to property, depends upon his duty to receive and entertain as an innkeeper, and they must stand or fall together. *Grennell v. Cook*, 3 Barb. 485; *Ingalsbee v. Wood*, 36 Barb. 455; s. c., 33 N. Y. 577; *Hulett v. Swift*, 571. \* \* \*

"The case of *Washburn v. Jones*, 14 Barb. 193, has no analogy to this. There the defendant was made liable for negligence in fact in the construction of the stall, by reason of which the horse received the injury, and that liability would follow if he was to be regarded merely as an ordinary bailee."

From opinion of Supreme Court, contra.—"Some of the authorities hold that where there is a stipulated contract as to time, price, etc., the party is a boarder, but when he is at the inn without any bargain he is a guest. 1 on Con. 628; *Thompson v. Lacy*, 3 Barn. & Ald. 283; *Parkhurst v. Foster*, 1 Salk, 387; *Dausey v. Rich*, 2 Ellis & Bl. 144; *King v. Ives*, 7 C. & P. 213; *Wilmute v. Clark*, 5 Sandf. 247; *Crommell v. Stevens*, 3 Abb. N. S. 34; *Stewart v. McReady*, 24 How. 62; *Bennett v. Ditson*, 5 Term. 273; *Manning v. Wells*, 1 Thomp. 746. A careful examination of the cases cited evinces that the contract was entire, covering the whole case; while, in the case at bar, the agreement only embraced a portion of the accommodations to be furnished by the defendant, and which the plaintiff, Eggner, actually had. The meals and the stabling only were provided for, while the rest remained to be determined upon a question of value. It was not enough that the price for the meals and the stabling was agreed upon, for fixing a price per day for a sojourner at an inn does not make him a boarder, or anything but a guest. *Pinkerton v. Woodward*, 1 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Maine 169; *Parker v. Flint*, 12 Mod. 225. Nor does the fact that Eggner, as one of the plaintiffs, was to take care of the horse, make him any the less a guest. In *Seymour v. Cook*, 53 Barb. 451; 35 How. 180, the guest led the horses out of the stable, when one of them was kicked and injured, and it was held that the innkeeper was liable. The same principle has been applied to actions brought against common carriers for the loss of or injury to property. *Mallory v. Tallant*, 1 R. R. Co., 39 Barb. 488; *Medgett v. Bay State*, 1 Daly, 151; *Cayle's Case*, 1 Coke, 32, 33a. Nor is it important how often Eggner came there, or whether he came regularly. *Bac. Ab. tit. Ins. Co.* 5. The length of time is not material. 5 Tenn. 273. 5 Barb. 563; *Allen v. Smith*, 12 C. B. (N. S.), 104; *Eng. C.* 630; *Walling v. Potter*, 9 Am. L. Reg. (N. S.) 618. The purpose for which the horse was used is also of no consequence. 33 Cal. *supra*, 602; 7 Cush. *supra*, 423." See *Washburn v. Jones*, 14 Barb. 193.

Persons belonging to the army and navy, who have no permanent residence they can call home, are to be regarded as travelers when stopping at public inns; to deprive them of their privileges as such, and

give to them the character of boarders merely, it must appear that an explicit contract was made to that effect.

Plaintiff and her husband H., who was an officer in the United States army, having no permanent home, but living where military duty called him, occupied rooms in the defendant's hotel under an agreement, by which they were to so occupy, upon terms specified, until the spring or summer following, provided everything was satisfactory, and the husband was not sooner ordered away on military duty. H. and family took their meals at the hotel restaurant, paying for each meal the same as other guests. No notice was posted in said rooms as prescribed by the Innkeepers Act (Chap. 421, Laws of 1855). In an action to recover the value of property of plaintiff, stolen from said rooms while so occupied, held, the facts justified a finding that the relation between the parties was that of innkeeper and guest; and so that defendants were liable.\*

It appeared that the defendants kept separate apartments for boarders and for transient persons, and that H. and family were registered among the former. Held, in the absence of proof that H. was aware of this fact, defendant's liability was not affected thereby. *Hancock v. Rand*, 94 N. Y. 1, aff'g 17 Hun, 279, and judg't for pl'ff, distinguishing *Vance v. Throckmorton*, 5 Bush. 41; *Manning v. Wells*, 9 Humph. 746; *Hursh v. Byers*, 29 Mo. 469; *Pollock v. Landis*, 36 Iowa 651; *Lusk v. Belotte*, 22 Minn. 468.

From opinion.—“The authorities hold beyond question that the fixing of the price does not make a party a boarder. See *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Me. 169; *Walling v. Potter*, 35 Conn. 183. \* \* \*

‘The length of time that a man is at an inn makes no difference, whether he stays a week, or a month or longer; so although he is not strictly transient, he retains his character as a traveler,’ but he may, by a special contract to board and sojourn, make himself a boarder, and being such the innkeeper is not liable. Story on Bail. sec. 477; 2 Pars. on Contracts, 150 *et seq.* The decisions have not been entirely harmonious as to whether fixing in advance the price to be paid and the length of the stay has the effect in law to constitute such person a mere boarder or lodger, and to deprive such visitor of the character of guest. There are numerous decisions in the books of recent date which hold that where there is a special agreement as to time and price that does not absolutely disturb the relationship of innkeeper and guest. *Pinkerton v. Woodward*, 33 Cal. 557; *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Norcross v. Norcross*, 53 Maine 169; *Walling v. Potter*, 35 Conn. 183; *McDaniels v. Robinson*, 26 Vt. 316. See, also, *Parker v. Flint*, 12 Mod. 255. These cases indicate a tendency in the

\* Chap. 253, Laws 1894, provided—Sec. (1) “Whenever the keeper of any hotel or inn shall receive into his hotel or inn any person as a boarder, he shall have lien upon and right to detain the baggage and effects of such boarder to the same extent and in the same manner as if such boarder had been received as a guest; and such lien may be enforced in the manner prescribed by law for the enforcement of a lien upon the baggage or effects of a guest.” This act was repealed by the Lien Law, Laws 1897, ch. 418, which, in § 71, provides for liens of hotel, inn, boarding and lodging house keepers.

courts to conform the old rule to the changes made in hotel keeping in modern times.

We are referred by the learned counsel for the appellants to numerous cases to sustain the doctrine he contends for, among which are: *Vance v. Throckmorton*, 5 Bush. (Ky.) 41; *Manning v. Wells*, 9 Hump. (Tenn.) 746; *Hursh v. Byrum*, 29 Mo. 469; *Pollock v. Landis*, 36 Iowa 651; *Lusk v. Belote*, 22 Minn. 468, and others. A careful examination of these authorities discloses that in each of them it is very apparent that the relation of landlord and guest did not exist, and that the party who claimed damages of the innkeeper was in every case a boarder beyond any question, and that in most, if not in all of them, there was a special contract as to time and price which established that relationship.

Horses are not given into the innkeeper's custody, so as to make him responsible for their safe keeping, where they are tied under his stable without notifying him or his servants of their presence or requesting attention to them. *Bradley Livery Co. v. Snook*, (N. J. L.), 50 Atl. B. 358; s. c., 55 L. R. A. 208.

#### 1. WHO IS A GUEST.

Innkeeper was liable when goods of guest were deposited, by direction of former's servant, in uninclosed space near highway. *Piper v. Manny*, 21 Wend. 282.

An innkeeper may refuse to receive goods for lodgers from third persons, but if he does receive them he will be liable as an innkeeper.

Goods of a firm deposited by a member thereof, as a guest, make innkeeper responsible to firm. *Needles v. Howard*, 1 E. D. Smith, 100.

One purchasing liquor at an inn is a guest. *McDonald v. Edgerton*, 1 Barb. 560.

Contract for board at less than customary prices does not destroy relation of innkeeper and guest. *Beale v. Posey*, 72 Ala. 323.

For failure to make a special contract with a guest as required by statute, innkeeper would not be entitled to receive compensation for such a one's lodging; but would be liable as innkeeper for loss of guest's goods, even though no license has been taken out as required. *Lanier v. Youngblood*, 73 Ala. 587.

A traveler who enters an inn as a guest does not cease to be such by (1) proposing to remain a certain number of days, or (2) by paying in advance. *Pinkerton v. Woodward*, 33 Cal. 557.

A rule of the house to charge guests a less rate per diem weekly where he remains more than a week not brought to the notice of a guest does not make him a boarder, instead of a guest. *Magee v. Pacific Improvement Co.*, 98 Cal. 678.

The fact that one staying at an inn lives in the same town where the inn is situated will not relieve the proprietor from an innkeeper's liability. *Walling v. Potter*, 35 Conn. 183.

Though not a traveler, one who receives transient accommodation at an inn is a guest. *Walling v. Potter*, 35 Conn. 183.

Where porter gave traveler check for his baggage at depot, and it was lost while being conveyed to hotel by carrier. The latter became entitled to rights of guest. *Caskeney v. Nagle*, 83 Ga. 696.

See, for distinction between guest and boarder, *Shoecraft v. Bailey*, 25 Iowa, 553.

Innkeeper is liable for loss of guest's horse, chaise and harness. Committing the same to innkeeper to be fed constitutes him a guest although he himself does not lodge there nor take any refreshment there. *Mason v. Thompson*, 9 Pick. (Mass.) 280. See *McDaniels v. Robinson*, 26 Vt. 316.

A traveler received as a guest does not become a boarder by making an agreement for the price of his board by the week. *Berkshire &c. Co. v. Proctor*, 7 Cush. 417.

See, also, *Hall v. Pike*, 100 Mass. 495.

The jury should decide in a doubtful case whether a person is a guest or a boarder. *Ross v. Mellin*, 36 Minn. 421.

A trunk left on platform erected by hotel for reception of guests' baggage is *infra hospitium* and innkeeper is liable for its loss. *Maloney v. Bacon*, 33 Mo. App. 501.

A guest is a wayfarer who stops at an inn and is accepted. *Manning v. Wells*, 9 Hump. (Tenn.) 746.

A guest at an inn is one who seeks rest or lodging for a night or a day. *Comer v. State*, 26 Tex. App. 509.

If a man retains his status as a traveler, neither the length of his stay nor an agreement for board by the day or week will change his relation from that of guest to that of boarder. *Jailie v. Cardinal*, 35 Wis. 119.

## 2. WHO IS NOT A GUEST.

One who is not otherwise a guest cannot hold the proprietor to an innkeeper's liability for the loss of his horse left at the stable of the inn for the night. *Ingallsbee v. Wood*, 33 N. Y. 577.

A person attending an entertainment at an inn upon invitation and payment is not a guest so as to bind the innkeeper as such for injury to such person's horse, although he may be liable for negligence. *Fitch v. Casler*, 17 Hun, 126. See *Carter v. Hobbs*, 12 Mich. 52.

Peddler who left his pack at an inn by consent of innkeeper without engaging room or food cannot charge the liability of innkeeper for the loss of it. *Toub v. Schmidt*, 60 Hun, 409.

Innkeeper is not liable for goods left at his house by one not a guest. *Centlivre v. Ryder*, Edm. Select Cas. (N. Y.) 273.

Innkeeper is not liable for loss of coat of one dining at the hotel on the invitation of a guest. *Gastenhoper v. Clair*, 10 Daly (N. Y.), 265.

Plaintiff sold out her business and removed to defendant's town. She engaged rooms and board for so much a month, staying there for six months. She was a boarder and not a guest. *Haff v. Adams*, (A) 59 Pac. Rep. 111.

Not liable for goods of guest, left to be called for on his return, after settling his bill and departing. *O'Brien v. Vaill*, 22 Fla. 627.

Hotel proprietor is liable as innkeeper for guest's baggage a reasonable time after his departure. *Adams v. Clein*, 41 Ga. 67.

See, also, *Hayes v. Turner*, 23 Iowa, 214.

Regular boarder by the week deposited gold with hotel keeper, but put it with his own valuables in his safe, and the court held that he was not liable as innkeeper, plaintiff not being a traveler or guest. *Johnson v. Reynolds*, 3 Kas. 257.

Persons who enter the house of a licensed innholder for the purpose of procuring drinks are not guests. *Commonwealth v. Moore*, 101 Mass. 244.

An innkeeper is not liable to one, for the loss of overcoat and gloves, who buys a ticket to a ball given at defendant's inn by a fire company. The fact that during the night he spent money for liquor and cigars in the saloon of the inn does not affect the question. *Carter v. Hobbins*, 10 Mich. 52.

Liability of innkeeper as insurer is only in favor of travelers. Where persons entered defendant's hotel in August and remained there until October following, the proprietor was not liable for jewelry of them stolen while in the hotel. *Lusk v. Belote*, 22 Minn. 468.

One who was a guest in an inn, but to avoid payment of bill was absent a day had his name checked off the register, cannot recover for valise left in a friend's room and stolen while he was away. *Mill v. Peeples*, 60 Miss. 819.

Plaintiff, without an intention to occupy a room, engaged one for the purpose of securing a place of safety for his valuables, depositing them with the clerk of the inn. Was not a guest. *Bunn v. Johnson*, 77 Ark. App. 596.

One whose only business in a hotel is to deposit his money there for safe keeping, is not a guest and cannot hold the proprietor to an innkeeper's liability for the loss of it. *Arcade Hotel Co. v. Wiatt*, 44 St. 32.

Innkeeper was held not liable for loss of hats of guests of a party which contracted with the former for a dinner, though they had



registered and assigned a room. *Amey v. Winchester*, 68 N. H. 447; s. c., 39 L. R. A. 760.

Where money of guest was left with clerk, after his bill had been paid, the relationship had ceased and hotelkeeper was not liable. *Whitemore v. Haroldson*, 2 Lea (Tenn.), 312.

Plaintiff, to entertain a friend, removed with his family from his home to a hotel in the same city and engaged rooms and board for two or three weeks at boarders' rate and was assigned to rooms on the regular boarders' floor. He was a boarder and not a guest. *Meacham v. Galloway*, 102 Tenn. 415.

(d). WHAT IS AN INN.

Where no license could be issued for the sale of liquors except to an innkeeper, if defendant admits he has a license, he will be held to an innkeeper's liability for loss of guest's property. *Korn v. Schedler*, 11 Daly, 234. *Kopper v. Willis*, 9 Daly, 460.

A hotel having a cafe where guests may take their meals and pay for them is an inn. *Krohn v. Sweeney*, 2 Daly (N. Y.), 200.

A person who, without contract, as to terms or definite period of remaining, receives whoever comes, is an innkeeper. *Taylor v. Monnat*, 4 Duer (N. Y.), 116.

One providing temporary accommodations for emigrants is an innkeeper. *Willard v. Reingardt*, 2 E. D. Smith (N. Y.), 148.

Lodging house, with arrangements for meals, if desired, is an inn. *Krohn v. Sweeney*, 2 Daly (N. Y.), 200; *Bernstein v. Sweeney*, 1 J. & S. (N. Y.) 271.

Defendant ran a "European Cafe" with a hotel attachment. Plaintiff engaged rooms but took her meals elsewhere. Defendant was liable as an innkeeper. *Bullock v. Adair*, 63 Ill. App. 30.

A house used for accommodating boarders and travelers for pay is an inn. *St. Louis v. Siegrist*, 46 Mo. 593.

(e). WHAT IS NOT AN INN.

A boarding house keeper is not an insurer, like an innkeeper, of his guest's goods, but where the same were purloined he is only answerable for negligence. *Seigman v. Keeler*, 4 Misc. (N. Y.) 528.

A building used strictly as a lodging house in which there is no arrangement for boarding guests is not an inn. *Cromwell v. Stephens*, 2 Daly (N. Y.), 15.

A restaurant, where meals are only furnished, is not an inn. *People v. Jones*, 54 Barb. 311; *Carpenter v. Taylor*, 1 Hilt. 193.

Parlor car company is not liable as an innkeeper. *Welsh v. Pullman &c. Co.*, 16 Abb. U. S. 352; *Pullman &c. Co. v. Smith*, 73 Ill. 360.

In Wharton on Negligence it is said that such companies are of great weight of authority, regarded as ordinary bailees for hire. Section 610 and 680, citing, *Palmer v. Wagner*, 11 Alb. L. J. 149; *Pfaender v. Car Co.*, 4 Weekly Notes, 240; s. c., 2 Weekly Notes, 324. But it is held that a sleeping car company so far as it renders service similar in kind to that furnished by an innkeeper is subject to the same liability. *Overcoat left in care of porter was lost. Pullman Palace Car Co. v. Lowe*, 28 Neb. 239. (See Common Carriers of Passengers, post 36.)

Customer at a restaurant was held not to be a guest at an inn. *Sheffer v. Willoughby*, 61 Ill. App. 263; s. c. aff'd, 163 Ill. 518.

The proprietor of a private boarding house is a private housekeeper. *Smith v. Amcannon*, 3 Brewst. (Pa.) 344.

A farmer, yielding to the laws of hospitality and taking in travelers for a compensation is not necessarily an innkeeper; the question as to whether he is an innkeeper is for the jury. *Howe v. Franklin*, 20 T. 798.

#### (f). \*LIMITATION OF LIABILITY.

A personal notice to a guest that a safe is provided for money, jewelry, and that unless so deposited the innkeeper will not be liable, is equivalent to posting a notice in the guest's room as provided by ch. 42, § 1855. Independently of the statute, it is negligence for the guest to leave two thousand dollars (\$2,000) in his room in the city of New York after such notice. *Purvis v. Coleman & Stetson*, 21 N. Y. 100, aff'g judgt for def't. See, *Classen v. Leopold*, 2 Sweeny, 705.

An innkeeper who provides a safe for money and jewels of the guest

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\*NOTE.—Chapter 227 of the Laws of 1883, amended by chapter 285 of the Laws of 1892, N. Y., provides:

Sec. (1). Whenever the proprietor or proprietors of any hotel or inn shall provide a safe in the office of such hotel, or other convenient place for the safe-keeping of any money, jewels or ornaments belonging to the guest of such hotel or inn, and shall notify the guest thereof by posting a notice (stating that such safe is provided, in which such money, jewels or ornaments may be deposited) in a public and conspicuous place and manner in the office and public room, and in the public parlors of such hotel, and, if such guest shall neglect to deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments sustained by such guest by theft or otherwise; but the hotel proprietor or lessee shall be obliged to receive property on deposit for safe-keeping exceeding one hundred dollars in value; and if such guest shall deliver such money, jewels or ornaments to the person in charge of such office for deposit in such safe, said proprietor or proprietors shall not be liable for loss thereof, sustained by such guest, by theft or otherwise, in any sum exceeding the sum of one hundred and fifty dollars, unless by special agreement in writing by proprietor or manager.

Sec. (2.) No hotel-keeper shall be liable to any guest for loss of wearing apparel, goods or merchandise for any sum exceeding the sum of five hundred dollars, where it shall appear that such loss occurred without the fault or negligence of such hotel-keeper; nor shall he be liable in any sum for the loss of any article or articles of wearing apparel, cane, umbrella, satchel, valise, box, bag, bundle or other chattel belonging to such guest, and not within a room assigned to him, unless the same shall have been specially intrusted to the care and custody of such hotel-keeper or his servants.

and posts a notice thereof in the room, pursuant to statute, that he shall not then be liable for the loss thereof, is not liable for money not so deposited. *Hyatt v. Taylor*, 42 N. Y. 258, aff'g order rev'g judg't for pl'ff.

At common law, innkeepers are insurers of the property of their guests.

Under our statutes (Laws of 1855, chap. 42) innkeepers who have provided a safe, and posted notices of the fact in accordance with the act, are exonerated from liability for "money, jewels and ornaments" of a guest not deposited in the safe.

But the exemption is limited to the particular species of property named, and being in derogation of the common law, cannot be extended in its application by doubtful construction.

Held, accordingly, that the watch of a guest at an inn, worn and used by him in the ordinary manner, is neither a "jewel or ornament" within the meaning of the act, and that the innkeeper is liable for the loss thereof in the room of the guest, notwithstanding his compliance with the act of 1855. *Ramaley v. Leland*, 43 N. Y. 539. See, *Burnstein v. Sweeney*, 1 J. & S. 271.

Plaintiff, a guest in defendant's hotel, offered to the bookkeeper a large package containing jewelry, and without stating its contents, requested him to deposit it in the safe. The bookkeeper replied that it was not necessary, and requested plaintiff to take it to his room, saying, it would be just as safe there. When plaintiff was ready to leave, he packed his trunk, in which the package then was, delivered up the key of his room to the hotel clerk, and requested the trunk to be brought down immediately. This was not done; and upon plaintiff's calling for it shortly after it was found broken open and the package stolen. Held, that defendant could not be held responsible for a refusal to receive; but that there was a "neglect to deposit" within the meaning of the innkeepers' act of 1855. Laws of 1855, chap. 421.

That said act, however, only relieves the hotel proprietor from losses occasioned by such neglect; and that, as in this case, the loss happened at a time when the package, if it had been deposited, would have been returned to the guest to be packed prior to departure, defendant was liable.

A considerable portion of the property recovered for, was neither money, jewels, or ornaments, and hence, the landlord was not exempt from liability for the loss thereof, under this statute. It was neither within the statute or the notices posted in the hotel. *Bendetson v. French*, 46 N. Y. 266, rev'g 44 Barb. 31 and aff'g judg't for pl'ff. See *Stanton v. Leland*, 4 E. D. Smith 88; *Kellogg v. Sweeney*, 46 N. Y. 291, modifying 1 Lans. 397 and judg't for pl'ff.

\*Chap. 658, L. 1866, exempts an innkeeper for loss by fire in a barn and outstanding building, caused by an incendiary and without negligence. The burden is on the innkeeper to show both facts. Evidence showed that the door was open into the loft and the lumber left so that the incendiary could get in. This was sufficient to sustain a verdict of negligence. *Faucett v. Nichols*, 64 N. Y. 377, rev'g 2 Hun, 521 and judg't for pl'ff for rejection of evidence; citing, *Dausey v. Richardson* 3 E. & B. 165; *Schwerin v. McKie*, 51 Hun, 180.

A statute providing that innkeepers, who furnish a safe place of deposit for valuables and notify guests, shall not be liable for loss of valuables not so deposited, being enacted for the protection of proprietors of hotels, may be waived; and, where the rooming clerk was the manager of the hotel and authorized plaintiff's assignor to leave her jewelry in her room, he was deemed to have waived it. *Freidman v. Breslin*, 51 App. Div. 268; s. c. aff'd, 169 N. Y. 574.

A watch is neither "money, jewels or ornament" of a guest under a statute providing that they must be deposited with the innkeeper, to charge him with their safe keeping. *Becker v. Warner*, 90 Hun, 187.

Nor are silver forks, a silver ladle with the coat of arms of Virginia engraved thereon and a gold watch with a picture of the owner's mother inside, all locked in a trunk. *Briggs v. Todd*, 28 Misc. 208.

Under a statute providing that, when an innkeeper shall provide a safe, and post a notice of the same in the rooms, the guest shall bear the loss of money not deposited in the safe, it was held that the proprietor is not liable for loss of any money not so deposited. *Hyatt v. Taylor*, 51 Barb. 632; s. c. aff'd, 42 N. Y. 258. See *Gile v. Libby*, 36 Barb. 70.

When a guest subscribes a register, at the head of the page of which is an agreement exempting innkeeper from liability for valuables not deposited, etc., the latter is not so exempted, unless guest had knowledge thereof or assented thereto at the time of signing. *Bernstein v. Sweeney*, 1 J. & S. 271.

Mere posting of notice in guest's room will not limit innkeeper's liability. *Bodwell v. Bragg*, 29 Iowa 232.

A notice on a register on which guests wrote their names, that money, coats, etc., must be left at the office, otherwise proprietor is not responsible, was not a publication as required by statute, and would not relieve innkeeper from liability. *Murchinson v. Sergeant*, 69 Ga. 206.

As to the construction of Mass. Pub. Stats. chap. 102, secs. 12-16, limiting common law liability of innkeepers, see the following cases.

\*NOTE.—The duty of hotel keepers to provide fire escapes is governed by § 40 of the Domestic Commerce Law, N. Y. Laws 1896, ch. 876.

Burbank v. Chapin, 140 Mass. 123; Spring v. Hagar, 145 Mass. 186; Becker v. Haynes, 29 Fed. Rep. 441.

The statutory notice to limit liability, to be effective, must be brought to the knowledge of the guest, so that his assent may be presumed. *Olsen v. Crossman*, 31 Minn. 222.

Where the statute permits innkeeper to limit his liability by posting notices, the notices must be not only printed and posted as pursuant to the statute, but must observe all the requirements thereof. *Porter v. Gilky*, 57 Mo. 235.

See, also, *Batterson v. Vogel*, 8 Mo. App. 24.

A statute requiring notice to innkeeper of merchandise of guest for sale or sample in the inn, is satisfied by nothing short of a written notice. *Fisher v. Kelsey*, 16 Fed. Rep. 71.

(g). RULES AND REGULATIONS AND DISOBEDIENCE THEREOF.

Innkeepers may make reasonable rules and regulations for safe keeping of goods, but they must be clear and specific. *Van Wyck v. Howard*, 12 How. Pr. 147.

When guest neglects to deposit baggage when directed, innkeeper is not liable. *Wilson v. Halpin*, 1 Daly (N. Y.), 496; s. c., 30 How. Pr. 124.

A guest was allowed to recover from an innkeeper for the loss of a trunk and its contents, except valuable mineral specimens, where notice was posted in the room instructing guests to leave their valuables in the office vaults. *Brown Hotel Co. v. Burckhardt*, 13 Colo. App. 59.

But the fact that a place is provided for overcoats does not relieve for loss of one committed to a servant, according to known custom of house. *Labold v. Southern Hotel Co.*, 54 Mo. App. 567.

(h). CONTRIBUTORY NEGLIGENCE OF GUEST.

Where guest takes exclusive custody of his property the landlord may not be liable. Wharton on Negligence, sec. 690.

Whether leaving the door unlocked and valuables exposed, or whether leaving door unlocked under circumstances likely to induce a theft of the goods, constitutes contributory negligence may be a question of fact for a jury. Wharton on Negligence, sec. 691.

A guest took a strumpet to his room, who stole part of his money; the rest he asked the clerk to take charge of, which he refused to do. His prior misconduct and contributory negligence did not prevent liability for loss of the remainder, which was subsequently stolen. *Lucia v. Omel*, 46 App. Div. 200; s. c. aff'd, 53 App. Div. 641.

Guest cannot recover where he exposes his goods or neglects to lock his door. *Fowler v. Dolorn*, 24 Barb. 384.

Guest need not lock his door to recover for theft. *Buddenberg v. Benner*, 1 Hilt. 84; even upon retiring for the night. *Classen v. Sweeney*, 2 Sweeney, 705

Guest's failure to inquire for goods delivered at the hotel for him several days was not contributory negligence. *Eden v. Drey*, 75 Ill. App.

Innkeeper repelled presumption of negligence from loss of goods showing that guest's room was probably unlocked. *Hulbert v. Hart*, 79 Ill. App. 289.

Remaining away all night is not as matter of law contributory negligence on the part of a guest. *Turner v. Whitaker*, 9 Pa. Super. C.

Failure of guest to comply with reasonable rules of innkeeper brought to his knowledge will discharge innkeeper from liability for loss of goods occasioned thereby. *Fuller v. Coats*, 18 Oh. St. 343; *Houder*, Tully, 62 Pa. St. 92.

The question of the plaintiff's negligence in laying his gloves upon his overcoat on a bench in the presence of the innkeeper is for the jury. *Read v. Amidon*, 41 Vt. 15.

Selection of a room, which was known by a guest to be defective and dangerous, was held contributory negligence. *Glass v. Colman*, 14 Vt. 635.

Guest was intoxicated and left his door unlocked. Innkeeper nevertheless, liable for theft by a servant. *Cunningham v. Buck*, 7 W. Va. 671; s. c., 35 L. R. A. 850.

When guest neglects to lock the door of a room containing goods belonging to him, he cannot recover for loss of the same from innkeeper. *Burgess v. Clements*, 4 Maule & S. 306.

#### (i). WHEN INNKEEPER IS LIABLE AS AN ORDINARY BAILEE.

Although an innkeeper be not liable as such by statutory exemption or otherwise he will be liable for negligence as an ordinary bailee. *Wharton on Negligence*, sec. 689, citing *Hawley v. Smith*, 25 Vt. 642; *Grennel v. Cook*, 3 Hill, 485; *Hayes v. Turner*, 23 Iowa, 53; *Wiser v. Chesley*, 53 Mo. 549; *Adams v. Clem*, 41 Ga. 67.

Goods leased to another and by him deposited with innkeeper, innkeeper liable only as a bailee to such owner. *Coykendall v. Egan*, 55 Barb. 188.

As plaintiff was a boarder and not a guest and the hotelkeeper exercised no negligence, he was not liable for loss. *Haff v. Adams*, (Ala.) 59 Pac. Rep. 111.

Valise of guest was stolen when he was absent from the hotel. *Ray v. Marshall*, 9 Colo. 482.

Innkeeper liable only as naked depository for a valise left in hotel office, without attention to it, and taken by clerk to a room where baggage was kept. *Stewart v. Head*, 70 Ga. 449.

Although an innkeeper be not liable as such by reason of the termination of the relation he may be liable for negligence as an ordinary bailee. *Hayes v. Turner*, 23 Iowa, 214.

For a discussion of an innkeeper's relation toward a pedler without a license as that of an ordinary bailee, see *Cohen v. Manuel*, 91 Me. 274; s. c., 40 L. R. A. 491.

Innkeeper is responsible only for gross negligence when he receives valuables for deposit without hire, "that omission of care which even the most inattentive and thoughtless never fail to take of their own concerns." *Wiser v. Chesley*, 53 Mo. 547.

Innkeeper is liable only for negligence to members of a dinner party. *Amey v. Winchester*, 68 N. H. 447.

An innkeeper, having exercised due diligence, was not liable for loss by theft from a boarder. *Meacham v. Galloway*, 102 Tenn. 415.

Damages to goods of traveling salesman displayed in a sample room chargeable to innkeeper although full innkeeper liability does not attach as regards such goods. *Scheffer v. Corson*, 5 S. D. 233.

#### (j). WHEN LIABILITY ENDS.

Liable for injury to one horse by another, while owner is taking it from stable to depart. *Seymour v. Cook*, 53 Barb. 451; s. c., 35 How. Pr. 180.

But not if guest has departed without intention of returning; even if it be specially intrusted to him, innkeeper is only an ordinary bailee, *Wintermute v. Clark*, 5 Sand. (N. Y.) 242.

Where guest leaves his valise after paying his hotel bill, without any directions, and not intimating that he intended to return, the landlord is not liable for its loss. *Glenn v. Jackson*, 93 Ala. 342.

But when, after departure of guest, the innkeeper delivers baggage to an unknown person, *without inquiry*, he is liable for the loss of it. *Wear v. Gleason*, 52 Ark. 364.

Innkeeper is liable for the baggage of a guest left for a reasonable time in his care after the guest's departure. *Adams v. Clem*, 41 Ga. 65.

Innkeeper is not liable as such if after departure of guest his trunk is delivered to the wrong person. *Hays v. Turner*, 23 Iowa, 214. See *Grinnel v. Cook*, 3 Hill (N. Y.) 485.

Innkeeper is liable while guest continues to pay for his board although he be temporarily absent. *McDonald v. Edgerton*, 27 Vt. 171; *Hays v. Turner*, 23 Iowa, 214.

## XI. Banks—Savings.

Mere possession of the book, delivered to a depositor by a savings bank by a stranger or other person than the owner, does not authorize a payment of the deposit to such person. *Smith v. Brooklyn Savings Bank*, 101 N. Y. 58; *Kimball v. Norton*, 59 N. H. 1.

Yet, if the depositor has contracted that all payments may be made to one presenting the pass book, and that payment under such circumstances shall be deemed good and valid, he is bound thereby, unless the bank be chargeable with want of ordinary diligence or care. If, at the time of such payment, a fact or circumstance is brought to the knowledge of the bank's officers which is calculated to excite the suspicions and inquiry of an ordinarily careful person, it becomes the duty of the officers of the bank to institute such inquiries, and for failure to do so they may be regarded as negligent, and the payment be held invalid. *Gearns v. Bowery Savings Bank*, 135 N. Y. 557; *Kummel v. G. S. Bank*, 127 id. 488; *Wall. v. Emigrants' Industrial Savings Bank*, 64 Hun, 249; *Israel v. Bowery Savings Bank*, 9 Daly, 507; *Sullivan v. Lewiston, etc.*, 56 Maine, 507; *Levy v. Franklin Savings Bank*, 117 Mass. 448.

And if, in connection with such contract, the bank stipulate to use its best efforts to prevent fraud, etc., more than ordinary care will be required. *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 314.

But a depositor may not recover if he was guilty of contributory negligence, as where he furnished a stranger with the information whereby to answer test questions put by the bank upon making a payment. *Wall. v. Emigrants' Industrial Savings Bank*, 64 Hun, 249.

A savings bank, upon the receipt of a deposit, entered the same in its books and delivered to the depositor a pass book containing the rules of the bank, and among others that no depositor should be paid without producing the pass book, and that all payments made to the person producing the same should be deemed good and valid payments.

The rules constituted the conditions upon which the deposit was received, and the bank was authorized to pay upon the production of the book without an order from the depositor, and where the bank is not chargeable with want of diligence or an omission of duty, such payment is binding upon the depositor although made to a wrong person.

The pass book was presented with a forged order purporting to have been signed by the depositor. The forgery was immaterial inasmuch as the presentation of the book justified the payment.

The pass book provided that "the secretary will use his best efforts to prevent fraud, but all payments made to persons producing the book shall be deemed good and valid payments to the depositors respectively." The deposit was made by a female, while the person wrongfully drawing the money was a male. The judge, writing the opinion, said: "I do not discover that there was anything in the transaction to indicate that the order was forged, as upon somewhat questionable evidence the jury has found;" and, also, "The bank had the right to make the payment if



did on the simple production of the pass book." *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. 418. [This case was criticised in *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 318, and was distinguished in *Smith v. Brooklyn Savings Bank*, 101 id. 58, 63, and *Kummel v. G. S. Bank*, 127 id. 488, 491.]

The defendant's rule provided that "although the bank would endeavor to prevent fraud upon its depositors, yet all payments to persons presenting the pass books issued by the bank shall be valid payments to discharge the bank; in the case of lost books, the bank will decide as to the person to whom payment shall be made, without right of the depositors of such lost books to question the correctness of the payment." Also, "the pass book shall be a voucher of the depositor, and the possession of the pass book shall be sufficient authority to the bank to warrant any payment made and entered in it; and the bank shall not be liable or called on to make any payments without the presentation of the pass book at its counter, that the proper entering may be made in it."

It was the custom of the bank to require the signature of each depositor, at the opening of an account, in a book kept for that purpose. The book of the plaintiff, who had so signed, was stolen and was presented to the bank by a person who signed the plaintiff's name to the receipts for the amounts of the deposits, and received the same. In an action to recover the amount by the depositor, the assistant teller, who paid the money, testified that he compared the signature to the receipt with that of the plaintiff upon the book, and was satisfied that the former was genuine. The plaintiff's evidence tended to show that the signatures were unlike, and the question was whether the failure to discover the discrepancy was negligence. A verdict was directed for the defendant.

It was held that, while the bank was not absolutely discharged by payment upon the production of the pass book, irrespective of the exercise of ordinary care in the examination of signatures, yet, to be evidence of negligence, the dissimilarity must be so marked and apparent that it can be readily discovered by the person competent to hold the position of teller; and the judgment was upheld for the defendant. These institutions are required to exercise reasonable care. 56 Maine 507; 27 Conn. 229; 46 N. H. 78. *Appleby v. E. C. Savings Bank*, 62 N. Y. 12.

Defendant's by-laws provided that "the bank will use its *best efforts* to prevent fraud; but all payments made to persons producing the pass book shall be good and valid payments."

"A draft may be made personally or by order in writing of the depositor (if the bank have the signature of the party to their signature book), or by letters of attorney duly authenticated, but no person shall

have the right to demand any part of his or her principal or interest without producing his or her bank book that such may be entered therein."

The wife of the plaintiff obtained possession of the deposit book, which she presented with a forged check or order, and the same was paid to her. On the trial, defendant's own officers stated that there was a difference between the signature to the order and that in the signature book. The court declined to charge that the payment was valid, but left it to the jury to determine whether defendants used its *best efforts* to prevent fraud.

It was held that, as the appellate court had not the benefit, which the trial court did have, of the inspection of the signatures, it could not say but that said court, on inspection, discovered such a difference, as, with the other circumstances of the case, authorized a submission of the case to the jury; and that the exercise of ordinary care and diligence and good faith was not sufficient, as the contract of the bank to use its best efforts required more than ordinary care, and, in such case, the bank was *not protected by the clause in the rules that a payment to one producing the deposit book should be deemed good and valid*. If the payment had been made in reliance upon the order alone, and in the absence of agreement as to the pass book, the defendant could not have been excused as it would have been bound to know that the signature of its customer was forged. *The National Park Bank v. Ninth National Bank*, 46 N. Y. 77; *Allen v. Williamsburgh Savings Bank*, 69 id. 314, aff'g judg't for def't.

Distinguishing, *Schoenwald v. Metropolitan Savings Bank*, 57 N. Y. 418, and *Hayden v. Brooklyn Savings Bank*, 15 Abb. N. S. 297, where it was found by the referee, as a matter of fact, that the bank was not negligent, *Appleby v. Erie Co. Savings Bank*, 62 N. Y. 125.

See *Welsh v. German American Bank*, 73 N. Y. 424.

The defendant delivered to "S," a depositor, a pass book which stated that the account was with her "in trust for Christopher Boone." After receiving one year's interest, "S." died and the defendant paid the amount of the deposit to her administrator. In the absence of any notice from the beneficiary the payment was good, as the deposit constituted "S." a trustee with title to the fund (distinguishing *Martin v. Funk*, 75 N. Y. 134), and upon her death her rights as trustee devolved upon her administrator (*Banks v. Ex'rs of Wilks*, 3 Sandf. 99; *Bucklin v. Bucklin*, 1 Abb. Court of App. 242; *Bunn v. Vaughn*, id. 253; *Emerson v. Bleakley*, 2 id. 22; *Trecothlic v. Austin*, 4 Mason, 16, 29), and the defendant had no right to inquire into the nature of the trust, and, until notice, owed no duty to the beneficiary. *Boone v. Citizens' Savings Ins. &c.*, 84 N. Y. 83, rev'g 21 Hun, 235, and judg't for pl'ff.

Approving, *Allen v. Williamsburgh Savings Bank*, 69 N. Y. 317.

In 1869 a person deposited in a savings bank, \$1,880 in the name of Henry Seaman of a certain address, and left his signature. One Harry Vail, living at the same place, was, in 1872, sent to prison, where he died, and under a stack of hay on his farm was found a deposit book issued by the bank to Henry Seaman, of like number and amount as of the one already stated. This book was delivered to Vail's administrators who demanded from the receiver of the bank payment of the dividend due on the deposit. Before such presentation, however, some person presented to the receiver's clerk, a deposit book apparently issued by the bank in the name of Henry Seaman, and demanded payment of the dividend, which was made to him, as the book contained the whole account, and was a precise duplicate of the book found under the hay stack. The person presenting it was questioned as to his age, occupation and residence, and answered the description given by the actual depositor. The signatures were compared and believed to resemble each other sufficiently.

The claim by the administrators was determined by the referee, who reported that the receiver had used reasonable and ordinary care and diligence on his previous payment of the dividend, and that the administrator was not entitled to the same. The appellate court held (1), that the burden rested upon the plaintiff to show that the deposit was made by Vail, and to establish title to the deposit book, and that the evidence failed to establish such conclusions; (2) that the evidence justified a finding that the duplicate pass book was issued, and that Seaman transferred one, or that it came to the hands of the person who drew the dividend, and the payment having been made with due care and diligence by the receiver to the one presenting the deposit book, he was entitled to protection; (3) that in case the deposit was made by Vail with a false description of occupation and age, and no duplicate book was issued, his administrator should not recover, as Vail by his action created confusion and doubt, which misled the receiver, and as the latter had acted in good faith. *The People v. Third Avenue Savings Bank*, 98 N. Y. 661.

The possession by a stranger of the pass book of a depositor of the savings bank constitutes no evidence of a right to draw money thereon, unless the bank show that there was a special contract with the depositor authorizing such a mode of payment. There was in such pass book the following rule, "All payments made by the bank upon presentation of the pass book, and duly entered therein, will be regarded as binding upon the depositor; money may also be drawn upon the written order of the depositor or his attorney, when accompanied by the pass book."

The by-laws contemplated but two modes of payment, one to the depositor personally, and the other upon his written orders, both requiring the presentation of the pass book as the condition thereof, and did not authorize the bank to make any payment to a stranger whose only evidence of authority was the possession of the pass book. *Smith v. Brooklyn Savings Bank*, 101 N. Y. 58; distinguishing *Schoenwald v. Metropolitan Bank*, 57 id. 418.

The pass book of a savings bank contained the rule, that payment should only be made to the depositor or his duly constituted attorney on the presentation of the pass book; and that the bank would not be responsible "for any fraud committed on its officers in producing the pass book and drawing money without the knowledge and consent of the owner."

Money was drawn upon a forged check or receipt by a stranger, who had stolen the pass book. It was held that the pass book was not negotiable and its possession did not constitute proof of the right to draw money thereon; but imports liability of the bank to the depositor for the amount of moneys entered therein, as deposited, and an agreement to pay at such times and in such manner as the depositor shall direct.

The jury found upon evidence authorizing a submission of that question to them, that the defendant's officers were negligent in making the payment, and judgment thereon was upheld. The negligence seemed to consist, as to one item, in this: the cashier asked the person presenting the book where he lived, to which he first replied, "New York," and afterwards stated that he had lived in Brooklyn before that at Tillary street, and the cashier asked him no further questions. Another payment was made by the clerk, who judged from the first that the signature to the receipt was not exactly right, and he asked the person presenting it if he could not write with a more fluent hand, and received the answer that he was not feeling well.

It appeared that, as to the first item, the cashier did not avail himself of the means at hand to identify the person presenting the pass book and forged receipt; but upon this evidence and the fact that the signature was before the jury for comparison, a submission of the question upon both items was held to be correct. *Kummel v. G. S. Bank*, 101 N. Y. 488; distinguishing *Schoenwald v. Metropolitan Savings Bank*, 57 id. 418.

The plaintiff, as administrator of "M," deceased, brought action to recover balance of the deposit with the defendant. The defendant proved that the balance had been paid to one "K," a person unknown to the defendant's officers, upon presentation of "M's" pass book, together with a paper purporting to be a power of attorney executed

plaintiff in his individual capacity, wherein he was described as executor of the will of "P," and which, although it gave a correct number of the pass book, by its terms authorized "K" to draw all moneys on deposit with defendant credited to the plaintiff as such executor. The pass book and power of attorney were obtained by fraud.

The trial court refused to submit the question as to whether the defendant acted with ordinary care and diligence in making such payment, to the jury. This was error, as the alleged power of attorney, upon its face, did not relate to the deposit in question, and conferred no power upon "K" to draw money, and this might furnish reasonable grounds for suspicion, and the question of defendant's negligence respecting the same should have been submitted to the jury.

The court laid down the rule that "if at the time (of payment) a fact or circumstance was brought to the knowledge of the defendant's officers which was calculated to have excited the suspicion and inquiry of an ordinarily careful person, it was clearly their duty to institute such inquiry, and their failure to do so presented a question for the consideration of the jury. *Gearns v. Bowery Savings Bank*, 135 N. Y. 557.

The defendant's rule, which was agreed to by the depositor, was, that "the officers and clerks will endeavor to prevent frauds on the depositors, but all payments made to any person presenting the proper deposit book shall be good and valid payments." Also, "on the decease of any depositor the amount standing to the credit of the deceased shall be paid to his or her legal representatives."

A depositor died in Pennsylvania and an administrator was appointed and discharged. One Devlin got possession of the book and tried, unsuccessfully, to obtain the money thereon, and later began an action to recover the deposit. A referee was agreed upon to try the action; he had an office in the same building with the defendant's attorney. The plaintiff's attorney prepared the defendant's answer and the referee's report, and paid all expenses of obtaining a judgment, but taxed no costs against the defendant, and recovered judgment that the defendant pay the money to Devlin. In an action by the depositor's administratrix to recover the deposit, it was held that the judgment was collusive, and did not protect the bank from the second rule, and the question for the jury was of the defendant's negligence. The court seemed to have thought that the second rule applied only to the facts of the case, but that if this were not so the plaintiff should have been allowed to go to the jury on the question of the defendant's negligence, and the complaint should not have been dismissed. *Farmer v. Manhattan Savings Institution*, 60 Hun. 462.

The bank book of a savings bank provided, that the possession of the

pass book should be sufficient authority to warrant any payment made and entered in it, and that the bank should not be liable, or called upon to make any payment, without the presentation of the pass book at its counter, etc., also, the following: "Although the bank will endeavor to prevent fraud on its depositors, yet the payments to persons presenting the pass book issued by the bank shall be valid payments to discharge the bank."

The plaintiff, having a deposit in the bank, upon the request of a stranger, gave him information, as to certain facts, which would enable the stranger to answer the test questions commonly put by a bank to a depositor, and thereafter the stranger, as James Wall, appeared at the bank with the pass book. The paying teller regarded the signature as slightly different from that in the signature book, put the test question, and, as these were answered correctly, paid the money. In an action brought by Wall it was held, that the defendant was bound to exercise reasonable care and diligence in making payments, and that the plaintiff, in furnishing the stranger with the information enabling him to answer the test questions was guilty of contributory negligence and could not recover. *Wall v. Emigrant Industrial Savings Bank*, 64 Hun, 249.

A deposit in the name of "Ellen C. Maxwell, in trust for George T. Maxwell," is presumptively a trust fund and payment to the representatives of the *cestui que trust* out of the deposit, upon presentation of the pass book, discharges the bank from liability. *Bishop v. Seamen's Bank for Sav.*, 33 App. Div. 181.

\* See *Matter of Dohrman*, 15 App. Div. 67.

A bank's by-laws, discharging it from liability upon payment to one producing the pass book, were held to apply only in the lifetime of the depositor or upon his death without its knowledge, where they also provide for payment upon depositor's death to his legal representative. Where the book was produced by another to whom the deposit was paid upon an affidavit purporting to show possession of the pass book as a gift *causa mortis* it must prove such title before it can be discharged. *Podmore v. South Brooklyn Sav. Inst.*, 48 App. Div. 218; s. c., 55 App. Div. 624.

Plaintiff permitted another to take her savings bank deposit book and failed to notify the bank, when he reported to her that it was lost. Payments were afterwards made by the bank on orders purporting to be signed by the depositor presented with the book. The bank was held not negligent. *Winter v. Williamsburgh Sav. Bank*, 68 App. Div. 193.

A bank rule that payment to those producing the pass book shall discharge it of liability, does not relieve it of the duty of exercising reasonable care. Asking one presenting the pass book the usual questions

asked of a depositor upon the original deposit without asking if he was the depositor, was not, as a matter of law, the exercise of such care. *Abramowitz v. Citizen's Sav. Bank*, 17 Misc. 297.

It was not due diligence in a bank to pay out an entire deposit to one whom it knew was not the depositor, although he produced the pass book. And in view of such negligence, its rule that payment to one producing such pass book should relieve it of liability, was unavailing. *Geitelsohn v. Citizens' Sav. Bank*, 20 Misc. 84; aff'g s. c., 19 Misc. 422; s. c., 17 Misc. 574; rev'g s. c., 17 id. 57.

Where an indorsement is forged, it is the bank's duty to discover it before the check is paid. A depositor is under no obligation to the bank to examine pass book for the purpose of discovering forgeries, and his right of action depending on a refusal by the bank to satisfy his demand, is not barred by the statute of limitations if, not discovering the forgery until seven years after the check was paid, he made no demand until that time. *Bank of Brit. N. Am. v. Merchant's &c. Bank*, 13 Weekly Dig. 374; s. c., aff'd, 91 N. Y. 106.

Notwithstanding the following regulations: That no person should have the right to demand any part of his principal or interest without producing the original book, and all payments made to persons producing the deposit book should be deemed good and valid payments to depositors respectively, the bank officers were not absolved from the exercise of ordinary care in making payments upon faith of the depositor's book. On the trial it devolves upon the plaintiff to show a failure of ordinary care. *Israel v. Bowery &c. Bank*, 9 Daly, 507. *Schoenwald v. Met. Sav. Bank*, 57 N. Y. 418.

Unless bank has by its silence been induced to take any action or lost its rights, the depositor is under the necessity of proving fraud, error or mistake in the accounts. *Frank v. Chem. Nat. Bank*, 37 N. Y. Supr. Ct. 26; s. c., 45 id. 452; s. c. aff'd, 84 N. Y. 209.

A rule of a bank, that, on the death of a depositor, the money shall be paid to her legal representative did not justify its refusal to honor the demand of one to whom she had made a gift of the deposit during her life and who thereby was substituted as the depositor. *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. 4.

A rule, that, in case of lost books, the bank would decide who was entitled to the deposit, did not justify its refusal to honor the demand of the executor of a depositor, where he was the only claimant and the book had been lost for several years. *Mills v. The Albany Exch. Sav. Bank*, 28 Misc. 251.

A bank did not use the requisite diligence, where a party presenting a pass book, though answering the usual questions satisfactorily and

giving the usual identification by another, failed to make the depositor "mark," where the doubt could have been settled by sending to the depositor a short distance from the bank. *Rosen v. State Bank*, 32 Misc. 23.

A rule of a bank, that payments to persons producing the pass book would relieve it of liability, did not protect a bank, where it knew that the party producing it was not the depositor. *Picken v. Emigrants' Industrial Sav. Bank*, 33 Misc. 92.

Savings bank cannot avail itself of payment on forged order of depositor with pass book, as a defense *under a by-law printed conspicuously on the pass book* providing that "payment on deposits shall be made only to the depositor's order or to his legal representative on the presentation of the depositor's book." *Eaves v. People's & Bank*, 27 Conn. 229.

Pass book obtained of a bank by fraud is not of itself proof of negligence. Therefore, bank is not estopped from denying its liability to bona fide assignee of the book. *McCaskill v. Conn. Savings Bank*, 6 Conn. 300.

The diligence due to a special depositor is not measured by the fact that the bank was no more diligent in a like case with its own funds. *Merchant's Nat. Bank v. Carhart*, 95 Ga. 394; s. c., 32 L. R. A. 775.

Officers of a bank, using reasonable care and diligence, taking proper means of identification, may pay money to one apparently in lawful possession of depositor's pass book, and not be accountable for loss incurred thereby. *Sullivan v. Lewiston Ins. Co.*, 56 Me. 507.

Where a bank, under the impression that a depositor was dead, after he had been absent for more than seven years without being heard from, paid the deposit to one appointed administrator who had produced the deposit book, it was accountable to the depositor. *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87.

By-law stipulating that "presentment of a deposit book shall be a discharge to the corporation for the amount so paid," and requiring notice of loss of book, protects the bank when it pays, in the exercise of reasonable care and in good faith, on a forged order and production of book, although depositor was ignorant of the loss of it. *Lery v. Franklin Savings Bank*, 117 Mass. 448; *Goldrick v. Bristol & Co.* Bank, 123 id. 320.

Where a depositor subscribed to by-laws by making his mark, and the bank was ignorant of the fact that he could not read, it was not liable to his executor for money paid, without negligence, and without notice that the book had been stolen, to a stranger personating the depositor, notwithstanding the usual probate citation had been published by the executor. *Donlan v. Provident Institution &c.*, 127 Mass. 183.

A bank was not warranted in requiring a bond of indemnity before



paying a deposit upon the loss of a pass book where there had been a fire in the testator's house in which it might have been lost and the treasurer of the bank testifies no one since had demanded payment of the account. *Hudson v. Roxbury Inst. for Sav.*, 176 Mass. 522.

A bank by-law, releasing it of liability, upon payment to anyone presenting the pass book, did not relieve the bank for payment upon a forgery of the depositor's name, where the by-law was not brought to his attention so as to become a part of his contract with it. *Ackenhausen v. People's Sav. Bank*, 110 Mich. 175.

It is not an exercise of ordinary fiduciary care for a bank to take a deposit of books from one, whom it knows to be not the owner, without the owner's consent, without an assignment, order or proof of delivery, and without sufficient evidence of pledgor's authority. *Kimball v. Norton*, 59 N. H. 1.

A bank by-law, that it is relieved of liability where depositor gave no notice of the loss of his book, is not effective where the bank fails to exercise ordinary care, as, by requiring identification, comparison of signatures, &c. Due diligence is not measured by the degree of care the bank exercises in regard to itself. *Brown v. Merrimack River Sav. Bank*, 67 N. H. 549.

A by-law that a bank shall be relieved of liability upon payment to parties producing the pass book, which is assented to by the depositor, is a valid contract limiting its liability where it has used due diligence. *Cosgrove v. Provident Institution &c.*, 64 N. J. L. 653.

It is error, where it appeared that the custom in the case of a depositor who could not write, was to enter answers to questions asked him in the signature book, to refuse to instruct the jury that such action on the part of the bank was not negligence. Where a depositor cannot write and permits another to sign for him without informing the officials of the facts, he cannot recover for money paid to this other person. *Fiore v. Ladd*, 22 Ore. 202.

Depositor living at a distance will be presumed to have assented to by-laws contained in deposit book received by him, although he never left his signature at the bank; so, where depositor's brother, presenting the book, signed depositor's name, and the bank made payment, it was held not liable, notice of loss of book, as required by by-laws, not having been given. *Gifford v. Rutland Savings Bank*, 63 Vt. 108.

It is a question for the jury, whether bank was guilty of negligence, under circumstances calculated to arouse suspicion, such as dissimilarity in handwriting; the rule requiring a previous notice of thirty days for the withdrawing of a deposit is for the protection of the depositor as well as the benefit of the bank. *Wegner v. Second &c. Bank*, 76 Mo. 242.

## BILLS, NOTES AND NEGOTIABLE INSTRUMENTS.

- I. FORGED BILLS.
- II. NEGLIGENCE IN EXECUTING.
- III. ALTERATION.
  - (a) Completed paper.
  - (b) Uncompleted paper.
- IV. NEGLIGENCE IN COLLECTING.
- V. BONA FIDE PURCHASERS.

### I. Forged Bills.

It being the duty of the drawee to satisfy himself of the genuineness of the bill, before he accepts or pays; and it being important to the holder and other previous parties that he should do so, it is settled that he accepts or pays at his peril. If he accepts he is bound to pay, although the drawer's signature turn out to be forged; and if he pays he cannot recover back his money, unless the forgery is discovered and notice given immediately or within such time as to give the holder the same advantage of proceeding against the party from whom he received the bill, as if it had been dishonored. *Price v. Neale*, 3 Burrow, 1354; *Smith v. Chester*, 1 T. R. 654; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & Cres. 428; *Cocks v. Masterman*, 9 id. 922. Where the plaintiffs intervened and paid the bill for the honor of the supposed drawers, *without having seen it*, it was held that they were not precluded by negligence from recovering the money back. It seems, that had the drawees paid the bill under the same circumstances they might have recovered the money. *Goddard v. Merchants' Bank*, 4 N. Y. 147, aff'g judg't for pl'ff.

In an action against the indorser of a note, protested for non-payment, evidence of the forgery of the maker's signature was held to be immaterial. *Lennon v. Grauer*, 159 N. Y. 433; aff'g s. c., 2 App. Div. 513.

**From opinion.**—Defendant, "as indorser of the note, must be regarded, in effect, as having contracted with the plaintiff a subsequent holder, that the instrument was what it purported to be; that it and as well the preceding indorsements were genuine and that he had a clear legal title thereto. (*Erwin v. Downs*, 15 N. Y. 575; *Turnbull v. Bowyer*, 40 N. Y. 456; *White v. Continental Nat. Bank*, 64 N. Y. 316; *Daniel on Negotiable Ins.* sec. 1357). The plaintiff in taking this note for value and before maturity, was entitled to rely upon this contract, to be implied from Grauer's indorsement of the note, that the note was the genuine obligation of the person purporting to have made it. If it were the fact that the name of the maker was forged, it would not discharge the indorser. *Coggill v. American Ex. Bank*, 1 N. Y. 113."

Where a husband, knowing of forgery of checks by his wife, fails to

make complaint to the bank, he cannot complain of future forgeries. *Neal v. First Nat. Bank*, 26 Ind. App. 503.

H. procured a loan representing himself as "D." The check for the money payable to D. was indorsed by H. as "D.," and again as H. As far as the bank was concerned H. was the intended payee, and it was not liable to the depositor. *Meyer v. Indiana Nat. Bank*, 27 Ind. App. 354.

One, whose name had been forged on a note, called at the bank that protested it in answer to a notice of protest, and, after examination of the note, told the cashier that it would be paid. But on the next day, in response to a demand for payment, he denounced the signature as a forgery. He was not necessarily negligent in failing at once to detect the forgery and notify the bank thereof, where he was in no way connected with the transaction. *Trader's Nat. Bank v. Rogers*, 167 Mass. 315.

Bank was not chargeable as upon a forgery, where the party was the one to whom the check was actually delivered in the belief that he was the payee. *States v. First Nat. Bank*, 17 Pa. Super. Ct. 256.

Both at common law and under a statute providing that a forged signature to negotiable paper creates no rights against a party thereto, a bank was liable for the payment of a check to the order of A. delivered to one falsely representing himself to be A., and forging his indorsement. *Tolman v. American Nat. Bank*, 22 R. I. 462.

The holder of a forged draft is not negligent in cashing it for one introduced by a reputable person without further inquiry; the drawee pays it at its own risk. *Moody v. First Nat. Bank*, 19 Tex. Civ. App. 278.

A bank was not negligent in failing to detect a forgery on a renewal note by failing to compare it with the original. *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81.

## II. Negligence in Executing.

When one having the opportunity and the power to ascertain with certainty the exact obligation he is assuming, chooses to rely upon the statements of the person with whom he is dealing and executes a negotiable instrument without reading or examination, as against a *bona fide* holder for value, he is bound by his act, and is estopped from claiming that he intended to sign an entirely different obligation, and that the statements upon which he relied were false, unless he can show that he was guilty of no laches or negligence in signing. *Chapman v. Rose*, 56 N. Y. 137.

Defendant entered into a contract with Miller to act as agent for the sale of a patent hay fork and pulley. A contract was filled out by Mil-

ler and signed by both; also an order, which was signed by defendant for one of the hay forks and two of the pulleys, for which, by the order defendant agreed to pay nine dollars. These were delivered to defendant. Another paper was then presented to defendant for his signature which Miller represented to be but a duplicate of the order. Defendant without reading or examining it, signed it and delivered it to Miller; the paper so signed was the note in suit. Plaintiff purchased in good faith before maturity, paying therefor \$245. The trial court erred (1) in submitting negligence of plaintiff in purchasing note; (2) in refusing to submit question of defendant's negligence in signing the note. *Chapman v. Rose*, 56 N. Y. 137, rev'g, 44 How. Pr. 364, and judg't for plaintiff.

The action was upon an indorsement of a bill of exchange, and the evidence was that the defendant indorsed it believing it to be a guarantee—that being represented to him as its nature by a person in whom he put confidence. The judge charged the jury that if the defendant signed it not knowing it to be a bill, but believing it to be a guarantee in consequence of a fraudulent representation as to its character, and if he was not guilty of any negligence or laches in signing it, he was not bound. The jury found for the defendant. Upon a review of the decision, and after a full and able discussion of the questions involved, the court held the direction at the trial to have been right; but a new trial was granted upon the ground that they were not satisfied with the finding of the jury on the question of fact. *Foster v. McKinnon*, L. (4 C. P.) 704. See the principle discussed and applied in *Page Kreky*, 137 N. Y. 307, "Contracts," post. 626.

In an action upon a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defense, that when he signed it, it was represented to him, and he believed it to be a contract entirely different in character.

The case distinguished from that of a note fraudulently obtained and which the maker intended to make. *Whitney v. Snyder*, 2 Lansing (N. Y.) 477, granting new trial on motion of defendant.

**From opinion.**—"This was an action against the defendant as maker of a promissory note. The plaintiff had testified that he purchased the note for value and before maturity. The defendant offered to prove in defense, that he was unable to read, and that when he signed the note it was represented to him, and he believed that it was a certain other contract, offered to be also produced in evidence, and which purported to be a contract *inter partes* of an entirely different character. The offer was overruled and the defendant excepted, and now moves for a new trial. We think learned judge at *nisi prius* erred in rejecting the evidence offered. The consent of the party alleged to have made

ial to the binding force of a contract. This principle has been often the case of deeds and other instruments misread, or the contents of been misrepresented to the party against whom the instrument is to be enforced. A *bona fide* holder of commercial paper for value and maturity, is protected in many cases against defenses which are perfectly alien between the original parties, such as that the signature was obtained by false and fraudulent representations; that the paper has been diverted; that the bill or acceptance has been filled up for a greater amount than to whom it was delivered was authorized to insert, etc. But in all cases where the party intended to sign and put in circulation the instrument without adequate security; where this is the case he is bound to know that he is using the means whereby third parties may be deceived, and innocently led into their property on the faith of his signature, and in ignorance of the state of facts. But, while this is a rule of convenience and propriety, there must be some limits to its application, some defenses as to which a *bona fide* purchaser, purchases at his peril.

A peculiar case of the note declared void by the statute, as in the case of usury, affords an illustration. During the period when, according to the law of this state, a *bona fide* holder for value, and before maturity, was protected against even the defense of usury, the statute against usury was practically abrogated as to negotiable paper. \* \* \*

A party who can give evidence, that he purchased the bill for value, before maturity, and as to whom the defendant is unable to bring home a question of liability is reduced to a mere question of the genuineness of the signature, we do not see how a party would be able to escape liability, as decided by the court in the case referred to, where he had written his name in the defendant's album, or for the purpose of franking a letter, or for any one of a thousand purposes for which a man is often called upon to furnish his name without the intention of making a negotiable instrument. The true principle was tersely stated by Bovill, Ch. J., in *Foster v. McKinnon*, inter alia, *arguendo*, who was stating the proposition, that where the plaintiff proves he is a *bona fide* holder for value, it is immaterial that the instrument was obtained by fraud. 'That,' said the chief justice, 'where the defendant intended to put his name to an instrument which

was brought by a *bona fide* purchaser of a promissory note, and the maker claimed to have signed under the belief that it was to act as agent for a patent cultivator. Upon the trial it was given to prove that the note was signed by the defendant in his house; that he and his two sons, who were present, could not read the paper, but did not understand it, and that it was then read over by the person presenting the note, who was an entire stranger to the defendant and his family, and that the defendant. Held, that it was proper to submit the question of the defendant's negligence to the jury, and that a motion to direct a verdict in favor of the plaintiff was properly denied. (Learned. P. J. ) *Fenton v. Robinson*, 4 Hun, 252; denying motion for new trial.

Defendant entered into two agreements with two unknown persons, one to act as agent for the sale of some cornshellers, and the other, that he might return all cornshellers not sold. Later another unknown person with the servant of the liveryman and employed to carry him to the defendant's house, came and represented that twenty cornshellers were at the depot, and asked defendant to receipt the same, which he did, and the receipt was in fact the note that came to the plaintiff as a *bona fide* holder.

Defendant, before signing, stated that he had fears that the receipt might turn out to be note, but was assured otherwise.

The defendant was a German and could not read English, and his nearest neighbor was a half mile away, but he consulted his wife, who could not read it. *National Exchange Bank of Auburn v. Venner*, 43 Hun, 241, sustaining verdict for def't.

**From opinion.**—"It was not disputed upon the trial that the signature of the defendant to the note was procured by gross fraud and imposition, perpetrated by the person to whom he delivered it, and that the latter was acting in concert with the persons with whom the defendant had the first negotiations.

The jury was also justified in reaching the conclusion that when the defendant signed the note he believed it was a paper of a different character, and did not contain a promise to pay money to any one unconditionally. The defendant admitted that he intended to execute an instrument which would contain a promise on his part of some kind, and that the form of the same, and the extent of his liability was to be ascertained and measured by the writing itself. The general rule of law applicable to the case is, that where a person is induced to sign a negotiable instrument by reason of fraud, artifice or deception practiced upon him by another, as to the nature of the instrument, and the maker signs the same innocently and under the belief that it is a contract of a different character, then there can be no recovery upon the bill or note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument. However, the maker was guilty of laches or negligence in this respect, he was liable to a *bona fide* holder for value, who purchased the note before maturity. *Dan. on Neg. Inst.* § 850; *Chapman v. Rose*, 56 N. Y. 137; *Foster v. McKim*, 38 Law Jour. (N. S.) 310; *Citizens' Nat. Bank v. Smith*, 55 N. H. 593; *First R. R. Co. v. Shay*, 82 Pa. 202; *Big. on Bills and Notes*, 583. \* \* \*

We think a case was made for the consideration of the jury, and that the question of the defendant's negligence was properly submitted to them for determination. As the maker could not read the English language he was obliged to rely upon the representations made by the other party, or consult and ascertain its contents from some third person. His wife, who was present, could give him no information, as she was unable to read the paper. It cannot be said, as the plaintiff thinks, that it was negligence *per se* not to seek his neighbors and learn from them the contents of the writing. The subject matter of the negotiations was one of great importance, and the terms of the agreement assented to by the defendant were plain and could be readily and accurately expressed in writing by any person.

ite and was accustomed to business. The nature and character of ended to be executed must always be considered in determining the defendant's negligence, so far as it is based on the omission to members for the purpose of ascertaining from them the contents of the farmer, who could not read, should sell and deliver to a mill a load receive pay therefor, and should then be requested to sign a voucher counting room, and should sign a paper prepared for that purpose, out to be a negotiable instrument, could it be said that the farmer negligence, as matter of law, because he did not seek some third the purpose of ascertaining the import of the writing? The case not like the one before us in all respects, but it has been stated for of illustrating that the question of negligence is not always one of becomes a question of fact for the consideration of the jury. \* \* \* ff cites us to our decision in the case of this Plaintiff v. Ogden, 31 an authority in support of his argument that the exception was well at case it was held that the defendant therein, the maker of a note, negligence in omitting to consult the members of his own family, and were present at the time of its execution. ng the ruling of the trial judge in submitting the question of the jury, we do not intend to depart from the rules of law stated in n that case."

ignorant of the language, was induced to sign a note without n his part, under the belief that he was signing another in- Note was void, even in hands of an innocent purchaser. *Moje*, 20 Misc. 632.

tween maker and payee, and ignorance of its contents, did te a note as against an innocent purchaser where maker note without reading it. *Orr v. Sparkman*, 120 Ala. 9.

per se negligence for one who cannot read nor write to sign lum about a certain agency, which is, in reality, a promis- *Bedell v. Herring*, 77 Cal. 572.

t, who cannot read, is not liable on a promissory note made day after date, which was represented to him as payable six r date. *Wenzel v. Shulz*, 78 Cal. 221.

umption that the maker has read the note and knew its con- butted, where he was, without negligence on his part, fraud- ced to sign upon the representation that it was another kind ment. *Kingman v. Reinemer*, 166 Ill. 208; aff'g s. c., 58 3.

er's signature was procured fraudulently did not invalidate the hands of a *bona fide* holder, where he was negligent in e care to inform himself of its contents; especially where the was no different in legal effect from the one he supposed he . *Exchange Nat. Bank v. Plate*, 69 Ill. App. 489.

t, a farmer, signed, what purported to be a contract consti-

tuting him agent for a pulverizing machine. He was not liable even *bona fide* purchaser. *Detwiler v. Bish*, 44 Ind. 70; *Gibbs v. Linab* 22 Mich. 479; *Martin v. Smylee*, 55 Mo. 577; *Briggs v. Ewart*, 51 245; *De Camp v. Hanna*, 29 Oh. St. 467; *Walker v. Ebert*, 29 Wis. 19; *Butler v. Carns*, 37 id. 61; (case of illiterate man) *Willard v. Nels* 35 Neb. 651.

The maker of a promissory note was not allowed to defend a suit a *bona fide* holder on the ground that he had signed it under the belief that it was a different contract, induced by the misrepresentations of the payee. *Douglass v. Matting*, 29 Iowa, 498.

**From opinion.**—"It is better that the defendants and others who so carelessly affix their names to papers, the contents of which are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired and the business of the country thereby interfered with and unsettled."

At request of agent defendant signed his name to a blank piece of paper in order that his signature might be identified; and the instrument sued upon was printed over that signature. No liability. *Caulk v. Whistler*, 29 Iowa, 495; *Nance v. Lary*, 5 Ala. 370; *Baxendale v. Bennett*, 3 Q. B. Div. 525.

The signature of an illiterate person was fraudulently procured to a mortgage note for one amount, where, without negligence on his part, he was induced to believe he was executing a lease and a note for another. Was not liable even to an innocent purchaser for value. *Greene v. Wilkie*, 98 Iowa, 74.

Defendant did not intend to sign a note, but admitted signing a contract referring to the note in question, which constituted him agent for the sale of certain machines. He incurred no liability on the instrument as a note. *Anderson v. Walter*, 34 Mich. 113.

Where the evidence shows that defendant signed a paper thought by him to be a note for five dollars, but which, in reality, was a note for sixty dollars, it is error to instruct the jury that the recovery be for the full amount claimed. *Closs v. Theifels*, 79 Mich. 589.

Chapter 114, general laws, 1883, construed not to avoid maker's liability on a note on the ground of misrepresentation as to its nature and effect. *Yellow Med. County Bank v. Tagley*, 57 Minn. 391.

If defendant knew that he was signing a promissory note, and could not read it, but relied upon the assurance of the other party, he is liable to a *bona fide* purchaser. *Ward v. Johnson*, 51 Minn. 480; *Cowgill v. Petifish*, 51 Mo. App. 264; *Cannon v. Lindsay*, 85 Ala. 198; *Trimble v. Thorson*, 80 Iowa, 246; *Bank v. Stanley*, 46 Mo. App. 440.

It is not *per se* negligence for an aged and infirm man to fail to c



stance of some one to help him read a document he is about  
*Bank v. Clark*, 52 Mo. 593.

a procuring signature of a co-maker did not invalidate note in  
 innocent holder for value. *Riley v. Reifert*, (Tex. Civ. App.)  
 Rep. 185.

nt was sued on a note made to one, "or bearer," but in fact  
 note in which the words "or bearer" were crossed out, and  
 as not allowed. *Kellogg v. Steiner*, 29 Wis. 626.

for any amount other than that for which defendant signed  
 ndant's note. *Griffiths v. Kellogg*, 39 Wis. 290.

endant, who was well advanced in years, signed his name on  
 f what he thought, and was informed, was a guarantee, but  
 in reality, a bill of exchange for £3,000, and was sued as  
 the same. The jury found that he was free from negligence,  
 ourt held that he was not liable as indorser to an innocent  
 value. *Foster v. MacKinnon*, L. R. 4 C. P. 704.

### III. Alteration.

drawer of a bill or check, or maker of a note, leaves a blank,  
 s been filled up so as to give no evidence of alteration, he may be  
 ily of such negligence, as will make him liable to a *bona fide*  
 r the apparent amount of the indebtedness. The distinction be-  
 instrument that the maker delivers as a completed instrument  
 that is intentionally incomplete is important, but not conclusive.

ow on Estoppel it is said, that there has arisen a misconcep-  
 s doctrine from *Younge v. Groat*, 4 Bing. 253, where it was  
 the drawer of a bill thus negligently leaving a blank should  
 ss of such filling up of the same as between him and the ac-  
 t that the better authorities agree that no estoppel can exist  
 such facts to prevent the drawer or maker from alleging the

See the cases cited in *Bigelow on Estoppel*, p. 494, notes 4  
 ng which are *Holmes v. Trumper*, 22 Mich. 427; *Greenfield*  
*owell*, 123 Mass. 196. But, see, *Rainboldt v. Eddy*, 34 Iowa,  
*ranger v. Thomson*, 21 Iowa, 249; *McDonald v. Muscatine*  
*owa*, 319; *Capital Bank v. Armstrong*, 62 Mo. 59; *Redding-*  
*ds*. 45 Cal. 406; *Wirrell v. Gheen*, 39 Pa. St. 388; *Garrard*  
 67 id. 82.

### COMPLETED PAPER.

completed instruments were delivered and opportunity to alter  
 was furnished by the manner in which they were drawn there  
 some decisions, that seem to be exceptions to the general rule  
 ed respecting complete paper.

Where a blank space was left after the words "one hundred" so that the additional word "fifty" could be and was inserted thereafter, the maker was liable to a *bona fide* holder for value, upon the principle that if one, by his acts, or silence, or neglect, misleads another, or affects a transaction whereby an innocent party suffers, the blamable party must bear the loss. *Garrard v. Hadden*, 67 Pa. St. 82.

Where before the words "fifty pounds, two shillings" in a check a space was left which a clerk filled up with the word "three," and the banker having paid the whole amount of 350 pounds, 2 shillings, the clerk retained 300 pounds thereof, the loss fell upon the drawer. *Yount v. Groat*, 4 Bing. 253.

But, in *Benedict v. Cowden*, 49 N. Y. 396, the defendant was applied to to become agent for certain persons, and executed a note for a certain amount payable to the bearer one year from date. At the bottom of the note were these words, "the above note to be paid from the proceeds of machines, when sold." There not being room to sign after the words, the maker was advised to sign just above them, upon the assurance that it would be the same. This he did, and such words were then after cut off and the note then sold to the plaintiff for value and without notice. The question was held to be properly submitted to the jury as to whether the words at the bottom of the note were designed by the parties as a part of the contract, and it was so held upon appeal that the cutting off of the same was a destructive alteration of the instrument. *The question of the maker's negligence was not raised and did not enter into the decision.*

Where the maker of a negotiable instrument puts it forth in such a condition that an alteration can be made without defacing it or exciting the suspicions of a prudent man, the maker may be estopped from alleging the alteration, as a defense, as against a *bona fide* holder. *Daniels on Negotiable Instruments*, 371; *Town of Solon v. Williamsburgh Savings Bank*, 35 Hun. 414; *Zimmerman v. Roat*, 75 Pa. St. 191; *Garrard v. Hadden*, 67 Pa. St. 82; *Statton v. Stone*, (Colo. App.) 61 Pac. Rep. 481; *Howie v. Lewis*, 14 Pa. Sup. Ct. 232; *First &c. Bank v. Webster*, 121 Mich. 149.

But where a space, negligently left, was filled in such a manner as to be a palpable alteration, the maker was held not liable even to an innocent purchaser. *Alexander v. Buckwalter*, 8 Del. Co. Rep. (Pa.) 7; s. c., 17 Lanc. L. Rev. 366.

See, also, *Walsh v. Hunt*, 120 Cal. 46; s. c., 30 L. R. A. 697.

Where parties executing unsealed bonds certified, that they were issued under their hands and seals, and the seals were thereafter placed upon the bonds, and so came into the hands of innocent parties, the

liable. *Metropolitan Life Insurance Co. v. Bender*, 124 N. Y. 465, when the certificate was made by agents of a municipality. *High Savings Bank v. Town of Solon*, 136 N. Y. 465, aff'g 124 N. Y. 465, and judgment for plaintiff.

On Negotiable Instruments, page 364, it is said: "The rule applicable to such cases is, that the party who puts the instrument in circulation invites the public to receive it of any one having possession with apparent title, and he is estopped to urge the actual fact at which, through his act, ostensibly has none. The instrument itself furnishes the only criterion by which a holder to whom it is offered can test its character, and when that instrument reveals nothing to arouse the suspicions of a prudent man, he is not permitted to suffer when there has been an actual alteration."

The drawer of a check may be liable where he draws the instrument in such an incomplete state as to facilitate or invite fraudulent alteration. He is not bound to so prepare the check that nobody else could tamper with it. A depositor owes his bank the duty of great care in verifying returned vouchers to detect forgeries and is liable to it for negligence in this regard. *Critten v. Bank*, 171 N. Y. 219; modifying s. c., 60 App. Div. 241.

#### INCOMPLETE PAPER.

Where the instrument has not been delivered as completed, and blank places have been purposely left, the maker will be liable, if negligence has, in connection therewith, caused loss to an innocent holder.

Where the maker makes and delivers his promissory note, perfect in form, and a blank is left after the word "at" for the place of payment, it carries with it an implied authority for any *bona fide* holder to fill the blank. The insertion of a place of payment and negotiation of the note in accordance with the agreement of the original parties does not avoid it in the hands of a *bona fide* holder for value, although the note be delivered incomplete or filled up in any way. *Redlick v. Doll*, 54 N. Y. 235, 18 App. Div. 235, for def'd't.

Where drafts were delivered to the drawee with directions to fill them for a certain sum, and they were filled up for a larger sum, the drawer is not liable for such latter sum to a *bona fide* holder, and although the agreement of the parties was forgery, the acceptor was not liable on setting up the facts. *Van Duzer v. Howe*, 21 N. Y. 531. In the following cases the question of improperly filling in uncompleted instruments arose: *Ledwich v. McKim*, 53 N. Y. 307; *Chemung Canal Co. v. Gardner*, 44 id. 680; *Day v. Saunders*, 3 Keyes, 347; *Mitchell v.*

Culver, 7 Cowen, 336; Boyd v. Brotherson, 10 Wend. 93; Mi Bank v. Eldred, 9 Wall. 544; Angle v. N. Y. Mutual Life Ins. C U. S. 330; Weaver v. Lescure, 89 Ill. App. 628; Roberson v. Blev Kan. 50; Weidman v. Symes, 120 Mich. 657.

One who signs or indorses a note in blank, to be used as a se authorizes the person to whom it is delivered to fill the blanks *spects essential to the completeness of the note* as such; but, in t sence of express authority or consent, no authority can be implied the delivery, to *insert a special agreement not so essential*.

The date, the amount, the name of the payee, and place of pa may be inserted in their appropriate blanks. Page v. Morrell, 3 117; Van Duzer v. Howe, 21 N. Y. 531; Kitchen v. Place, 41 465; Angle v. N. W. M. L. Ins. Co., 92 U. S. 339; but not rate terest not allowed by law.

Where, therefore, in a note, which was indorsed for the accom tion of the maker, blanks were left for the date, the time the no to run, the payee and the principal sum, held, that while the mak authority to fill these blanks, the indorsement conferred no autho write in the note an agreement that after maturity it should c special rate of interest, greater than the regular rate, although t of the State where the note was made permits special arrangeme be made for the rate specified.

Also, held, when a note so filled in, was delivered by the maker newal of another note, and received by a collecting agent, authori the owner of the old note to renew it, that such authority did not the agent in the acceptance of the new and the surrender of t note.

But held, that where the agent acted in perfect good faith, be he was obeying instructions. and relying upon a supposed autho the maker to fill in the note, although he assumed to be a profe expert in the business, he was not liable to his principal for d unless the defect might have been discovered by the *diligent exer that professional skill he was bound to possess and exert*.

Such agent is responsible to his principal for the negligence of torney whom he employs. Weyerhauser v. Dup 100 N. Y. 150.

Where a note is executed and delivered to another with can unfilled blanks, an innocent purchaser may properly regard the as the agent of the former to do the filling. Leseure v. Weaver. App. 375.

The defendant had left with a clerk some signatures on blank of paper, intended to be used as notes or indorsements, accord specific instructions. The clerk was by fraud to part with one o

tures, and it was filled up as a note, leaving the signature of the payee and indorser. The action was by a holder in due course who recovered. *Putnam v. Sullivan*, 3 Mass. 45.

**Principle.**—"The counsel make a distinction between the cases where the fraudulently induced to indorse the note he is not to pay, and when he never intended to indorse a note of that description for a different purpose. Perhaps there may be some distinction which ought to prevail; as if a blind man had a note fraudulently read to him, and he indorsed it, supposing it to be the one of him. But we are satisfied that an indorser cannot avail himself of his blindness, but in cases where he is not chargeable with any laches or misplaced confidence in others. Here, one of two innocent parties is injured. \* \* \* The loss has been occasioned by the misplaced confidence of the holder in a clerk too young or too inexperienced to guard against the fraud of the promissors." Upon these grounds the indorsers were held liable.

The contract was in form of a skeleton note, which was detached and the blanks filled out. Signers of the contract were held not negligent. *Hardy v. Hardy*, 10 N. D. 551.

The bank put it in the power of his agent to issue checks like ones of a bank to cash, cannot complain, where the bank in good faith issued such fraudulent checks. *Armour v. Greene County State Bank*, 10 Fed. Rep. 631.

#### IV. Negligence in Collecting.

A note, payable on demand, is not chargeable with negligence in making such demand within any particular time. *Parker v. Parker*, 8 N. Y. 379, reversing 31 Hun, 578.

A note is not discharged by negligence of payee to proceed against the principal debtor upon surety's request, when such debtor continues solvent and the note was collectible. *Thompson v. Thompson*, 45 Barb. 214; *Frost v. Benedict*, 21 id. 247.

If the creditor requests the creditor to collect the debt from the principal, and the creditor neglects to do so, at the time when it is collectible, and, by a subsequent change of circumstances, it becomes uncollectible, the creditor is discharged from liability. *Remsen v. Beekman*, 25 N. Y. 552; *Edwin v. Edwin*, 17 Johns. 384; *Pain v. Packard*, 13 id. 174.

Negligence on the part of a creditor and neglect to prosecute will not discharge surety. *Fulton v. Matthews*, 15 Johns. 39; *Leppell v. Shaw*, 3 N. Y. 446; *Dorlon v. Christie*, 39 Barb. 217; *Spenson v. Hall*, 45 id. 217. *Field v. Cutler*, 4 Lansing, 195. See also *Field v. Cutler*, 4 Lansing, 195. for pl'ff. distinguishing *Craig v. Parkis*, 40 N. Y. 181. See also *Spenson v. Hall*, 45 Barb. 214; *Frost v. Benedict*, 21 id. 247.

Surety was released when holder failed to sue his principal solvent, as the surety requested. *Kendall v. Milligan*, 62 Ark. 629.

A statute providing that a demand note shall be considered honored after four months, held not extended by an act imposing contract of indorsement on one who indorses a negotiable or non-negotiable note in blank, so as to make a delay of more than four months in presentment of a non-negotiable demand note a discharge of an indorser thereon. *Oley v. Miller*, 74 Conn. 304.

Holder of check on bank at a considerable distance did not deliver it to his own bank for three days after receiving it; drawee in meantime failed. Was negligent. *Tomlin v. Thornton*, 99 Ga. 585.

Holder, by carelessness, failed to perfect a default in a suit against maker and indorser for one or more terms. Accommodation indorser was not discharged by the extension of time. *Hall v. Pratt*, 103 Ga. 171.

Failure of holder to file claim against a solvent estate, which was sufficient to pay all claims, discharged surety. *Waughop v. Barlett*, 168 Ill. 134; aff'd s. c., 61 Ill. App. 252.

Holder of a check on a local bank may present it at any time during banking hours on the day following delivery, though he knows the bank is likely to fail. *Northwestern Iron Co. v. National Bank*, 70 Ill. App. 111.

Failure to make the statutory presentment of a note for presentment did not relieve surety, where estate was insolvent and nothing could be realized. *Watts v. Bolin*, 86 Ill. App. 474.

Notes indorsed after maturity must be presented within a reasonable time after maturity. *Kimmel v. Well*, 95 Ill. App. 15.

Where all the parties live in the same city the holder may have the close of banking hours on the day following delivery of the check for presentment and demand. *Brown v. Schintz*, 98 Ill. App. 452.

Obligation of a holder of a note payable at a particular place is discharged by presentment there. He is not bound to go beyond and make personal presentment to maker. *Ewen v. Wilbor*, 99 Ill. App. 132.

Holder of non-negotiable notes, who delayed for several years to sue the maker, released indorser. *Matchett v. Anderson Foundry & Works*, (Ind. App.) 64 N. E. Rep. 229.

Notice "to sue the note which I signed as surety, or I will not continue to be liable," was not a compliance with Ind. Rev. Stat. section 1224; as it omitted the equivalent of "forthwith," and the surety was not discharged. *McMillin v. Deardorff*, 18 Ind. App. 41.

Failure to present, released the drawer of a check, where, though the account in the bank was overdrawn, he had a special deposit, which he had reason to believe the bank would pay it from. *Hamlin v. Simpson*, 105 Iowa, 125.

indulgence to maker of note did not release surety. There must be an agreement definitely extending his time. *Hall v. First Nat. Bank*, Kan. App. 493.

Failure in attempting to collect an acceptance given as collateral release sureties, where it had been satisfied by check before its maturity as collateral. *Turner v. New Farmer's Bank*, (Ky.) 39 S. W. Rep. 440.

Assignee, as against the assignor, is not negligent in failing to test the genuineness of the signature of the note. *Spalding v. Gates*, (Ky.) 50 S. W. Rep. 440.

Assignor's delay in bringing suit on note after it fell due was held to constitute a negligence as would discharge the assignor; and his request for indulgence did not relieve the liability. *Riggs v. Covenant Bank*, (Ky.) 49 S. W. Rep. 190.

Accommodation of holder to sue payee did not discharge accommodation maker. *Forstall v. Fussell*, 50 La. Ann. 256.

Delay of two and a half years in foreclosing security did not discharge mortgage though it in the meantime depreciates. *Gray v. Farmer's Bank*, 81 Md. 631.

Delay in making demand on a demand note was not unreasonable where the note was intended to be of a more or less permanent character. *Yates v. Goodwin*, 96 Me. 90.

Delay or indulgence does not discharge surety. Must be an agreement to extend the time or vary the contract. *Way v. Dunham*, 166 N. H. 257.

Discharge from whatever cause within the statutory period of limitation does not discharge maker though the note was for the indorser's account. *Agawam Nat. Bank v. Downing*, 169 Mass. 297.

Discharge must be made on a demand note, under a statute requiring payment within a reasonable time, within 60 days of its issue in the absence of evidence of custom and usage justifying delay. *Merritt v. Bank*, (Mass.) 62 N. E. Rep. 987.

Instruction that drawee bank should not be made a collecting agent for indorser. *Carson & Co. v. Fincher*, (Mich.) 89 N. W. Rep. 570.

Check received on Friday deposited on Saturday, was held to be cashed when presented the following Monday morning. The drawee bank was held to be of presentment was open and doing business though it closed on Saturday afternoon. *Haggerty v. Badwin*, (Mich.) 91 N. W. Rep. 150.

Drawee bank held liable for failure to use reasonable care and to protect the rights of its correspondent against the indorser by proper protest of the check delivered for collection. *Ft. Snelling Nat. Bank v. Security Bank*, (Minn.) 91 N. W. Rep. 257.

Holder lost his rights against a surety under a statute requiring former, when notified to do so, to sue principal, where he brought suit in wrong county without attempting to ascertain the principal's residence. *Cox v. Jeffries*, 73 Mo. App. 412.

Drawer of a check was not discharged by negligence in its presentation unless injured thereby. *Long Bros. v. Eckert*, 73 Mo. App. 445.

Mere failure to apply depositor's deposit upon his note did not release surety. *Citizens' Bank v. Booze*, 75 Mo. App. 189.

Holder is not negligent in failing to collect collateral, where maker insolvent and nothing could be realized. *Fourth Nat. Bank v. Blawie*, 81 Mo. App. 428.

Indorsee's failure to present check for 26 days was negligence, when he subjected it to the equities of the drawer. *Farmers' Nat. Bank v. Dufus*, 82 Mo. App. 399.

Suit was begun within 30 days after notice by surety to sue, as provided by Mo. Rev. Stat. 1889, sec. 8344, but at M., where summons was returnable one week later than at D. Was not negligence. *Collum v. Lucksinger*, 83 Mo. App. 110.

Suit was begun two days after notice to sue, as provided by Mo. Rev. Stat. 1889, sec. 8344. The summons was made returnable more than 30 days from its date; but it was no longer than necessary to obtain service. Surety was not discharged. Surety appealed and ordered writ of habeas corpus; but the court below refused to issue writ. Plaintiff failed to take out the execution against the principal was not negligence. Principal sold homestead in meanwhile. Failure to file transcript in Circuit Court did not injure surety as it would have created no lien on the homestead. *Patton v. Cooper*, 84 Mo. App. 427.

After the certification of a check, the holder held not chargeable with negligence in presenting it. *Muth v. St. Louis Trust Co.*, 88 Mo. App. 100.

Mere delay in collecting note did not discharge sureties. *Hefferli v. Krieger*, 19 Mont. 123.

Indorsee, requested by surety to seize collateral and apply it on payment of note, failed to do so. Did not release surety. *Myers v. Farmers' State Bank*, 53 Neb. 824.

Where holder merely forbore to sue in the absence of request, and neglected to do so upon request, surety was not discharged. *Bank v. Maywood*, 56 Neb. 188.

The drawer of a draft was permitted to recover its proceeds from the collecting bank to whom it had been sent for collection, and by which it had been credited on an account between it and the forwarding bank, which had become insolvent. *Nash v. Second Nat. Bank*, (N. J. L.), 10 Atl. Rep. 727.



ence in presenting check did not discharge drawer, where he  
unds in bank applicable to its payment. *First Nat. Bank v.*  
*Bank*, 30 Or. 296.

k received after banking hours was deposited for collection the  
and presented for payment the day following. There was  
ence. *Lour v. Fox*, 171 Pa. St. 68; *Willis v. Finley*, 173 id. 28.  
, having sufficient money on deposit to pay the note at  
failed to apply it thereon. Discharged indorser. *Farmers'*  
*k v. Marshall*, 9 Pa. Super. Ct. 621.

's attachment was dissolved by reason of defect in affidavit.  
was not discharged where accident occurred through the mis-  
former's attorney who was of reputed skill and good standing.  
*Bank v. Kensington Land Co.*, (Tenn.) 37 S. W. Rep. 1037.  
r is not injured by the negligence of the holder in failing to  
otest, where maker was, at and after maturity, insolvent.  
*v. Bohn*, (Tex. Civ. App.) 40 S. W. Rep. 637.

or of an insurance policy was released under a statute, requiring  
f non-negotiable instrument, in order to hold assignor as surety  
to use due diligence in collecting, where latter failed for two  
commence an action. *Gooch v. Parker*, 16 Tex. Civ. App. 256.  
ten notice to holder of a note, that the writer was not a prin-  
signed as a surety, and requesting collection from other makers  
lure to sue within the statutory period, discharged the writer,  
e was not injured thereby. *Sullivan v. Dwyer*, (Tex. Civ.  
S. W. Rep. 355.

elay in suing after maturity did not discharge indorser as  
*Rice v. Farmer's &c. Bank*, (Tex. Civ. App.) 42 S. W. Rep.

must present the check or forward it for presentation on the  
wing its receipt. Deposit in a local bank for collection does  
d the time or permit the latter to forward it to a correspondent  
that it will take longer than if sent direct. *Gregg v. Beane*,  
2.

e to duly present a claim against estate of principal guarantor  
elease a surety on the guaranty. *Donnerberg v. Oppenheimer*,  
290.

was not discharged by reason of bank's failure to apply, at  
irection, his deposit, which was insufficient to pay the note  
*Kirkland Land &c. Co. v. Jones*, 18 Wash. 407.

in suing principal at request of surety until third day of  
llowing notice was not unreasonable. *Rotting v. Cleman*, 20  
6.

Surety was not released by mere continuance of suit by consent creditor who was under an obligation to do so. *First Nat. Bank v. Persons*, 45 W. Va. 688.

A check was mailed to payee at a place a short distance from his residence. He was not charged with its receipt so as to charge him with delay in sending it on for presentment, until it had reached him. *Lloyd v. Osborne*, 92 Wis. 93.

Payee of a check residing in the same place as the bank must present it within banking hours on the day after its reception, exclusive of Sunday or holidays. *Grange v. Reigh*, 93 Wis. 552.

Holder allowed statute of limitations to bar action upon the note. Did not discharge surety, who could have paid the note and sued the principal or, under a state statute, have compelled him to satisfy the note. *Nelson v. First Nat. Bank*, 69 Fed. Rep. 798.

A drawer of a check is only discharged to the extent that a failure to present it has injured him. *Bowen v. Needles Nat. Bank*, 87 Fed. Rep. 430.

A holder of a check may recover on it though he has been negligent in delaying to present it, where the holder has not been prejudiced thereby. *Andrus v. Bradley*, 102 Fed. Rep. 54.

### V. Bona Fide Purchasers.

Gross negligence *only* is not a good defense to an action on a note; it may however be evidence of *mala fides*. *Goodman v. Harvey*, 4 A. & E. 870; *May v. Chapman*, 16 M. & N. 355; *Jones v. Gordon*, 2 A. Cases 616; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Pittsburgh Bank v. Neal*, 22 id. 96; *Murray v. Lardner*, 2 Wall. (U. S.) 11; *Hotchkiss v. Nat. Bank*, 21 Wall. 354; *Collins v. Gilbert*, 94 U. S. 753; *Brown Spoffard*, 17 Alb. L. J. 31; *Ex parte Estabrook*, 2 Low. 517; *Schoen v. Houghton*, 50 Cal. 528; *Brush v. Scribner*, 11 Co. 395; *Craft's Appeal*, 42 id. 146; *Bank v. McClelland*, 9 Colo. 66; *Matthews v. Poythress*, 4 Ga. 287; *Comstock v. Hannah*, 76 Ill. 53; *Shreeves v. Allen*, 79 id. 553; *Murray v. Beekwith*, 81 id. 43; *Matt v. Alley*, 141 id. 284; *Spetler v. James*, 32 Ind. 202; *Tescher v. Merriam*, 118 id. 586; *Gage v. Sharp*, 24 Iowa 15; *Lake v. Reed*, 29 id. 23; *Woodfolk v. Bank of America*, 10 Bush. (Ky.) 504; *Ellicott v. Martin*, 6 Md. 509; *Commercial Bank v. Nat. Bank*, 30 id. 11; *Maitland v. Citizens' Bank*, 40 id. 540; *Worcester Bank v. Dorchester Bank*, 48 Cush. 488; *Spooner v. Holmes*, 102 Mass. 503; *Smith v. Livingston*, 111 id. 342; *Miller v. Finley*, 26 Mich. 249; *Howry v. Eppinger*, 29 id. 29; *Fink v. Chambers*, 95 id. 508; *Horton v. Bayne*, 52 Mo. 53; *Merrick v. Phillips*, 58 id. 436; *Hamilton v. Marks*, 63 id. 167; *K*

amater, 3 Neb. 325; Crosby v. Grant, 36 N. H. 273; Merri-  
ckwood, 47 id. 81; Hamilton v. Vought, 34 N. J. L. 187;  
son, 16 Barb. 548; Steinhart v. Boker, 34 id. 436; Lord v.  
56 id. 593; Johnson v. Way, 27 Ohio St. 374; Phelan v.  
a. St. 59; State Bank v. McCoy, 69 id. 204; Moorehead v.  
id. 118; Greneaux v. Wheeler, 6 Tex. 515.

of a purchaser for value of stolen negotiable paper, includ-  
able to bearer, is not impaired by negligence. It will only  
by proof of fraud or bad faith. Notice of such facts, as  
a prudent man upon his guard, will not defeat his recovery  
Belmont v. Hoge, 35 N. Y. 67; Birdsall v. Russell, 29 id.  
nan v. Simonds, 20 How. (U. S.) 365; Murray v. Lardner,  
; Goodman v. Harvey, 4 Ad. & El. 870.

made advances upon coupon bonds, which originally were  
d by, or had attached to them, certificates stating in sub-  
upon the surrender of the certificate and bond, the holder  
d to full paid preferred stock. These certificates were re-  
the body of the bond. When the bonds were transferred  
the certificates were not with them. Held, that while the  
the certificates might be a circumstance of some weight in  
g the question, yet of itself, it did not prove fraud or bad  
ch v. Sage, 47 N. Y. 143, aff'g judg't for pl'ff. See, Bird-  
ell, 29 id. 220.

purchases negotiable paper before due for a valuable con-  
in good faith and without actual knowledge or notice of any  
tle, holds it by a title valid as against every other person.

a of a defect of title; knowledge of circumstances which  
e some suspicion in the mind of a prudent man; disregard  
f information, an examination of which would disclose such  
fine, gross negligence at the time of the purchase, will not  
t his title. It is evidence, but not conclusive, of bad faith,  
ust be established by one seeking to impeach such title.

in United States bonds, payable to bearer, is not bound to  
ry of one offering to sell, as to his right or title thereto, or  
special precautionary measures to ascertain or protect the  
others; and in case of the purchase by him of such bonds  
been stolen, the fact of an omission on his part to examine  
notices of the theft at his place of business, will not, of itself  
ual knowledge or notice, deprive him of the character of a  
urchaser. *Seybel v. National Currency Bank*, 54 N. Y. 288,  
v 383, and judg't for pl'ff; following, *Goodman v. Harvey*,  
870, disproving *Gill v. Cubitt*, 3 Barnwall & Cresswell 466,

which was modified in *Crook v. Jadis*, 5 Barn. & Adol. 909. The rule of *Goodman v. Harvey* was followed in *Uther v. Rich*, 10 Adol. & 784; *Arbouin v. Anderson*, 1 Q. B. 498-504; *Byles on Bills of Exchange*, 119, is to the effect that, "It is now definitely settled that if a person takes, *honestly*, an instrument made or become payable to bearer, he has a good title to it, with whatever degree of negligence he may have acted, unless his gross negligence induced the jury to find fraud." See *Hall v. Wilson*, 16 Barb. 546. See, *Steinhart v. Boker*, 34 id. 4; *Magee v. Badger*, 34 N. Y. 247; *Belmont Branch Bk. v. Hoge*, 35 N. Y. 65; *Galveston R. Co. v. Cowdrey*, 11 Wall. (U. S.) 478; *Swift v. Tyson*, 16 Peters 1; *Bank of Pittsburgh v. Neal*, 22 How. 108; *Murray v. Lardner*, 2 Wall. (U. S.) 110.

Where bonds, reciting on their face that they were not valid unless authenticated by trustees of mortgage securing them, were stolen, the defendant was not negligent in failing to notify the public of the theft, and although the plaintiffs bought for a good consideration and in good faith, they got no title. *Maas v. M. H. & T. R. Co.*, 83 N. Y. 223.

See *Germania Savings Bank v. Village of Suspension Bridge*, 100 N. Y. Hun, 590.

Gross carelessness alone cannot, as a matter of law, divest the title of a purchaser for the value of negotiable property, but may constitute evidence of bad faith. *Canajoharie National Bank v. Diefendorf*, 123 N. Y. 191; *Goodman v. Harvey*, 4 Ad. & El. 870.

Plaintiff took note as collateral security for loan to the holder who was a note broker. It was held to be a *bona fide* purchase and that plaintiff was not chargeable with notice that the note had been diverted. *American Exchange Nat. Bank v. New York Belting, &c. Co.*, 148 N. Y. 60; *aff'g s. c.*, 74 Hun, 446.

**From opinion.**—"While it is true that the Potter-Lovell Company was engaged in business as a broker in commercial paper, we do not think that this circumstance was enough to raise a doubt as to its authority to deal with commercial paper in its possession, which third persons were bound to entertain. It was necessary, in order to deprive the paper of its negotiable attributes, that it should appear that the plaintiff knew, or had reason to believe, that the Potter-Lovell Company was acting as agent for the maker and not as an owner."

Plaintiff advanced money on a corporate note, duly executed by the president of the corporation, payable to a third party and by him endorsed to a firm of which the president was a member. It was held that this was a *bona fide* purchase and the plaintiff was not put upon inquiry. *Cheever v. Pittsburgh &c. R. Co.*, 150 N. Y. 59; *s. c.*, 34 L. R. A. 100; *rev'g s. c.*, 72 Hun, 380.

**From opinion.**—"The mind, at the threshold of the inquiry, encounters principles that point in opposite directions and lead to different conclusions."

the other is allowed to preponderate in the mental process of determining legal rights of the parties. On the one hand is the principle which protects a *bona fide* holder of commercial paper from existing antecedent equities of parties, and on the other the principle which protects a corporation against unauthorized and fraudulent acts of its own officers. There is not much difficulty in stating the rule of law defining the duties and obligations of a party presenting negotiable paper for discount or sale before due. He is not in peril to be on the alert for circumstances which might possibly excite suspicion of wary vigilance; he does not owe to the party who puts the paper in his hands the duty of active inquiry in order to avert the imputation of bad faith if the rights of the holder are to be determined by the simple test of honesty and diligence, and not by a speculative issue as to his diligence, or negligence. The rights cannot be defeated without proof of actual notice of the defect and bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title according to the doctrine, will prevail. (Magee v. Badger, 34 N. Y. 249; Am. Ex. Nat. Bank v. Belting, &c. Co., 148 N. Y. 705; Knox v. Eden Musee Am. Co., 148 N. Y. 202; Vosburgh v. Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 202; Jarvis v. Manhattan Beach Co., 148 N. Y. 652.)

The question now is, not what the facts were, but what they appeared to be. He had the right, from the notes themselves, to assume. He had no reason to assume that the relations to the paper of every party whose name appeared on it were precisely what they appeared to be. (Hoge v. Lansing, 35 N. Y. 249.)

\* \* \* "The principle that applies in a case where an officer of a corporation makes the corporate obligation payable to himself, and then deals with it for his own benefit, does not aid in solving the question whether the paper of that character is presented by the officer or agent of the corporation, it bears upon its face sufficient notice of the incapacity of the officer to issue it. (Hanover Bank v. Am. Dock & T. Co., 148 N. Y. 612; Am. Ex. Nat. Bank v. Am. Dock & T. Co., 143 N. Y. 559; Wilson v. M. E. R. Co., 145 N. Y. 255; Gerona v. McCormick, 130 N. Y. 261). There are numerous cases to that class cited by the learned counsel for the defendant on this point. There is a manifest distinction between them and the case at bar. Here the bank was not dealing with the corporate notes payable to himself, but with notes which had been regularly issued, so far as appeared from their face, to a firm of which he was a member and which he had transferred to a firm of which the officer was a member and which he acted as agent in procuring the loan from Brooks and pledging them to the bank.

\* \* \* None of the cases cited by the learned counsel for the plaintiff sustain the proposition that such a circumstance is sufficient to put the holder of negotiable paper upon inquiry or charge him with knowledge of the defect in case he fails to make it, and there are many cases that tend to support the contrary view. (Am. Ex. Nat. Bank v. N. Y. B. & P. Co., 148 N. Y. 705; Am. Ex. Nat. Bank v. Consolidation Bank, 48 Pa. St. 514; Walker v. Kee, 14 S. C. 142.)"

The bank discounted for a customer a note running "we promise to pay," signed by parties in their individual names with the addition of the words "President," "Secretary." It was held that the bank was not bound to inquire whether the note was intended as an individual obligation or as a corporate obligation and could sue the signers as a *bona fide* purchaser.

chaser. *First Nat. Bank v. Wallis*, 150 N. Y. 455; aff'g s. c., 80 N. Y. 435.

**From opinion.**—"It appears that the bank discounted the note on the primarily of its customers, the payees, making no inquiry as to whether it was a corporate or individual obligation, and having no knowledge on the subject. In law it was the individual note of the defendants (*Casco National Bank v. Clark*, 139 N. Y. 308; *Merchant's Nat. Bank v. Clark*, id. 315), and the nature of the promise is quite consistent with an intention to create an individual obligation."

Plaintiff, having taken, for value, from the payee a note made to order by his firm and indorsed by him and then by another firm, sued the makers as second indorsers. It was held that he was charged with knowledge that the firm indorsement was for accommodation and was bound to inquire into its validity. *Smith v. Weston*, 159 N. Y. 194; aff'g s. c., 49 Hun, 25.

See, also, *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201; rev'g 12 App. Div. 624; *First Nat. Bank v. Weston*, 25 App. Div. 414; s. c., 49 App. Supp. 542.

**From opinion.**—"While upon the production of the note by the plaintiff, proof of the signatures of the parties thereto and of presentment and not of dishonor, a *prima facie* case was established in his favor, as soon as it appeared that the note was indorsed outside of the firm business and without the authority of all the members, the burden of proof shifted, and in order to recover it was necessary for the plaintiff to show that he was a *bona fide* purchaser, or that the indorsement was authorized. (*Joy v. Diefendorf*, 130 N. Y. 6; *Canajoharie Bank v. Diefendorf*, 123 N. Y. 191; *Nickerson v. Ruger*, 76 N. Y. 279; *First Nat. Bank v. Green*, 43 N. Y. 298). It was not enough for him to prove simply that he paid value for the note before maturity, but it was necessary for him to go farther and show either that he had no knowledge or notice equivalent to knowledge that the indorsement was for the accommodation of the makers, or else that it was made with the authority of or was ratified by the other members of the firm. (*Vosburgh v. Diefendorf*, 119 N. Y. 357; *Bank of Rochester v. Bowdoin*, 1 Wend. 159; *Dob v. Halsey*, 16 Johns. 34; *Laverty v. Burr*, 1 Wend. 529). Since the note was transferred to the plaintiff by one of the makers, who was also the payee and first indorser, the presumption arose that the second indorsement was made for the accommodation of some prior party to the note and threw the burden on the holder of showing that it was authorized. (*National Park Bank v. German-American & Co.*, 116 N. Y. 281). The plaintiff knew he was dealing with one of the makers of the note when he took it from James K. Van Campen and he knew also that Mr. Van Campen, either as maker or as first indorser, could not be expected to have possession of the note if it had passed through the firm of Weston Brothers in the ordinary course of business. He was, therefore, put upon inquiry, which, if made in the proper quarters, would, as it must be presumed, have disclosed the fact that the second indorsement was made without authority. (*Foot v. Sabin*, 19 Johns. 154; *Wilson v. Metropolitan El. Ry. Co.*, 120 N. Y. 145; *Stall v. Catskill Bank*, 18 Wend. 466; *Gansevoort v. Williston*, 14 Wend. 134; *Joice v. Williams*, id.; *Wilson v. Williams*, id. 146)."

the note is not presented by one prior in order of liability to the indorser the rule does not apply and the purchaser is liable with notice that the indorsement is not in the ordinary business and need not inquire into its validity. *Bank of the Valley v. Weston*, 159 N. Y. 201; rev'g s. c., 12 App.

discounted a note, made in the firm name by a member of the which defendant was also a member, for accommodation of the indorser and indorsed by him as first indorser and by a third partner partnership, as second indorser. It was held that, as to the paper was on its face regular and in the holder's hands in the course of business and plaintiff was not put upon inquiry. *National Bank v. Weston*, 161 N. Y. 520; rev'g s. c., 31 App.

Decision.—“There is one feature, however, which distinguishes this case from others against these defendants, that have been before us. (*Smith v. Weston*, 159 N. Y. 194; *Monongahela Valley Bank v. Weston*, 159 N. Y. 201). Formerly under consideration were presented to the purchaser, either by the firm or by a party who would not, in the ordinary course of business, have his possession unless they were accommodation paper. This fact, however, was given tending to show that the notes had been signed by the name of the firm without the consent of the other members, was not given such notice to the purchaser as to cast upon him the burden of inquiry whether he was a *bona fide* purchaser, or that the use of the firm name by the defendant was authorized by his co-partners. In the case now before us, the notes were presented to the plaintiff by the payee, to whom it had apparently been delivered by the Weston Brothers, as makers, in the usual course of business, and upon the face of the transaction, there was nothing to put the purchaser upon inquiry. The plaintiff had a right to assume, in the absence of any defect, that the relation to the paper of every party whose name was written upon it was precisely what it appeared to be. (*Cheever & Co.*, 150 N. Y. 59). While the plaintiff may have had notice of the subsequent indorsers, who do not defend, had indorsed for the accommodation of the other party to the note, the presentation of the note by the payee was upon the capacity in which the Weston Brothers had signed it. It was apparently business paper, and there was nothing for the plaintiff to inquire about in that regard.”

It was held that it was given in purchase of land and stipulated thereon. Purchaser was put upon inquiry as to the consideration of the note having been paid. *Scott v. Scott*, 2 App. Div. 240.

A note payable to a member, indorsed by another firm and purchased by a payee was notice that the indorsement was for accommodation and consequently not in the regular course of business. *First Nat. Bank v. Weston*, 25 App. Div. 414.

The “as trustee” put a purchaser upon inquiry as to the trust.

tee's right to use the trust funds is in his personal affairs; and an innocent purchaser of the funds only after the funds had been diverted did not discharge the duty to investigate. *Marshall v. De Cordova*, 26 App. Div. 61.

Parties dealing with firms are put upon inquiry as to the firm's signature. Signature "Iba & Green" to a note when the firm name was "E. Iba & Green," put the purchaser upon inquiry as to the reason for the signature. *Lucker v. Iba*, 54 App. Div. 566.

Knowledge of the accommodation character of a note did not constitute notice to an innocent purchaser with notice of a fraudulent diversion of the funds. *Beall v. General Electric Co.*, 16 Misc. 611.

On proof of diversion, the burden is on the holder to show that he acquired the note without notice. *McCammon v. Shantz*, 26 Misc. 476.

See, also, *McCammon v. Shantz*, 49 App. Div. 460.

The purchaser of a firm note, stated to have been taken for business, went to the maker's store, saw no bicycles but saw that his firm was engaged in the transportation business and made no inquiries. It did not constitute notice to him with knowledge that the note was outside the partnership business. *Union Nut & Bolt Co. v. Doherty*, 32 Misc. Rep. 247; s. c. aff'd, 100 App. Div. 100.

The taker of a check several days past due with the letters "N. Y. City" marked thereon, by a bank which had dishonored it, held not a bona fide purchaser. *Spero v. Holoschutz*, 36 Misc. 764.

Knowledge that one in possession of a note is a maker and that the note is to be negotiated for his benefit is sufficient to notify a purchaser that the note is not a bona fide purchase. *Evans v. Speer & Co.*, 66 Ark. 204.

A note payable to a firm or bearer in the hands of a partner does not constitute notice to charge a purchaser with knowledge of the rights of the partner. Possession of such a note is *prima facie* evidence of ownership. *Bell v. Paris v. Pearson*, 66 Ark. 310.

Note in payment of a patent right, which does not so state upon its face as required by statute, held void in the hands of a bona fide purchaser. *Wyatt v. Wallace*, 67 Ark. 575.

Knowledge that notes were given by stockholders for subscription of stock, in consideration of a promise to issue stock upon their payment, is not so out of the usual course as to charge holders with notice that the stock was not delivered. *Kinkel v. Harper*, 7 Colo. App. 45.

A letter of authority to agent to draw provided he is still in a certain place and "needs the money yet" was held to notify one cashing a check drawn in pursuance thereof that the authority must be exercised within a reasonable time. Seventeen days held not unreasonable. *People's Bank v. Denver Nat. Bank*, 24 Colo. App. 199; aff'd s. c., 7 Colo. App. 199.

Fact that the same person is the president of both the maker and the



not necessarily put one on inquiry. *St. Joe &c. Min. Co. v. Bank*, 10 Colo. App. 339.

ent "without recourse" does not put one upon inquiry. *Annott*, (Colo. App.) 66 Pac. Rep. 567.

maker from payee of note with coupons secured by trust deed, to a remittance of interest, stating that he would send coupon received from holder, charged maker with notice that payee owner and not entitled to interest. *Campbell v. Equitable Co.*, (Colo. App.) 68 Pac. Rep. 788.

ge that the consideration for the note was an agreement, which, if the payee's insolvency, could not be carried out, was knowledge of consideration for the note. *Russ Lumber &c. Co. v. Land &c. Co.*, 120 Cal. 521.

executed for the accommodation of a bank made payable to its by him indorsed in blank, was negotiated by the president benefit. Knowledge that he was president of the bank was that his act was unauthorized. *Kaiser v. United States Nat. a.* 258.

ge of the consideration of a note expressed on its face was at to charge a purchaser with notice of the failure thereof. *Lyville &c. R. Co.*, 99 Ga. 232.

ge of the possession of a note by a firm of which one of the a member did not charge a purchaser with notice of pay- *g v. Riley*, 101 Ga. 372; s. c., 40 L. R. A. 244.

execution by a husband and wife did not give notice that the surety for the former. *Southern &c. Asso. v. Perry*, 103

ge that a guaranty was the consideration for a note did not archaser with notice that the payee might or did fail to ful- anty. *Hudson v. Best*, 104 Ga. 131.

r of a non-negotiable note is chargeable with notice of lack ation. *Ryals v. Johnson County Sav. Bank*, 106 Ga. 525.

stating that it was given for patent right was not void for ear evidence of its character on its face, though it failed e the patent or state the amount of the consideration as re- tatute. *Smith v. Wood*, 111 Ga. 221.

ge that promoters had sold property to a corporation for more paid for it did not charge holders of corporate notes with that they had fraudulently represented to its stockholders mpany was getting it at cost. *Cranston v. Bank of State of 2 Ga.* 617.

es were stated in an indorsement to be secured by an in-

terest in horses described in a certain agreement did not charge purchaser with knowledge of the contents thereof. *Biegler v. Merchants' Bank*, 164 Ill. 197; *aff'd* s. c., 62 Ill. App. 560.

Indorsement on a note and trust deed that certain property was leased by order of Joseph Brugger, holder of note secured by the deed "made purchaser negligent in making no inquiry except trustee himself. *Chicago Title &c. Co. v. Brugger*, 196 Ill. 90 s. c., 95 Ill. App. 405.

That a purchaser of a draft was suspicious, did not charge knowledge of defective title. *Lampson v. Illinois Trust &c. Bank*, 111 Ill. App. 371; *Weaver v. Leseure*, 89 id. 628.

The fact that notes were in the hands of one from whom they were taken when first seen and that he promised to get them indorsed without notice that an indorsement was for accommodation, and, being a corporation, imposed the duty of inquiry. *Pick v. Ellinger*, 111 Ill. App. 570.

A statement by a father, that his wife objected to his signing a note for his son, coupled with knowledge that the money went to the use of the son, charged a purchaser with notice that the father signed only as agent for the son. *Peterson v. Stege*, 67 Ill. App. 147.

A purchaser of a note took it without any actual knowledge of the defenses, though he failed to make inquiry under circumstances which would have raised a suspicion in the mind of an ordinary person. He was not charged that he could recover as a *bona fide* purchaser. *Gray v. Goode*, 111 Ill. App. 504.

Provided, he was not guilty of bad faith. *Kent v. Barnes*, 111 Ill. App. 617.

Knowledge that a holder was an agent was sufficient to impose a duty of inquiry as to the extent of his authority. *Schneider v. Lebanon &c. Co.*, 73 Ill. App. 612.

A purchaser of a note was not charged with knowledge of notices published in newspapers. *Gehbach v. Carlinville Nat. Bank*, 83 Ill. App. 129.

That note bore on its face evidence of connection with a trust was sufficient to put a purchaser upon inquiry as to the trustee's right to dispose of it. *Lang v. Metzger*, 86 Ill. App. 117.

To defeat title of *bona fide* holder he must be chargeable with bad faith. Suspicion or knowledge of facts which would make it negligent not to inquire is insufficient. *Metcalf v. Draper*, 98 Ill. App. 399.

The maker of a note and his sons, who had been charged with notice and arrested were released through the efforts of an attorney. The knowledge of the facts gave notice of the unreasonableness of the fee for the note was given. *Shirk v. Neible*, 156 Ind. 66.

holder of a note is not put upon inquiry as to its consideration if suspicious facts appear upon its face. *Pape v. Hartwig*, 23 Ind. 333; *National Exch. Bank v. Berry*, 21 Ind. App. 261.

Suspicion or carelessness was not sufficient to charge a purchaser with notice, but only such gross negligence or willful neglect as will constitute bad faith. *Lehman v. Press*, 106 Iowa, 389.

Holder of a note was not charged with notice where he made no inquiry though he was negligent in not going far enough. *Central Exch. v. Spurlin*, 111 Iowa, 187; s. c., 49 L. R. A. 661.

Indorsement in a note that it was executed for the purchase money of goods, which a lien was retained as security was not sufficient to put holder upon notice as to any fraud connected therewith. *McCarty v. Le & Co.*, 100 Ky. 4.

Holder took a renewal of a note in smaller notes for the same amount without inquiry. The character of the transaction was not sufficient to charge holder with notice of the maker's intention to defraud or mislead. *Seabree Deposit Bank v. Clark*, (Ky.) 48 S. W. Rep. 1089. Indorsement of notes "for collection" gives notice of lack of authority to dispose of them to the extent of the indorser's interest. *Maskill v. Huffaker*, (Ky.) 49 S. W. Rep. 770.

Holder of a bank discounting notes of a corporation was also a holder of the latter. Not being an officer he was not chargeable with notice of fraud on the part of the corporation in obtaining the notes. *World Man. Co. v. Hamilton-Kenwood Cycle Co.*, 123 Mich. 620. Holder after protest did not charge one with notice of illegality as to the corporation; even though taken under suspicious circumstances. *Ford*, 89 Me. 140.

Holder cannot charge that an indorsement is for accommodation will not charge holder with notice that it is for any other purpose than for credit. *Reed*, 62 Minn. 384.

Holder after maturity binds a purchaser as to facts which the circumstances reasonably put him on inquiry as to. *Fuller v. Quesnel*, 63

Ind. 68. Holder cannot charge that payee ran a "bucketshop," that the first indorser was a gambler therein and that the maker had dealings with the concern in which the payee was sufficient to suggest inquiry; and the purchaser was not charged with knowledge that the note was given for a gambling debt, which inquiry would have revealed. *Merchant's Nat. Bank v. Sullivan*, 106 Ind. 68.

Holder will not be charged with knowledge of facts which inquiry might have revealed, unless the circumstances were so patent as to constitute lack of inquiry a matter of bad faith. *Gale v. Birmingham*, 105 Ala. 555; *Collins v. McDowell*, 65 Minn. 110.

The words "as advised" on a draft do not import notice that there are no funds in the hands of drawee, where the purchasers knew in previous transactions such drafts were promptly honored. *Am. &c. Bank v. Gluck*, 68 Minn. 129.

Pendency of proceedings to test the validity of a note are not a defense to a purchaser before maturity. *Fulton v. Andrea*, 70 Minn. 445.

Delivery of check by mistake to wrong party did not prevent recovery by an innocent purchaser thereof. *Burrows v. Western &c. Telegraph Co.* (Minn.) 90 N. W. Rep. 1111.

Suspicion which does not amount to bad faith will not charge a purchaser with knowledge of defects which an inquiry would have revealed. *Borgess Invest. Co. v. Vette*, 142 Mo. 560; *Schroeder v. Seitz*, 6 Mo. App. 233; *Brown v. Hoffmeyer*, 74 Mo. App. 385.

Notice that a note is payable to a trustee, binds a purchaser to a reasonable inquiry as to the extent of his authority to deal with it. *Galloway v. Son*, 61 Mo. App. 21.

Lack of "credits" on an installment note for payments past due does not exclude the holder from the rights of a bona fide purchaser. *Corkle v. Miller*, 64 Mo. App. 153.

Holder of past due paper is not bound to look behind the appearance of the paper, arising from transactions independent of the note as to his assignor, for latent equities. *Mohr v. Byrne*, 135 Cal. 87; *Craig v. Johnson*, 87 Mo. App. 478.

Purchase of a check under suspicious circumstances, that could not have been cleared by mere asking a question, and were incompatible with ordinary business prudence or common honesty, does not entitle the purchaser to the protection of a bona fide purchaser. *Harrington v. Butte &c. Mining Co.* 19 Mont. 411; s. c., 36 L. R. A. 539.

Purchaser took a joint note from one of the makers as collateral for an individual note. He was not chargeable with knowledge of diversions of the proceeds. *American Exch. Nat. Bank v. Ulm*, 21 Mont. 440.

A purchaser after maturity whose vendor was an innocent purchaser without notice succeeds to his rights. *Jones v. Wiesen*, 50 Neb. 23.

That an officer of a corporation issued a note by it to himself as president does not put a purchaser upon inquiry as to his authority therefor. *Stout v. Ponca Mill Co.*, 54 Neb. 500.

A bona fide purchaser is not charged except with actual knowledge of circumstance such as would put an ordinary man upon inquiry is insufficient. *First Nat. Bank v. Pennington*, 57 Neb. 40.

The words "This note is secured by a contract on land \* \* \* described as," was not sufficient to put a purchaser upon inquiry. *Knight v. Finney*, 59 Neb. 274.

inquiry on the part of a purchaser depends on law of the place contract is to be performed and not upon the law of the forum, the place of performance is Vermont, the question must rest upon evidence showing knowledge of facts sufficient to put the man on inquiry. *Limerick Nat. Bank v. Howard*, (N. H.) 641.

signed and left with payee's agent for delivery on condition of signature of others. The conditions were not fulfilled and note in circulation. Held no defense against an indorsee in due course. *Walter v. Andrus*, 10 N. D. 558.

Description "No. of Note 2821. No. of Policy 654,971" gives notice to agent that it is a premium note and belongs to company. *Drumpton*, 121 N. C. 122.

Knowledge of the consideration for note does not put a purchaser on inquiry to ascertain whether it has failed or not. *United States v. Floss*, 38 Or. 68.

Holder of a check is not put upon inquiry as to its consideration on reason of its being dated ahead. *Rogers v. Dunn*, 172 Pa. St.

Signature "The Crowell and Class Cold-Storage Co., by Chas. N. [illegible]," did not put a purchaser upon inquiry as to whether the company became a corporation. *New York Nat. Exch. Bank v. Crowell*, 313.

Assignment of the firm name to a partner's note, in his hands discounted for his benefit was notice to the bank of the possibility of being unauthorized. *Brown v. Pettit*, 178 Pa. St. 17; s. c., 723.

Holder to investigate suspicious circumstances will not charge a bank with notice unless they amount to bad faith upon his part. *Lancaster Nat. Bank v. Garber*, 178 Pa. St. 91.

Holder before purchasing, asked the makers if the notes were all paid. He was told that he believed they were, that they had been given for a specific object and would be paid when due. Plaintiffs charged with notice of the other person's failure to perform that object. *Snyder v. Hancock*, 9 Pa. Dist. R. 159.

Holder of a note that a note was given for a patent right charged the taker with notice of a failure of consideration, though the statement was not on the face of the note. *Troxell v. Malin*, 9 Pa. Super. Ct.

Holder of draft is bound to look at the terms of acceptance only. *First Bank v. Rencker*, 18 Pa. Super. Ct. 192.

Knowledge of fraud or duress in procuring a note throws upon subse-

quent holder burden of proving himself a *bona fide* holder for *Kirby v. Berguin*, (S. D.) 90 N. W. Rep. 856.

Bank accustomed to discount paper at from 12 to 25 per cent was put upon inquiry by purchasing notes at 20 per cent discount from a stranger, where he knew the maker to be solvent. *Oppenheimer v. Farmer's &c. Bank*, 97 Tenn. 19. See 33 L. R. A. 767.

A manufacturer of furnaces sold them to a manufacturer of an engine, taking notes directly to them upon the resale of both by the latter. Was not chargeable with representations made by the latter. *Springs Min. Co. v. McIlvrien*, 97 Tenn. 225.

Inquiry would have revealed that the word "trustee" was on the note; failure to make it did not charge the holder with notice of the equities of the maker. *Tradesmen's Nat. Bank v. Looney*, 99 Tenn. 32. s. c., 38 L. R. A. 837.

Mere knowledge of the consideration and that it might fail, did not put a purchaser upon inquiry to ascertain whether or not it had been paid. *Merchant's &c. Bank v. Pennland*, 101 Tenn. 445.

A purchaser of a note relying on a letter, for the authority of an agent, was chargeable with knowledge as to ownership also contained in the letter. *Bristol Bank &c. Co. v. Jonesboro &c. Co.*, 101 Tenn. 545.

A purchaser of a draft in settlement of insurance was chargeable with notice of fraudulent overinsurance, where he had both policies and the draft in his possession. *Teutonia Ins. Co. v. Bussell*, (Tenn.) 48 S. W. Rep. 70.

Taking a note payable to a certain person or bearer directly from the maker of the makers was sufficient to charge the purchaser with notice of equities in favor of sureties. *Battle v. Cushman*, (Tex. Civ. App.) 33 S. W. Rep. 1037.

A manufacturer having made arrangements with another for the use of its machinery, whereby it had the right to see that notes turned over to it were therefore had proper security, was not a purchaser without notice of the equities of the notes especially where it was notified of the terms of the contract. *Hutches v. Case Threshing Machine Co.*, (Tex.) 35 S. W. Rep. 60.

The position of an indorsement of holder above the blank indorsement of a corporation to whom it had been indorsed specially was not affected by the fact that the latter's being an accommodation indorsement. *Marshall Bank v. O'Neal*, 11 Tex. Civ. App. 640.

Mere knowledge of fact suggesting inquiry will not charge a purchaser with what inquiry would have revealed, where there is no bad faith. *Hynes v. Winston*, (Tex.) 40 S. W. Rep. 1025.

Knowledge that a note was the property of an estate puts a purchaser upon inquiry as to the authority of the guardian to negotiate. *Gillespie v. Crawford*, (Tex. Civ. App.) 42 S. W. Rep. 621.

note was taken from payee under a blank indorsement and that of the holder, who was a maker, had the possession of it, did a purchaser with notice of an equity, the husband having held wife's agent. *Brainerd v. Bute*, (Tex. Civ. App.) 44 S. W.

negligence in failing to inquire into suspicious circumstances large purchaser with the knowledge inquiry would have re-  
*ulberger v. Morgan*, (Tex. Civ. App.) 47 S. W. Rep. 379. See  
W. Rep. 738; *Rotan v. Mardgen*, (Tex.) 59 S. W. Rep. 585;  
*Grobe*, (Tex. Civ. App.) 44 S. W. Rep. 898.

ed occupation by vendor was not notice of a claim of owner-  
broker negotiating a note for the purchase price. *Stephens v.*  
*ld*, 22 Tex. Civ. App. 182.

ult of the contractor, one of the two sureties on his bond, who  
ent of the bank that advanced the money to the contractor,  
e other to execute a note to raise money with the bank to com-  
contract upon the assurance that he would not be held liable  
te was simply for the purpose of showing to the bank examiner.  
ence of actual knowledge of the president's representations on  
the bank it was allowed to recover on the note. *Bank of Cle-*  
*arper*, (Tex. Civ. App.) 67 S. W. Rep. 188.

er was a *bona fide* holder, though the circumstances surround-  
nsaction were sufficient to charge him with notice that it was  
modation. *Israel v. Gale*, 77 Fed. Rep. 532.

er, who takes a note in good faith, though with knowledge of  
circumstances, is not guilty of such laches as will prevent his  
*bona fide* holder. *Doe v. Northwestern Coal &c. Co.*, 78 Fed.

*Atlas Nat. Bank v. Holm*, 71 Fed. Rep. 489; *Germania Bank v. La*  
*id*. 145.

dge that a holder of notes was president of the bank which was  
r in blank thereon was not notice to a purchaser that the holder  
e owner thereof. *Kaiser v. First Nat. Bank*, 78 Fed. Rep. 281.  
unting without other special circumstances is not so far out  
al course of business as to charge a purchaser with knowledge  
ransaction was unauthorized. *United States Nat. Bank v.*  
*Bank*, 79 Fed. Rep. 296.

indorsement of a person neither a payee, indorsee nor assignee,  
uaranty, is presumed to be without consideration, and a pur-  
chargeable with notice accordingly. *Lyon &c. Co. v. First Nat.*  
Fed. Rep. 120.

asener of a draft drawn by an officer of a railroad company, is

negligent in failing to institute inquiry, where the latter asks for certificate of deposit in his own name for the proceeds. *Farmer's Loan Co. v. Fidelity Trust Co.*, 86 Fed. Rep. 541.

Purchaser of a note made by a corporation to and indorsed by an officer making it for his own benefit is chargeable with notice of lack of authority. *Park Hotel Co. v. Fourth Nat. Bank*, 86 Fed. Rep. 7.

A purchaser is negligent in not making inquiry concerning circumstances which would put an ordinarily prudent man on inquiry and is chargeable with the knowledge inquiry would have revealed. *Litchfield Nat. Bank v. Adams*, 70 Vt. 133.

See, also, *Roth v. Allen*, 32 Vt. 135.

Purchaser may recover, under a statute requiring proof of knowledge or evidence sufficient to show bad faith, to constitute an infirmity, where he made no inquiry as to the consideration of payee, though he knew makers to be insolvent. *McNamara v. Bank of Wash.* (Wash.) 68 Pac. Rep. 903.

Knowledge that notes indorsed in blank by a corporation were not made to it by the officer making the indorsement did not charge a purchaser with notice that it was accommodation paper. *Hiawatha Iron Works v. John Strange Paper Co.*, 106 Wis. 111.



## COMMON CARRIER OF GOODS.

WHO ARE COMMON CARRIERS.

WHO ARE NOT COMMON CARRIERS.

EMISE OF A VESSEL.

WHEN LIABILITY BEGINS.

FROM WHAT DUTY SPRINGS.

EXTENT OF LIABILITY.

DELAY IN TRANSPORTATION.

(a) Strikes of employés.

CARRIAGE OF ANIMALS.

PERISHABLE GOODS.

INHERENT DEFECTS—UNDISCLOSED DANGERS IN GOODS.

INEVITABLE ACCIDENT AND VIS MAJOR.

(a) Inevitable accident.

(b) Vis major.

(c) Concurring negligence of carrier.

LIMITATION OF LIABILITY.

(a) Validity and construction of contracts limiting liability.

1. Carriers of goods.

2. Carriers of passengers.

(b) Disclosure of value.

(c) Care required in case of release.

CONTRACTS OF SHIPMENT.

(a) Who may make.

1. On behalf of shipper.

2. On behalf of carrier.

(b) How made and what constitutes.

1. Freight.

2. Baggage.

(c) Variation of terms of contract by parol.

DEVIATION FROM CONTRACT AND INSTRUCTIONS.

LOADING AND CARE OF SHIPMENT.

DELIVERY.

(a) Notice of arrival.

WHEN LIABLE AS WAREHOUSEMAN.

CONNECTING CARRIERS.

(a) Through contracts.

(b) Initial carrier's liability thereon.

(c) Connecting carrier's liability thereon.

- (d) Effect of selling coupon tickets and checking baggage through.
- (e) Effect of receiving goods billed through.
- (f) Burden of proof when there is no through contract.
- (g) Effect of partnership or joint traffic arrangements.
- (h) Effect of agency.
- (i) Stipulations for exemption.

### I. Who Are Common Carriers.\*

**Persons, whose business it is to receive such goods as parties seek to trust to their care for the purposes of transporting the same from place to another for compensation, are common carriers.** *Sweet v. L* 23 N. Y. 335.

A common carrier exercises a *quasi* public employment, and has legal duties to perform; he cannot reject a customer at pleasure, or charge any price that he chooses to demand; and if he refuses to carry according to the course of his employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his risk and services (*Bac. Abr. Carriers* [B]; 2 *2* 599; *Story on Bail.* 328; 2 *Ld. Raymond*, 917; *Skin.* 279; 1 *2* 249; 2 *Show. R.* 332; 8 *Mees. & Wells.* 372; 1 *Pick.* 50; 15 *Co.* 539); and an action will lie against him upon a tort, arising *ex delicto* for a breach of duty. *Orange Co. Bank v. Brown*, 3 *Wend.* 158. *L* *N. J. Steam Navigation Co.*, 11 N. Y. 485.

Common carriers include those who for transportation receive baggage, coin, bank-notes, commercial paper. *Sweet v. Barney*, 23 N. Y. 335.

A common carrier was defined in *Gisburn v. Hurst*, 1 *Salk.* 249, "any man undertaking, for hire, to carry the goods of *all persons indifferently*;" and in *Dwight v. Brewster*, 1 *Pick.* 50, to be, "one who undertakes, for hire to transport the goods of *such as choose to employ him* from place to place." In *Orange Bank v. Brown*, 3 *Wend.* 161, Justice Savage said: "Every person who undertakes to carry, for compensation, the *goods of all persons indifferently*, is, as to the liability imposed, to be considered a common carrier. The distinction between a common carrier and a private or special carrier is, that the former holds himself out *in common*, that is, to all persons who choose to employ him, as ready to carry for hire; while the latter agrees, in some special contract, with some private individual, to carry for hire." *Story on Contracts* sec. 752a. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the

\* NOTE.—That special circus cars, &c. are carried as special, not as common, carriers, see "*Liability*," post p. 237.

who offers. "On the whole," says Prof. Parsons, "it seems that no one can be considered as a common carrier, unless in some way, held himself out to the public as a carrier, in such a way as to render him liable to an action if he should refuse to carry for the person who wished to employ him." 2 Pars. on Cont. (5th ed.) 166, *Belger v. Sackrider*, 37 N. Y. 341.

A company is a common carrier. *Belger v. Dinsmore*, 51 N. Y.

Companies are common carriers, but not as to goods that pass through their hands in his possession. *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 211; disapproving of *Fisher v. Clisbee*, 12 Ill. 344; *Powell v. Mills*, 100 N. Y. 91; *Wilson v. Hamilton*, 4 Ohio St. 722. *White v. Winnisimuck*, 155.

Defendants advertised themselves as general truckmen, their particular business being heavy machinery. They kept and maintained for this purpose a large number of trucks and horses and the necessary help for the operation of the business. They were employed to move heavy machinery and negligently injured it while unloading. It was held to be an error to refuse to instruct the jury that the defendants were common carriers. *Jackson &c. Works v. Hurlbut*, 158 N. Y. 34; 15 Misc. 93.

Opinion.—"Truckman, wagoners, cartmen and porters who undertake to carry goods for hire as a common employment in a city or from one town to another are common carriers. It is not necessary that the exclusive business of the carrier shall be carrying. Where a person whose principal pursuit is to solicit goods to be carried to the market town in his wagon on certain terms makes himself a common carrier for those who employ him. The fact that the defendants had no regular tariff of charges for their services, that a special price was fixed by agreement, does not change the relation. The necessity for a different charge in each case arises, of course, out of the difference in labor in handling articles of great bulk. The charge in each case is proportioned to the risk assumed and commensurate with the responsibility as such. A common carrier is one who, by virtue of his office, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him, and every one who undertakes to carry for compensation the goods of all persons indifferently, is, by law, to be deemed a common carrier. (*Bank of Orange v. Brown*, 3 N. Y. 351; *Schouler on Bailments, and Carriers* [2nd Ed.], 351; *Story on Bailments*, Sections 495, and 496; 2 *Kent's Comm.* [4th Ed.], pp. 598, 599; 2 *Contracts*, 165, 175; *Angell on Carriers*, 870; *Allen v. Sackrider*, 37 N. Y. 341; *Lough v. Outerbridge*, 143 N. Y. 271)."

A warehouseman, whose contract of storage had expired, agreed to deliver goods for which he was paid a certain price. It was held that at the moment of accepting such employment he became a common

carrier and, the goods in the warehouse being in his possession as he was liable for their loss by fire as an insurer and not for negligence only. *Snelling v. Yetter*, 25 App. Div. 590.

Boatmen on canal employed in the transportation of property is a common carrier. *Arnold v. Halenbake*, 5 Wend. 33.

Also the owners of steamboats, railroads, canal boats, stage coaches, whose ordinary business is to carry goods. *Powell v. Myers*, 26 App. Div. 591, 594; *Hollister v. Nowlen*, 19 id. 234.

An expressman soliciting the carriage of trunks and packages is a common carrier. *Robinson v. Cornish*, 34 N. Y. St. R. 695.

(But, see, *People ex rel. Walker v. Babcock*, 16 Hun, 313, that a company will not be compelled by mandamus to carry goods subject to the common law liabilities of a common carrier. Relator should sue in an action for damages.)

A declaration alleging that defendant followed the occupation of a steamer or owner of a steamboat plying on a navigable river sufficient to establish the character of a common carrier upon him. *Bennett v. Filyaw*, 403.

The court will take notice that the owner of an omnibus line is a common carrier and liable as such for the loss of a passenger's baggage. *Parmelee v. McNulty*, 19 Ill. 556:

The mode of transporting is immaterial; the driver of a stagecoach, an ox team, carrying sugar for hire, is a common carrier. *Roberts v. Kennedy*, 2 Dana, (Ky.) 430.

One who "hailed goods" as a common carrier within city limits and obtained a license continued his liability by going beyond them. *Farley v. Farley*, (Ky.) 54 S. W. Rep. 840.

One who engaged himself to any body who would employ him to deliver freight, packages, etc., was a common carrier. *Cayo v. Assignee*, (Ky.) 55 S. W. Rep. 887; s. c., 49 L. R. A. 251.

A transfer company contracting to remove plaintiff's trunk from a car. *Da Ponte v. N. O. Transp. Co.*, 42 La. Ann. 696.

Proof of custom of street railway company to carry merchandise on hire fixes common carrier's liability on it for loss of a box of merchandise delivered to it to be carried on front platform of a car. *Levi v. L. R. Co.*, 11 Allen, 300.

An express company is a common carrier. *Brockway v. Atlantic Exp. Co.*, 168 Mass. 257.

The owner of a canal boat used for transportation of merchandise is a common carrier. *Humphreys v. Reed*, 6 Wharton, (Pa.) 485.

Where a storekeeper carried goods for hire in his wagon, he was a common carrier.

carrier for loss of them. *Gordon v. Hutchinson*, 1 Watts. 285.

Companies," post p. 603.

of defendant's agent in receiving plaintiff's cotton on board boat, this boat being used for transporting of defendant's sometimes that of others, fixed common carrier liability upon *McClure v. Richardson*, 1 Rice, (S. C.) 215.

ne company is a common carrier. *Kirby v. Western Union* Y. S. D. 623; s. c., 30 L. R. A. 621.

ay having no means of transportation of its own, but con- h other companies to transport its goods, is a common carrier. *Despatch &c. Co. v. Bloch*, 86 Tenn. 392.

e character of a steamboat company extended to the carry- mmodities usually carried upon Lake Champlain, and proof the bank bills were usually carried by the water craft on that ld be liable for the loss of a package of bank bills delivered of the boat for transportation, payment of fifty cents being a. *Farmers &c. Bank v. Champlain Transp. Co.*, 23 Vt. 186. of defendants, owners of canal boats used in transporting ir own business but in the present instance carrying oats for under special contract, was that of a private carrier. *Beck- bie*, 32 Vt. 559.

fact defendants were receivers under appointment of Court was no defense to a suit for loss of goods delivered to them carriers, when they had voluntarily assumed the duties of s. *Blumenthal v. Brainerd*, 38 Vt. 402.

vers," ante p. 89.

## II. Who Are Not Common Carriers.

ers of a steamboat employed in the business of towing boats not common carriers. *Caton v. Rumney*, 13 Wend. 387, and *v. Greene*, 3 Hill, 9; *Wells v. The Steam Navigation Co.*, 4.

sufficient to charge the defendant as a common carrier, to ne was the owner of a sloop and was specially employed by make a trip for a load of grain for which he was to receive m of money.

person is employed as a special carrier, he is bound only to of ordinary care, skill or foresight, in the execution of his *Ellen v. Sackrider*, 37 N. Y. 341.

See, to the same effect, *Fish v. Clark*, 49 N. Y. 122, aff'g 2 Lansing, 176; *Britt v. Brainerd*, 38 Barb. 574; *Arctic Ins. Co. v. Austin*, 54 id. 559; *Wood v. Austin*, 51 id. 9; aff'd in Court of Appeals, 4 Albany L. J. 113.

In action for an injury to cargo through negligence of the defendant while being towed by defendant's tug, Held,

(1) Contract for towing did not constitute defendants common carriers.

(2) Captain of tug was not master of crew or boats in tow, and no signals.

(3) Master of tow must use requisite care to guard against peril to navigation, and represents owner of freight.

(4) Where a canal boat in tow was run into and sunk by another owned by the same line, which owned the towing tug, that the owner of the cargo could not recover for its loss, it appearing that the omission to display proper lights upon the canal boat contributed to the injury.

(5) The rule might be different as to third and innocent persons. *Arctic Fire Insurance Co. v. Austin*, 69 N. Y. 470; rev'g 3 Hun, 19.

"A," contracting with "B," owner of a scow, for transportation of cattle, cannot recover for negligence of "C," owner of a tug boat, employed by "B," without "A's" privity. *Baird v. Daly*, 4 Lansing, 176. But the judgment was reversed by the Court of Appeals and an action against "C" by "A" allowed on the ground that in an action founded on negligence either the bailee or bailor may sue for damage done by a third party. *Baird v. Daly*, 57 N. Y. 236.

The owner of a tug used for towing purposes is not a common carrier and is not liable as an insurer, but there is an implied warranty that the tug is seaworthy (*Putnam v. Wood*, 3 Mass. 481-485; *Kopitoff v. Vinton*, 1 Q. B. Div. 377-380; *Cohn v. Davidson*, 2 id. 455; *The Omoa Co. v. Iron Co. v. Huntley*, 2 C. P. Div. 464; 1 Par. Mar. L. 238). The master must exercise reasonable care and skill in its management (the "*Margaret*," 94 U. S. 494-496; *The Steamer "Webb"*, 14 Wall. 44; *Wells v. The Steam Navigation Co.*, 8 N. Y. 375); and whether he was negligent in not anchoring instead of proceeding by night, where the course lay between certain shoals, was a question of fact for a jury.

Vessel not commanded by competent officer is unseaworthy. *Walsh v. Firemen's Ins. Co.*, 12 John. 128-134; *Draper v. Commercial Ins. Co.*, 4 Duer. 234; 2 Par. Mar. L. 135; *Tebó v. Jordan*, 67 Hun, 392; 32 id. 574.

A vessel not commanded by competent officers is unseaworthy, but not because navigated by unlicensed pilot, although statute requires pilot to be licensed; but this puts burden on owner to show that when stran-

command of a competent commander or pilot. *Tebo v. Jordan*, 218; s. c. aff'd, 147 N. Y. 387.

ment to restore a vessel in as good condition as when taken reception of ordinary use and wear, does not make the bailee

*Ames v. Belden*, 17 Barb. 513; *Hyland v. Paul*, 33 id. 241.

terer or lessee of a canal boat is not liable to the owner for

the boat which are the result of the negligence of those in

f tugs engaged by him to tow the boat from place to place,

belong to a company engaged in the business of towing. The

uld recover against the employees of those in command of

The Steamer Webb, 14 Wall. 406; *The Margaret*, 94 U. S.

*Laughlin v. The New York Lighterage &c. Co.*, 7 Misc. 119,

Common Pleas).

f a steamboat, though engaged in the business of towing,

for a single party. He was not a common carrier. *Knapp*,

*Affrey*, 178 Ill. 107; aff'd s. c., 74 Ill. App. 80.

carried express matter under a special agreement. Was a

ier. *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; s. c., 38

for particular customers at special prices constituted one a

ier. *Faucher v. Wilson*, 68 N. H. 338; s. c., 39 L. R. A. 431.

liable for the loss of a scow which it is towing caused by

e tide and winds as might have been reasonably expected.

*America*, 8 Benedict, (U. S.) 122.

v. Millar, 77 Pa. St. 238; *Rey v. Toney*, 24 Mo. 600.

y was struck by something under the water whose presence

e known by those in charge of the tug, the tug will not be

*Amer America*, 6 Benedict, (U. S.) 122.

v. Millar, 77 Pa. St. 238; *Rey v. Toney*, 24 Mo. 600.

liable for the loss of a scow which it is towing caused by

e tide and winds as might have been reasonably expected.

*Mac*, 2 Saw. (U. S.) 586.

r of a railroad, shipping his own freight over its lines, was

a constitutional provision forbidding officers to do business as

riers over its lines. *Bucksport &c. R. Co. v. Edinburgh &c.*

o., 68 Fed. Rep. 972.

### III. Demise of a Vessel.

ers of a line of canal boats engaged in the business of com-

ers of passengers and goods, who charter a boat to another

transportation company for a single trip, retaining the charge of it, navigating it with their own master and crew, are liable to a passenger for the loss of his goods upon the passage. *Campbell v. Perkins*, 8 N. Y. 430.

See *Bissell v. Torrey*, 60 N. Y. 635.

Vessel owners chartered her for a voyage for a cargo, save room for crew, etc. Held, that the owners retained possession of the vessel and were liable for a delay. Action arose between parties to charter party.

(1) Unless charter party was demise of ship itself, as contradistinguished from a right to have goods conveyed by the vessel, the owners are liable for negligence in its operation. 1 *Parsons on Shipping* Admiralty 278; *Drinkwater v. Brigg Spartan*, 1 Ware, 145; *Eames v. Cararoc*, 1 Newb. 528; *Sherman v. Fram*, 30 Barb. 478.

(2) Presumption favors continuance of ownership, although there are express words of grant in formal parts of the instrument. *Donahue v. Kettell*, 1 Clifford 135; 2 *Pars. on Contracts* 437; *Certain Logs v. Mahogany*, 2 Sum. 589; *The Aberfoyle*, 1 Abb. Ad. Rep. 242.

(3) The entire command and possession and control of a vessel must be surrendered to charterer before he becomes a special owner for a voyage. *McIntyre v. Bowne*, 1 J. R. 229; *Hoe v. Groverman*, 1 Cranch 214; *Marcadier v. Chesapeake Ins. Co.*, 8 id. 49; *Clarkson v. Eames*, 4 Cow. 470; *Drinkwater v. Brigg Spartan*, 1 Ware. 149; *Donahue v. Kettell*, *supra*; *Leary v. U. S.* 14 Wall 611; *Hagar v. Clark*, 78 N. Y. 45; *rev'd* 12 Hun, 524.

When general owner retains possession, command and navigation of ship, and contracts to carry cargo for voyage, the charter party is not a freightment sounding in covenant, and freighter is not clothed with the character or legal responsibility of ownership. But delivery of goods received from the charterer, to the consignees of the cargo at the port of destination absolves such shipowner from liability to the owner of the goods in absence of notice of ownership. *Robinson v. Chittenden*, 1 N. Y. 525; *rev'd* s. c., 7 Hun, 133.

See, also, *Campbell v. Perkins*, 8 N. Y. 432; *Parish v. Crawford*, 2 Strange 1251; *Clarkson v. Edes*, 4 Cow. (N. Y.) 470; *Mactaggert v. Henry*, 3 E. Smith, 398; *Marcadier v. The Chesapeake Ins. Co.*, 8 Cranch, 49.

The master, one of several owners, sailed vessel on shares, him paying for manning, victualing, etc. This was not a demise and the owners were held liable for negligence in the case of a seaman. *Scott v. Metcalf*, 107 N. Y. 211.

Where a manufacturing corporation acts as a common carrier, it, and not its officers, is liable upon contracts made by them for it, although



act as a carrier is not within its chartered powers. *Linkhauf*, 137 N. Y. 417.

Lord and Tenant," post p. 1316.

of a steamboat, not in control thereof, are not liable for the loss of those who are. *Gulzoni v. Tyler*, 64 Cal. 334.

of a tug is not liable for injury to a scow where his man, being engaged to tow a scow load of hay, gave orders to a man to get another tug, and tow the scow. *Bleecker v. Satsop*, 1 Wash. 77.

#### IV. When Liability Begins.

Liability of a common carrier, as such, begins when goods are delivered to him, at the place appointed or provided for their reception, in a condition and ready for immediate transportation.

The carrier applies to a railroad company to whom property has been delivered at one of its stations for immediate transportation although it is not able promptly to transport it, and there may be long storage of the property until cars can be furnished, and this, although by agreement between the parties it is the duty of the shipper to load it on the cars when it is shipped.

As for the destruction by fire of hay, alleged to have been destroyed by the defendant. The hay was delivered in bales for immediate transportation and placed in defendant's freight house, under the direction of the freight agent, where it was burned. It was the usage and regulation of the defendant, assented to by the shippers, that they were to load the hay into defendant's cars. Unless a delay in the shipment was caused by some fault of the shippers in not shipping the hay on cars when it was liable. *London and Lancashire Fire Insurance Co. v. Ogdensburg and Ogdensburg Railroad Co.*, 144 N. Y. 200; affirmed, 598.

**Conclusion.**—There is no doubt that it is the duty, generally, of a railroad company to load the freight delivered to it for transportation into its cars, and that the carrier generally devolve this duty by any regulation upon the shipper; and not legally, as a condition of transportation generally, exact from the shipper to place the freight into its cars. But we know from our own experience that as to hay, lumber, sawlogs, live animals and other bulky freight, the carrier usually loads the freight into the cars. We need not, however, now consider whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shippers acquiesced in the regulation and undertook the duty of loading. But we do not think that the carrier is liable when the shipper undertakes to load the freight into the cars necessarily postponed when the railroad company takes on the character of a common carrier. The rule as to the responsibility of the carrier is laid down in varying

phraseology in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. Liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent with his knowledge and consent. The liability of a railroad company as a common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier of goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception when they are in a fit and proper condition and ready for immediate transportation. If a common carrier receives goods into his own warehouse for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods. But on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done or some further direction is given or communication made concerning them by the owner, or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver until some change of place will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make the necessary preparation for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before the shipment, the former while they are in his custody is only liable as warehouseman, and his only responsibility as carrier is where goods are delivered to him, accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become impossible upon the carrier by a delivery and acceptance, he cannot be held responsible to them. *The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (eo instanti) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put in itinere.* *Judson v. Western R. R. Co.*, 4 Allen, 520; *Baron v. Eldridge*, 100 Mass. 455; *Grosvonts v. R. R. Co.*, 39 N. Y. 34; *O'Neill v. R. R. Co.*, 60 id. 138; *Redfield on Carriers*, § 80; *Angell on Carriers*, sec. 129. In *Wilson v. Atlanta & Charlotte R. R. Co.*, 10 Ga. 386, a case somewhat relied on by defendant's counsel, a quantity of wood was piled along the line of the defendant's railroad for the purpose of having it transported thereon, and the shipper was to place the wood in the defendant's cars. There the action was brought to recover damages on account of unreasonable delay in transporting some of the wood, and, also, for the loss of some portion thereof. The plaintiff failed to recover on the ground that upon all the facts in that case

the wood had not been delivered to and accepted by the railroad company for immediate shipment; and no principle was laid down in that case which can be invoked for the protection of the defendant in this. Here the hay was delivered to the defendant for *immediate shipment*, and it was accepted by it and placed in its freight house.

There was evidence tending to show that the freight had been paid that horses were placed in a shed designated by the defendant's servants and were loaded under the superintendence of one of them, that the horse in question was restive and refused to enter the box used for loading them, and he was, therefore, backed in and went through the door at the other end, off the dock, and was drowned. Held, that this evidence justified a finding that the horses were in the possession of the defendant.

The liability of a common carrier attaches when the property is deposited with him for transportation; and where a party, who is both a common carrier and a warehouseman receives goods into his warehouse to be transported by him, his responsibility as a common carrier commences when they are received. *Giblin v. The National Steamship Co.*, 8 Misc. 22; s. c. aff'd, 152 N. Y. 633.

See 52 N. H. 355; 3 Sawyer, 176; 35 N. Y. Supr. Ct. 434; 45 How. Pr. 90. So as to baggage, *Woods v. Devlin*, 13 Ill. 746; *Blossom v. Griffin*, 13 N. Y. 569; *Ladue v. Griffith*, 25 id. 364; *Coyle v. W. R. R. Co.*, 47 Barb. 152; *Rogers v. Wheeler*, 6 Lans. 420; 52 N. Y. 262; *Wade v. Wheeler*, 3 Lans. 201; 47 N. Y. 658; *Edw. on Bail.* sec. 528; *Hutch. on Carriers*, sec. 89.

Goods were loaded upon a spur track of a railroad, but the owner having no scales, the cars were moved to the station for weight to fix the freight charges. There was no delivery before reaching the station, as something yet remained to be done by the shipper before he relinquished control. *Dixon v. Central &c. R. Co.*, 110 Ga. 173.

Carrier was liable for theft of goods left in its warehouse when wrongfully rejected by one whom it allowed to hold itself out as an authorized agent, where the shipper had not the opportunity to safeguard them. *Seasongood v. Tennessee &c. Transp. Co.*, (Ky.) 54 S. W. Rep. 193.

Carrier was liable for a trunk delivered to a sub-agent employed by it. *Hamil v. New York &c. Ex. Co.*, 177 Mass. 474.

Goods placed in a freight depot for immediate shipment, are in carrier's custody, from the moment of delivery, though it was agreed that they were to go the following morning. *Meloche v. Chicago &c. R. Co.*, 116 Mich. 69.

Goods were delivered for shipment and left at depot but were not shipped because of a personal dispute between the agent and the shipper. Carrier was liable. *Lanning v. Sussex R. Co.*, 1 N. J. Law J. 21.

Loss of timber by fire, loaded on defendant's car not chargeable defendant, when shipper did not notify the company that it was real nor give the name of consignee. *Basnight v. Atlantic & C. R. Co.*, N. C. 592.

Upon a delivery and acceptance of goods, under the circumstances stated, the common law liability of a common carrier immediately attaches, and if they are lost by fire, while awaiting shipment, the carrier is liable to the same extent as if the goods were in transit, unless his liability has been modified, limited or restricted with the consent of shipper or owner of the goods. *Miriam v. Hartford & New Haven Co.*, 20 Conn. 354; *Trowbridge v. Chapin*, 23 Conn. 595; 2 *Redfield Railways*, 63, sec. 174; *Ford v. Mitchell*, 21 Ind. 54; *Gleason v. Transportation Co.*, 32 Wis. 85; *O'Bannon v. Southern Express Co.*, 51 A. 481; *Grosvenor v. New York Central R. R. Co.*, 39 N. Y. 34; *Illinois Central R. R. Co. v. Smyser*, 38 Ill. 354; *Burrell v. North*, 2 Car. Kir. 680; *Schouler on Bailments*, 381, ch. 4.

But, if anything remained to be done to the goods by the shipper before they are ready for transportation, or if any orders, directions or instructions were to be given before they were to be forwarded, such liability does not attach. *Judson v. Western R. R. Co.*, 4 Allen. 5; *Moses v. Boston & Maine R. R.* 4 Foster (32 N. H.) 71; *Blossom Griffin*, 3 Kernan 573; *Michigan Southern R. R. v. Schurtz*, 7 Mich. 515; *St. Louis, etc. R. Co. v. Montgomery*, 39 Ill. 335; *Lawrence W. & St. P. Railway*, 15 Minn. 390; *Watts v. Boston & Lowell R.* 106 Mass. 466; *Bannon v. Eldridge*, 100 Mass. 457; *Railroad Co. Barrett*, 36 Ohio St. 448.

The opening of an upper door of a warehouse of a railroad company after dark, when the place had been locked for the night, and putting goods therein, was not a delivery thereof to the carrier, though an agent a short distance away was notified and requested to ship them the following morning. *Spofford v. Pennsylvania R. Co.*, 11 Pa. Super. 97.

Cotton, placed for shipment on a platform kept for that purpose, was held to be delivered to the company, though a bill of lading had not the time been given. *St. Louis &c. R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. Rep. 28.

Property was received for immediate transportation after hours, was held to have been delivered, though the bill of lading was not to be given till the next day. *Gulf &c. R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. Rep. 220.

The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and

not affected by the carriage in which it is transported, or the fact that the carriage is loaded by the owner. The common carrier is an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. *Hannibal Railroad v. Swift*, 12 Wall. Rep. 262, aff'g judg't for pl'ff.

### V. From What Duty Springs.

The liability of a common carrier does not rest on his contract, but is a liability imposed by law. It exists, independent of the contract, having its foundation in the policy of the law; it is upon this legal obligation that he is charged as carrier for the loss of property intrusted to him. *Merritt v. Earle*, 29 N. Y. 115.

*Edwards on Bail*, 486; *Hollister v. Nowlen*, 19 Wend. 239; *Ansell v. Waterhouse*, 1 Chitty R. 1; *Hannibal R. Co. v. Swift*, 12 Wall. 262.

The obligations of a common carrier are imposed by law and not by contract. *Mynard v. Syracuse &c. R. Co.*, 71 N. Y. 180, 183.

A railroad company was forced by mandamus to furnish equal facilities to rival interests. *Cumberland &c. Telegraph Co. v. Texas &c. R. Co.*, 52 La. Ann. 1850.

But a carrier is under no duty to carry dangerous articles. *California Powder Works v. Atlantic, &c. R. Co.*, 113 Cal. 329.

Carrier is not bound to accept freight not properly prepared for shipment. *Elgin &c. R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

By basing recovery on negligence as a carrier at common law, recovery on contract is precluded. *Pennsylvania Co. v. Walker*, (Ind. App.) 64 N. E. Rep. 473.

### VI. Extent of Liability.

A common carrier in the carriage and delivery of goods, insures against all losses, except those occasioned by the act of God or the public enemy. *Dorr v. N. J. Steam Navigation Co.*, 11 N. Y. 485, 493; *Merritt v. Earle*, 29 id. 115.

Neither destruction by fire nor robbery by armed men will excuse loss. *Hollister v. Nowlen*, 19 Wend. 238.

From opinion.—“This is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons, that they may be safe in their ways of dealing.” In *Forward v. Pittard*, (1 T. R. 27) where the carrier was held liable for loss by fire. Lord Mansfield said, that “to prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, unless he shows it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightnings, and tempests.” And in relation to a loss by robbery he said, “the true reason is, for fear it may

give room for collusion, that the master may contrive to be robbed on pur and share the spoil." The rule has been fully recognized in this state. *Co McMeehen*, 6 Johns. R. 160; *Elliott v. Rossell*, 10 id. 1; *Kemp v. Coughtry*, 1 107. In *Roberts v. Turner*, 12 id. 232, Spencer, J., said, the carrier "is responsible as an insurer of the goods, to prevent combinations, chicanery, fraud."

A common carrier is subject to two distinct classes of liabilities—*where he is liable as an insurer without fault on his part*, the other *as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence*. *Myer v. Syracuse &c. R. Co.*, 71 N. Y. 180.

Loss of goods by a fire, unexplainable, unless caused by a driver's p was not by act of God or the public enemy and the carrier was liable as insurer. *Farley v. Lavary*, (Ky.) 54 S. W. Rep. 840.

Carrier is not liable to an owner for accepting goods from the person in whose possession they are at the time. *Livestock &c. Co. v. Chicago &c. R. Co.*, 87 Mo. App. 330.

Goods were received in New York for delivery in Ohio. Law of Ohio governed as the place of performance. *Jacobson v. Adams Ex. Co.* 10 Oh. C. D. 212.

A carrier owning capital stock of another is not liable for latter's negligence. *Gulf &c. R. Co. v. Lee*, (Tex. Civ. App.) 65 S. W. Rep. 54.

Carrier owes no duty to the sendee of package through the mail, though lost through negligence. *German State Bank v. Minneapolis &c. R. Co.*, 113 Fed. Rep. 414.

## VII. Delay in Transportation.

**A common carrier does not insure against delays, but is liable for injury from same, caused by his negligence.**

The law, upon well known motives of policy, has determined that the carrier shall be responsible for loss of property entrusted to him in transportation, though no actual negligence exist, unless it happens by the consequence of the act of God, or the public enemy; but when the goods are actually delivered at the place of destination, and the complainant complains only of a late delivery, *the question is simply one of reasonable diligence, and accident or misfortune will excuse him*, unless he have expressly contracted to deliver the goods within a limited time. *Parsons v. Hartford*, 14 Wend. 215; *Harmony v. Bingham*, ante 99. If an unusual amount of freight be received, and the carrier has properly equipped its road and runs as many trains as safety permits, and forwards freight in accordance with order of its receipts, it is not liable for delay caused by the accumulation

tion of freight, notwithstanding chapter 140, Laws 1850, sec. 36, which act contemplates that it may not always be in the power of a railroad company to dispatch either passengers or freight immediately upon their arrival at a station or junction, and it therefore allows the company a reasonable time after their arrival and the offer of property for transportation to set it in motion from such starting point or junction. *Wibert v. The N. Y. & Erie R. Co.*, 12 N. Y. 245; aff'g judg't for pl'ff.

Delay in transportation does not necessarily constitute conversion nor justify consignee in not accepting the goods, so far as the carrier is concerned. Carrier is bound to use all reasonable diligence. Verdict of two dollars for plaintiff sustained on plaintiff's appeal. *Scovill v. Griffith*, 12 N. Y. 509.

From opinion.—“This property was, for some cause, detained in Troy, some half dozen miles from Albany, about six weeks; and the defendant, during that time, made no effort to send it to its destination. This was inexcusable delay, and undoubtedly entitled the plaintiffs to all real damages sustained by them which were the natural consequences of the neglect. But it does not follow that the plaintiffs had a right to refuse and abandon the property and recover its full value. There is no evidence of a refusal to deliver, nor indeed that the plaintiffs ever demanded the property or gave the defendant notice that it had not been received. They were not bound to do either to give them a right of action. But the judge could not say to the jury, as a matter of law, that there had been a conversion; nor does it appear that the property had deteriorated in condition or had seriously depreciated in value, nor was it lost. Where there has been a deterioration and loss the carrier is liable. *Davis v. Garrett*, 6 Bing. 716; *Ellis v. Turner*, 8 T. R. 531; *Story on Bail*, § 608. In *Ellis v. Turner*, which was an action on the case, the carrier conveyed the goods beyond the place of destination, intending to deliver them on his return, but they were greatly damaged by the sinking of the vessel without any want of ordinary care or attention of the master or crew, and the carrier was held liable to make good the loss. Under the former system, to maintain trover against a carrier, there must have been an unjustifiable refusal to deliver or delivery to a wrong person, or sale or destruction, or some actual wrong or injurious conversion; something more than mere omission. *Packard v. Getman*, 4 Wend. 613; *Hawkins v. Hoffman*, 6 Hill, 586; 2 Saund. R. 49, i. k. m. It was not necessary that the wrong should be intentional; but, as a general rule, a mere non-feasance did not and does not work a conversion. And, indeed, every unauthorized intermeddling with the property of another is not a conversion. It was held by the Court of Exchequer in England that the act of the ferryman in putting the horses of the plaintiff on shore out of his ferry boat, though the jury should find it was done wrongfully, and not a conversion of the property, unless done with the intent to convert it to his own use or that of some third person, or unless the act had the effect to destroy it or change its quality. *Fouldes v. Willoughby*, 8 M. & W. 540. If it had appeared in this case that the defendant, from gross negligence, evincing a disregard of his contract and the rights of the plaintiffs, had carried the property by and on to another port, and had, with the actual knowledge of all the facts, kept it several weeks, I am not prepared to say the jury might not have found that there was something more than omission, or that the evidence would not have sustained a verdict

that the defendant was guilty of conversion, if rendered under a proper charge from the court."

It has been repeatedly held, and may be taken as settled law, that a carrier is not under the same absolute obligation to carry the goods entrusted to him in the usual time, which he is to deliver them ultimately at their destination. *Conger v. The Hudson River R. R. Co.*, 6 D. 375; *Wibert v. The N. Y. & Erie R. R. Co.*, 2 Kern. 245. But in the absence of a legal excuse, he is answerable for any delay to forward them in the time which is ordinarily required for transportation, by the kind of conveyance which he uses. *Blackstock v. N. Y. & C. R. R. Co.*, 20 N. Y. 50.

A railroad carrier stands upon the same footing as other carriers, and may excuse delay in the delivery of goods by accident or misfortune inevitable or produced by the act of God. *All that can be required of him in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so has been uniformly decided.* *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 245; *Blackstock v. N. Y. & Erie R. R. Co.*, 20 id. 48.

In the absence of special contract *there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be reasonable time.* Not only storms and floods, and other natural causes, may excuse delay, but the conduct of men may also do so. *Geismer v. L. S. & M. S. R. R. Co.*, 102 N. Y. 563.

When cotton was to be taken by one of two boats, the first leaving on October 27th, and is only delivered on the 26th, when freight sufficient for the first boat had previously been delivered, transportation by second boat is sufficient. *Fowler v. Liverpool & G. W. S. Co.*, 23 Hun. 101, s. c. aff'd, 87 N. Y. 190.

A delay in the unloading of stone is not unreasonable where the work did not proceed as fast as usual because of an unprecedented amount of freight to be handled. The carrier had proper facilities for its usual business and plaintiff was not neglected. There was no special agreement as to time. *Bouker v. Long Island R. Co.*, 89 Hun. 202.

Defendant was liable for a bicycle which it undertook to transport from New York to Sussex in Canada in June for use during vacation, where it failed to pay any attention to it until August, when it would have been useless. *Mitchell v. Weir*, 19 App. Div. 183; aff'd s. c., 100 Misc. 530.

Carrier was not liable for the freezing of plants, unless the delay was the proximate cause of the freezing. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615; aff'd s. c., 20 id. 730.



Bill of lading guaranteed through rates and specified no route. Carrier was liable for loss during a delay caused by holding the goods for shipment by the regular route, where they might have been shipped by another. *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523.

A bill of lading was issued to a consignor for a prospective shipment for the alleged accommodation of the consignee. Carrier was not liable for delay under the bill, notwithstanding a statute providing that loss resulting from issuing bills of lading without receipt of goods shall fall on the carrier, where the delay was the fault of the shipper. *Thompson v. Alabama Midland R. Co.*, 122 Ala. 378.

A carrier was liable for the consequences of a delay owing to the abandonment for lack of freight of the train for which the cattle were loaded. *Kansas &c. R. Co. v. Ayers*, 63 Ark. 331.

Delay in transporting stock by allowing train for which they were loaded to pass without taking them makes carrier liable for damage suffered. *Illinois Cent. R. Co. v. Waters*, 41 Ill. 73.

Delay was caused by lack of repairs of an engine. That the weather was very cold was no excuse for allowing water to freeze in the pipes thereof. It was not within an exemption of stress of weather as such weather was to be expected at that time of the year. *Cleveland &c. R. Co. v. Heath*, 22 Ind. App. 47.

Delay was by the shipper's act, where he failed to comply with the regulation that a car must be loaded by a time certain to be forwarded on that day. *Stoner v. Chicago &c. R. Co.*, 109 Iowa, 551.

Carrier was liable for a loss by fire during an unnecessary delay. *Hernsheim v. Newport News &c. Co.*, (Ky.) 35 S. W. Rep. 1115.

Carrier was liable for a delay through scarcity of water on account of a drought, where the contract was made during a drought. *Cincinnati &c. R. Co. v. Webb*, (Ky.) 46 S. W. Rep. 11.

Defendant was liable for a delay in delivery to a connecting carrier, the result of changing stock from one car to another, when they were billed to go "through" in one car. *Felton v. McCreary &c. Stock Co.*, (Ky.) 59 S. W. Rep. 744.

Delay of a few hours in arrival of a corpse not needing immediate burial did not warrant a verdict of \$1,640. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

Service of a garnishee process was no excuse for delaying transportation, though to a destination out of the state. *Baldwin v. Great Northern R. Co.*, 81 Minn. 247; s. c., 51 L. R. A. 640.

A carrier of perishable goods was negligent, where, after an unavoidable delay, instead of shipping them direct to their destination over another line, it forwarded them to another place on its own line where they

were sold at a reduced price. *Alabama &c. R. Co. v. Brichetto*, 72 Mo. 891.

A carrier was not liable for loss by fire, during a delay which was not the proximate cause of the injury. *Yazoo &c. R. Co. v. Millsaps*, Miss. 855.

Freedom from negligence as to a delay was no defense for failing to forward cattle at a time certain, as agreed. *Gann v. Chicago &c. R. Co.* 72 Mo. App. 34.

Sudden snow storm held a sufficient excuse for delay. *Cunningham v. Wabash R. Co.*, 79 Mo. App. 524.

Temporary obstruction of a warehouse by freight, which could have been quickly disposed of, was not a sufficient excuse for a long delay. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

Carrier could not avail itself of a stipulation against liability for delay, where its agent falsely represented that its train would make connections. *Hamilton v. Wabash R. Co.*, 80 Mo. App. 597.

Frequent and unnecessary delays amounting to six hours in two hundred miles was unreasonable. *Minter v. Chicago &c. R. Co.*, 82 Mo. App. 130.

Twenty-four hours for transportation, where it usually took 13 to 14 hours, raises a presumption of negligence. *Anderson v. Atchison &c. R. Co.* (Mo. App.) 67 S. W. Rep. 707.

Negligence of delay was for the jury, where it appeared that the train on which cattle were shipped arrived at its destination at seven in the morning, but plaintiff's cars were delayed and did not arrive until ten. *Sloop v. Wabash R. Co.*, (Mo. App.) 67 S. W. Rep. 956.

Defendant consumed 84 hours in traveling 400 miles. Held not reasonably diligent. *Hinkle v. Southern R. Co.*, 126 N. C. 932.

Where no time is specified, a reasonable time for performance is allowed. A delay of 48 hours in the delivering of cattle, after the time when by the usual and ordinary custom they should have arrived, was unreasonable. *Denman v. Chicago &c. R. Co.*, 52 Neb. 140.

It was no excuse for unreasonable delay on its own line that the cattle would not have reached their destination sooner had it connected with the other carrier on time. *Alexander v. Pennsylvania R. Co.*, 7 Pa. Super. Ct. 183.

The fact that the shipper was imprudent in failing to order the goods sooner, and his own lack of care after delivery, did not prevent his recovering such actual damages as he sustained by reason of the delay in transportation. *Belcher v. Missouri &c. R. Co.*, 92 Tex. 593; rev'g s. 47 S. W. Rep. 384, 1020.

Carrier was negligent in sending a corpse by a longer route than w

necessary. *Wells &c. Co.'s Express v. Fuller*, 13 Tex. Civ. App. 610.

An extraordinary flood was no excuse for delay where the effects could have been avoided by the exercise of reasonable diligence. *St. Louis &c. R. Co. v. Bland*, (Tex. Civ. App.) 34 S. W. Rep. 675.

A wait of seven hours for train by which cattle can be forwarded after the rest, feed and water, required by statute, was not unreasonable, there being no specified time for transportation. *Galveston &c. R. Co. v. Warnken*, 12 Tex. Civ. App. 645.

Liability of a carrier for delay was not increased by failure to sell the goods, where it was not notified that their character required quick delivery. *St. Louis &c. R. Co. v. Cates*, 15 Tex. Civ. App. 135.

A written contract for the shipment of cattle specified no particular time for delivery. It was held that the carrier had a reasonable time and evidence as to an agent's promise to deliver for a particular market was inadmissible. *Gulf &c. R. Co. v. Baugh*, (Tex. Civ. App.) 42 S. W. Rep. 245.

Defendant was liable for a delay caused by the breaking down of an engine, where it agreed to carry within a given time. *Texas &c. R. Co. v. Davis*, (Tex. Civ. App.) 54 S. W. Rep. 381; s. c., reversed on another point, 55 S. W. Rep. 562.

Carrier's liability for delay cannot be increased by special damages, unless it have knowledge of the exceptional necessity for prompt delivery. *International &c. R. Co. v. Hatchell*, 22 Tex. Civ. App. 498.

A carrier, contracting to carry by a given route, was liable for damage due to a diversion though made from necessity. *Missouri &c. R. Co. v. Liebold*, (Tex. Civ. App.) 55 S. W. Rep. 368.

Plaintiff shipped cattle to a point which ordinarily took three days. They did not arrive until Saturday and too late for sale on that day. The delay was unreasonable. *Missouri &c. R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Defendant's agent had knowledge of plaintiff's illness, that she had worked for a relative, and that a package carried by it directed to the relative contained medicine. It was held insufficient to constitute notice to defendant that the medicine was for plaintiff, so as to increase its liability for delay by special damages. *Pacific Exp. Co. v. Redman*, (Tex. Civ. App.) 60 S. W. Rep. 677.

Carrier was liable for results of delay though it had not notice that special damage would occur. *Texas &c. R. Co. v. Bigham*, (Tex. Civ. App.) 67 S. W. Rep. 522.

The reasonable time within which a carrier must deliver goods was dependent upon peculiar circumstances connected with the consignor's

contract of sale and delivery, of which the carrier had notice. The fact that the carrier was not expressed in the bill of lading, evidence thereof was admitted as a measure of damages. *Central Trust Co. v. Savannah &c. R. Co.* 104 Fed. Rep. 683.

Leave reserved in contract of affreightment to tow and assist vessel in all situations is no excuse for a vessel going 200 miles out of the way for her own convenience. *Schwarzchild v. National Steamship Co.* 104 Fed. Rep. 257.

Delay of a river transport company, which a carrier employed in transferring cattle over a portion of the route, was no defense in an action for the delay of the carrier. *St. Louis &c. R. Co. v. Edwards* 104 Fed. Rep. 745.

Heavy dew was not a sufficient excuse for delay as it was the carrier's duty to provide against it. *Missouri &c. R. Co. v. Trusket* 104 Fed. Rep. 728.

Carrier was not liable for delay in delivery of goods refused clearance as contraband of war, especially where the bill of lading stipulated "subject to delay." *Farmers' &c. T. Co. v. Northern P. R. Co.* 104 Fed. Rep. 829.

Notice subsequent to shipment of a special necessity for prompt delivery did not increase a carrier's liability for a delay. *Bradford &c. Chicago &c. R. Co.*, 94 Wis. 44.

Shipper of stock over different lines of railway must be held to contemplate the delays which appear from the time table to be necessary to make connections. *Burns v. Chicago &c. R. Co.*, 104 Wis. 646.

#### (a) STRIKES OF EMPLOYÉS.

**Strikes of employés may excuse delays, if they be accompanied by a delay in the operation of trains.**

Mere cessation of labor by employés will not excuse failure to operate.

A railroad corporation is responsible for damages resulting from a delay to transport freight in the usual time, which was caused by a number of its servants suddenly and wrongfully refusing to work.

Of 168 engineers in the employ of a railroad company, 140 suddenly and by concert abandoned their engines for the purpose of compelling the company to rescind a reasonable regulation. Held, although the superior officers were without the slightest fault, the corporation was responsible for the damages caused by a delay in transporting produce which resulted from the strike. *Blackstock v. N. Y. & Erie R. Co.* 104 N. Y. 48.

Live stock was stopped and delayed by strike of the men who were prevented from preventing its going forward. Although the strike was organized by

defendant's servants, they ceased to be such when they refused to obey orders, and the defendant was not liable. *Geisner v. L. S. & M. S. R. R. Co.*, 102 N. Y. 563; rev'g 34 Hun, 50.

This case distinguishes *Weed v. Panama R. Co.*, 17 N. Y. 362, where it was held that it is no defense to an action against a railroad corporation for its failure to transport a passenger with proper dispatch, that the detention was the willful act of a conductor in charge of the train.

**From opinion.**—"Here upon the facts, which we must assume to be true, there was no default on the part of the defendant. It had employes who were ready and willing to manage its train and carry forward the stock, and thus perform its contract and discharge its duty; but they were prevented by mob violence which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused has been held in several cases quite analogous to this which are entitled to much respect as authorities. *Pittsburg & C. R. R. Co. v. Hogen*, 84 Ill. 36; *Pittsburg C. W. L. R. Co. v. Hollowell*, 65 Ind. 188; *Bennett v. L. S. & M. S. R. R. Co.*, 6 Am. & Eng. R. Cas. 301; *I. & W. L. R. R. Co. v. Juntzen*, 10 Bardwell, 295.

The cases of *Weed v. Panama R. R. Co.*, 17 N. Y. 362, and *Blackstock v. N. Y. & E. R. R. Co.*, 1 Bosw. 77; aff'd 20 N. Y. 48, do not sustain the plaintiff's contention here. If, in this case, the employes of the defendant had simply refused to discharge their duties, or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions of those cases."

On account of a strike defendant was justified in changing the route by which it was transporting plaintiff's stock, although through failure of plaintiff to learn of the change, he was unable to properly care for the stock. Defendant was not liable. *Steiger v. Erie R. Co.*, 5 Hun, 345.

In an action brought by the people, by their attorney-general, a railroad corporation may be compelled by *mandamus* to exercise its duties as a carrier of freight and passengers.

The power to so compel it rests upon the ground:

1st. That the duty is a public trust, which, having been conferred by the state and accepted by the corporation, may be enforced for the public benefit.

2nd. Upon the contract between the corporation and the state, expressed in its charter or implied by the acceptance of the franchise.

3rd. Upon the ground that the common right of all the people to travel and carry upon every public highway of the state has been changed in this special instance by the legislature, for adequate reasons, into a corporate franchise, to be exercised solely by a corporate body, for the public benefit, to the exclusion of all other persons; whereby it has become the duty of the state to see to it that the franchise so put in trust be faithfully administered by the trustee.

It is no excuse for the non-performance of its duties by the company that its skilled freight handlers, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours) refused to work unless twenty cents per hour (or two dollars per day, for ten hours) was paid. *It was not alleged that the workmen committed any unlawful act; and no violence, riot or unlawful interference with the other employés of the respondent was shown.*

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organization, which held unlawful control of their actions, and sought through them to enforce its will upon the respondent, and that the respondent in resisting such unlawful efforts had refused to obey unjust and illegal dictation; and had used all the means in its power to employ other men in sufficient numbers to do the work; and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the attorney-general, would have been presented. *People v. N. Y. C. & H. R. R. Co.*, 28 Hun, 543.

The defendant claimed that it was prevented from transporting the property to the place of destination within the usual time, by riots and tumultuous assemblages of persons, who by force and violence detained and delayed the transportation without its fault, and that the delivery of the goods was made as soon, and in as good condition, as it was able to make it. The evidence tended to prove that the goods arrived at Englewood, a freight yard near the city of Chicago, on April 13th, were taken to the city on May 3rd, and delivered to the connecting carrier on May 16th; that the Lake Shore & Michigan Central Railway Company encountered difficulties in moving its trains into and through the city, which were occasioned by a combination of persons composed of switchmen of that and other railroads and others, to obstruct the movement of the trains; that there was a strike of this class of employés, which commenced on May 2nd, and continued until May 16th, which quite effectually interrupted the business of the road, though although the company employed other men, and had an adequate force to operate its trains, they were prevented by this organized opposition from proceeding with the business; that the trouble was mostly within the city, but that it also extended to the Englewood yard.

Held, that while the defendant was liable for the failure of its agencies, employed by it to carry the property, to exercise proper care and diligence, yet as the evidence given upon the trial would have authorized the jury to conclude that the company used all reasonable means and effort to move its trains, and that the delay in the time of

cupied in so doing was without negligence or fault on its part, it was error for the court to refuse to submit the case to the jury and to direct a verdict in favor of the plaintiff. *Little v. Fargo*, 43 Hun, 233.

Strike among carrier's employes does not relieve it from necessity of shipping flour consigned for transportation, unless violence from the strikers renders it impossible. *Haas v. Kansas &c. R. Co.*, 81 Ga. 792.

No liability for delay in transportation of goods, when the same is caused by strikes accompanied with violence. *L. & N. R. Co. v. Bell*, 13 Ky. L. R. 393.

A carrier was excused from supplying coal cars during a strike, where it was accustomed to supply itself with coal in that region and, by reason of the strike, had to use all its cars to haul its coal down from another district. *Louisville &c. R. Co. v. Queen City Coal Co.*, 99 Ky. 217.

A carrier is not relieved by the unavoidable consequences of a strike from getting directions as to the disposition of goods from the shipper under the changed circumstances, where that is possible. *Alabama &c. R. Co. v. Brichetto*, 72 Miss. 891.

A contract of shipment being unconditional, the carrier was liable for a delay caused by a strike in another company. The case is otherwise where there is no express contract. *Shelby v. Missouri P. R. Co.*, 77 Mo. App. 205.

Evidence of a strike on defendant's road is admissible to excuse defendant from transporting stock according to contract. *International &c. R. Co. v. Tisdale*, 74 Tex. 8.

Deterioration in a consignment of lemons when the delay was caused by mobs and strikes not chargeable to the carrier. *Gulf &c. R. Co. v. Levi*, 76 Tex. 337.

Delay in forwarding a shipment of cattle is excused if caused by a strike on the line. *Gulf &c. R. Co. v. Gatewood*, 79 Tex. 89.

Carrier accepting cattle with knowledge of a washout on its line, held not negligent *per se* nor liable for delay. *St. Louis &c. R. Co. v. Bland*, (Tex. Civ. App.) 34 S. W. Rep. 675.

### VIII. Carriage of Animals.

The liability of a common carrier of animals is not, in all respects, the same as that of a carrier of inanimate property.

But the liability of a railroad company, engaged as a common carrier of animals, is not limited to the careful and safe conveyance of the car containing them.

In the absence of a special agreement, the company is responsible for any injury which can be prevented by foresight, vigilance and care, although arising from the conduct of the animals.

The carrier is not an insurer against injuries arising from the nature propensities of animals, and which diligent care cannot prevent. As damage arising from other causes, the liability is the same as that of a carrier of other property. *Clarke v. Rochester and Syracuse R. Co.*, 14 N. Y. aff'g judg't for pl'ffs.

From opinion.—“The plaintiffs contended for the rule that the carrier bound to transport in safety and deliver at all events, save only the known cases in which a carrier of ordinary chattels is excused, while the defendants maintain that they are not insurers at all against the class of accidents which arise from the vitality of the freight. We are of the opinion that neither of these positions is well taken. A bale of goods or other inanimate chattel may be so stowed that absolute safety may be attained, except in transportation by water, where the carrier usually excepts the perils of the navigation, and except in cases of inevitable accident. The rule, established from motives of policy, which charges the carrier in almost all cases, is not therefore unreasonable in its application to such property. But the carrier of animals, by a mode of conveyance opposed to their habits and instincts, has no such means of securing absolute safety. They may die of fright, or by refusing to eat, or they may, notwithstanding every caution, destroy themselves in attempting to break away from the fastenings by which they are secured in the vehicle used to transport them, or they may injure each other. In such cases, supposing all proper care and foresight to have been exercised by the carrier, it would be unreasonable in a high degree to charge the carrier with the loss. The reasons stated by Chief Justice Marshall, in pronouncing the judgment of the Supreme Court of the United States, in *Boyce v. Anderson* (1 Peters 150) have considerable application to this case. It was there held that the carrier of slaves was not an insurer of their safety, but was only liable for ordinary neglect; and this was put mainly upon the ground that he could not have the same absolute control over them that he had over inanimate material. Where, however, the cause of the damage for which recompense is sought is connected with the conduct or propensities of the animal undertaken to be carried, the ordinary responsibilities of the carrier should attach. *Palmer v. The Great Northern Junction Railway Company*, (4 Mees & Wells, 749) was the case of an accident against a railway company for negligence in carrying horses, by which one was killed and others injured, but the damage was occasioned by the carriages running off the track of the road down an embankment, and the case did not turn upon the peculiarity of the freight, but mainly on the question whether the defendants had limited their responsibility by a notice. The jury found that no notice had not been given and that the defendants had been guilty of gross negligence. Mr. Baron Parke, in giving the opinion of the court, declared that the common law duty of carriers was cast upon the defendants. The precise question now before us was not discussed, but it was assumed that the law of carriers applied to the case. There is no question why it should not, in all cases of accidents connected with the conduct of the animals. But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire, of animals is bound to exercise, and would leave the owner, where he did not himself assume the duty of seeing to them, wholly at the mercy of the carrier. The nature of the case does not call for such relaxation of the rule, and, considering the laws of carriers to be established



upon considerations of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause of the exception requires.

We cannot, therefore, assent to the position of the counsel for either of the parties, in this case. The learned judge who tried this case gave to the jury the true principle of liability in such cases. Laying out of view the idea of inevitable accident, which it was not pretended had occurred, he instructed them that the defendants were responsible, unless the damage was caused by an occurrence incident to the carriage of animals in a railroad car, and which the defendants could not, by the exercise of diligence and care, have prevented. This accords with our understanding of the law."

In the transportation of living animals carriers are relieved from responsibility for such injuries as occur in consequence of the vitality of the freight, so far as such injury could not, by the exercise of diligence and care be prevented; in other respects, their responsibility in regard to stock is the same which rests upon them in regard to goods. *Clark v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 445, rev'g judg't for pl'ff, and new trial ordered.

Defendant contracted to transport a lot of hogs for plaintiffs from Buffalo to Albany. By the contract, in consideration of a reduced rate of freight, plaintiffs assumed the risks of injuries from heat, etc. Forty-three of the hogs died from the effects of the heat, the result of the negligence of defendant's employes in not watering and cooling the hogs by wetting. In an action to recover damages, held, that as the common law liability of carriers did not apply to live stock, but in the transportation thereof they were only liable for negligence, to give effect to the stipulation in the contract, it must be construed as exempting the defendant from injuries by heat, the result of negligence, and that therefore defendant was not liable. *Cragin v. New York Central R. R. Co.*, 51 N. Y. 61, rev'g judg't for pl'ff.

From opinion.—"The rule of the common law makes a common carrier responsible for the safe carriage and delivery of property intrusted to his care, unless he be prevented by the acts of God or of the public enemy. But this rule is not applied in its full extent to the carriage of live stock. Angell on Car. sec. 214; *Clark v. The Rochester and Syracuse R. R. Co.*, 14 N. Y. 570; *Bissell v. New York Central R. R. Co.*, 25 id. 442; *Smith v. New Haven and Northampton R. R. Co.*, 12 Allen, 531. In the transportation of such stock in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. Animals may injure or destroy themselves or each other; they may die from fright or from starvation because they refuse to eat, or they may die from heat or cold. In all such cases the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. Therefore in this case it was not sufficient to establish the common-law liability of the defendant to show that the

hogs died from heat; but it was incumbent on the plaintiff to show further, that there was some negligence or omission of duty on the part of the defendant."

The common-law liabilities of carriers attach to the carriers of animals, modified only so far as the cause of damage for which recompense is sought, is a consequence of the conduct or propensities of the animals undertaken to be carried. *Mynard v. Syracuse, Binghamton & N. York R. R. Co.*, 71 N. Y. 180; rev'g 7 Hun, 399, and aff'g judgt' of pl'ff.

**From opinion.**—"The carrier is excused from liability for loss caused by inherent infirmity or tendency to decay. It has been held that a carrier is responsible for the evaporation of liquids, nor for the diminution of molasses caused by the oozing through vent holes necessary to prevent the bursting of barrels, (Angell on Carriers, sec. 211, and cases cited); and exemptions from liability for loss by inherent qualities of animals, rests upon the same principle. Beyond this the common-law liabilities exist against the carrier of animals the same as the carrier of other property, and the clause in the contract can, therefore, operate in many cases where negligence cannot be imputed.

In Massachusetts, in *Smith v. R. R. Co.*, 12 Allen, 531, the court says: "The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation, the carrier assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property."

As to leakage, breakage, etc., see Wharton on Negligence, sec. 568.

Where a carrier receives horses for transportation it becomes an insurer against all loss, and can be relieved from liability in case of loss only where the loss could be attributed to the viciousness, unruliness or restiveness of the animal and the carrier has been guilty of no contributory negligence. *Giblin v. Nat. Steamship Co.*, 8 Misc. 2d 289, s. c. aff'd, 152 N. Y. 633.

A horse was tied in a stall in a car, constructed of joists, one of which was placed cross wise in front of it. By a sudden stoppage of the train the horse was thrown against the joist so violently as to break it and the ropes by which it was tied and cause the horse to fall so as to break its back. The facts raised a presumption of negligence. *Newman v. Pennsylvania R. Co.*, 33 App. Div. 171.

Though a carrier ships by an earlier train than agreed and no one was present to receive them and they were returned, plaintiff was negligent in failing to care for the animals during their reshipment. *Harrison v. Wier*, 75 N. Y. Supp. 909.

Where a horse, whose owner had agreed to load and unload at his own risk, was unloaded by the carrier for feeding, in compliance with statute and slipped on the bridge while being reloaded, a direction to find for plaintiff, if the horse was unloaded without his consent, was erroneous as disregarding the question of propriety of unloading at that point and the facilities therefor. *Nashville &c. R. Co. v. Parker*, 123 Ala. 68.

The duty of a carrier of a dog is not discharged by giving some attention to its necessities, but the supply of food must be adequate. *Southern Exp. Co. v. Ashford*, 126 Ala. 591.

The gate of a receiving pen sagged and had to be lifted in closing to latch it. The shipper's agents upon driving the cattle in made no effort to raise the gate so as to properly close it. No recovery was allowed for escape of cattle as it occurred through shipper's negligence. *St. Louis &c. R. Co. v. Law*, 68 Ark. 218.

A horse, received at defendant's wharf for transportation, fell overboard. Carrier, liable as an insurer. *Reed v. Wilmington &c. Co.*, 1 Marv. (Del.) 193.

It was held error to refuse to submit the question of negligence to the jury, where a carrier drove cattle into an unsheltered pen on a cold night after getting out an injured animal instead of returning them to the car. *Cooper v. Raleigh &c. R. Co.*, 105 Ga. 83.

Where a mule, by kicking, caught its leg in the grating of a car and broke it, the railroad company was held free from liability on the ground that a carrier is not an insurer against the inherent defects and vices of animals. *Cooper v. Raleigh &c. R. Co.*, 110 Ga. 659.

Carrier was not liable for damage to live stock by reason of lack of attention, where the shipper assumed that duty. *Central &c. R. Co.*, 111 Ga. 865.

Shipper agreed to load and unload and accompany the shipment relieving carrier from damage except by gross negligence. Shipper could not complain where he did not accompany the stock which was sealed in transit. *Susong v. Florida &c. R. Co.*, (Ga.) 41 S. E. Rep. 566.

Carrier is not bound to feed and water cattle where the contract of carriage imposes that duty upon the shipper. *Seaboard &c. R. Co. v. Cauthen*, (Ga.) 41 S. E. Rep. 653.

Carrier of cattle was liable for furnishing cars infected with a contagious disease. *Illinois C. R. Co. v. Harris*, 184 Ill. 57; s. c., 48 L. R. A. 175; aff'g s. c., 84 Ill. App. 462.

Carrier of a hog was liable for the refusal of an agent to place it where it could get sufficient air. *United States Ex. Co. v. Coffman*, 84 Ill. App. 491.

It was held error to charge that a carrier is liable for want of ordinary care, the true rule being that proof of injury or loss while in the possession of the carrier makes a *prima facie* case, which may be rebutted by evidence that it provided all suitable means of transportation and exercised that degree of care which the property required. *Burke v. United States Ex. Co.*, 87 Ill. App. 505.

It was held gross negligence "to kick" a car violently against an-

other containing horses. *Chicago &c. R. Co. v. Calumet Stock Farm*, 96 Ill. App. 337; s. c. aff'd, 194 Ill. 9.

A carrier was negligent in putting latticed cattle cars, bedded with straw near a defective engine, where they were liable to be set afire by sparks from it. *Parrill v. Cleveland &c. R. Co.*, 23 Ind. App. 638.

Carrier was liable for loss of cattle which escaped from insect shipping pens. *Missouri &c. R. Co. v. Bryne*, (Ind. Terr.) 49 S. Rep. 41.

It was for the jury to say whether carrier was negligent in carrying a horse in a car in which it had recently carried fresh lime and in exposing him to the elements during transit. *Galliers v. Chicago &c. Co.*, (Iowa) 89 N. W. Rep. 1109.

A shipper who actually attempted to care for stock in transit cannot recover, where damage was owing to his neglect, though the contract compelling him to do so was invalid. *Grieve v. Illinois C. R. Co.*, 104 Iowa 659; *Burgher v. Chicago &c. R. Co.*, 105 id. 335.

Common carriers transporting stock are liable as insurers for damage to the same. *Kun. Pac. R. Co. v. Nichols*, 9 Kan. 235.

Carrier of stock is not liable for injuries attributable to the inherent nature of the animal shipped. *St. Louis &c. R. Co. v. Clark*, 48 Kan. 321.

That the shipper accompanied his cattle and attended to their care did not relieve a carrier from liability for bumping the cars together violently as to throw the cattle about the cars, nor from preventing them from having food or water for more than fifty hours. *Atchison &c. R. Co. v. Ditmars*, 3 Kan. App. 459.

Carrier is not liable for damage due to the restiveness or viciousness of animals carried. *Hall v. Renfro*, 3 Metc. (Ky.) 51.

Weight of cattle broke the floor of a car which was in such condition that it was apparently not safe for the transportation of cattle. Burden on carrier to show injury was not caused by the break. *Ohio &c. R. Co. v. Taber*, (Ky.) 32 S. W. Rep. 168; s. c., 34 L. R. A. 685; s. c. aff'd, 36 S. W. Rep. 18; s. c., 34 L. R. A. 688.

It is the duty of an initial carrier to ascertain whether a connecting carrier can complete the transit and if not to forward it by another line or to notify the shipper, and it is negligent in failing to do so. *Louisville &c. R. Co. v. Farmer's &c. Firm*, (Ky.) 52 S. W. Rep. 972.

Carrier of live stock is not an insurer. *Louisville &c. R. Co. v. Harned*, (Ky.) 66 S. W. Rep. 25.

Horses injured in such a way as to subject them to attack of pneumonia. They all died of pneumonia. Defendant was liable. *Louisville &c. R. Co. v. Wathen*, (Ky.) 66 S. W. Rep. 714.

Horses shipped on a special express car provided with food, water and space to rest need not be unloaded every twenty-eight hours under U. S. R. S. sec. 4388. *Regan v. Adams Exp. Co.*, 49 La. Ann. 1579.

The carrier is not liable for refusing to delay a scheduled passenger train to unload a sick horse, where it offered to cut out the car containing the horse and leave it until the next train. *Id.*

Injuries to horses flowing from their own bad temper is not chargeable to carrier. *Evans v. Fitchburg R. Co.*, 111 Mass. 142.

Carrier was negligent in refusing to unload stock for rest, food and drink, especially when the train was delayed several hours by misconnections, and they could have been attended to conveniently, where it resulted in keeping them without such necessities for more than the limit of time prescribed by U. S. R. S. sec. 4386-90. *Brockway v. American Ex. Co.*, 168 Mass. 257.

A connecting carrier must at its peril ascertain whether it can continue the carriage of stock to their destination without violating a statute, limiting the time for keeping them loaded and it must not receive them if it has not the proper facilities for complying therewith. *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44.

*Querre*, as to whether live pigeons would or would not be regarded as common-law freight for express company conducting as common carrier. *American Merchants &c. Ex. Co. v. Phillips*, 29 Mich. 515.

It being the custom in Michigan to send a caretaker with stock, the shipper is negligent in failing to do so. The carrier does not assume the common law liability where none is sent, nor where one is sent but fails to do his duty. *Heller v. Chicago &c. R. Co.*, 109 Mich. 53.

Although a carrier may not limit his liability for loss by negligence, he is not answerable for loss from inherent nature of animal shipped. *Boehl v. Chicago &c. R. Co.*, 44 Minn. 191.

A carrier is not liable to the owner of a mule whose hoof was torn off during transportation, it being shown that equipments were in good condition. *L. N. &c. R. Co. v. Bigger*, 66 Miss. 319.

A carrier was held liable for injury to cattle by "kicking" one car against another, under a statute making a railroad company liable for injuries resulting from that method of switching, without regard to contributory negligence. *Illinois C. R. Co. v. Kerl*, 77 Miss. 736.

Where different kinds of hogs were shipped in the same car as permitted by statute, the presumption arose that any loss or injury was caused by the mixed shipment and such presumption was not rebutted by showing merely a failure to comply with a statute requiring trap doors in the car, without showing that such failure caused the injury. *Paddock v. Missouri P. R. Co.*, 155 Mo. 524.

Carrier was not negligent in failing to care for stock where the shipper had assumed the duty. *Holloway v. Wabash R. Co.*, 62 Mo. 53.

Carrier was negligent in allowing ice to remain on the floor of cattle chute, and the shipper was not contributorily negligent in sanding it before use. *Kincaid v. Kansas City &c. R. Co.*, 62 Mo. 365.

Shipper, who, having stock in excess of the capacity of the cars, commanded, crowded cattle in a close box car instead of waiting for more cars, could not hold the carrier for neglect to provide suitable accommodation. *Huston Bros. v. Wabash R. Co.*, 63 Mo. App. 671.

Carrier was liable for the insecurity of stock pens provided for stock awaiting shipment. *Tracy v. Chicago &c. R. Co.*, 80 Mo. App. 388.

The duty of a carrier of live stock is the same as that of carrier of other goods, except that they are not insurers against the injuries from their natures, propensities, and habits of such animals. *Cash v. Wabash R. Co.*, 81 Mo. App. 109.

Cattle train was delayed frequently and unnecessarily to the extent of six hours in 200 miles, and in positions where the stock was deprived of the breeze. Some of the cattle died of the heat. Held negligence on the part of the railroad company. *Minter v. Chicago &c. R. Co.*, 82 Mo. App. 130.

That shipper was to care for stock in yards awaiting shipment on the road, did not relieve a carrier of the care of part of the stock detained on account of the breaking of a car in which they had been shipped. *Union P. R. Co. v. Langan*, 52 Neb. 105.

The responsibility for animals is that of a common carrier except as to injuries due to their peculiar character and propensities. *Berg v. South Carolina R. Co.*, 9 S. C. 61.

Carrier was negligent in failing to provide facilities to enable a shipper to care for his stock and it is chargeable with knowledge of time spent on a connecting line in exceeding the statutory limit of time for its confinement without food, rest, &c. *Comer v. Columbia &c. R. Co.*, 52 S. C. 36.

Carrier was not relieved of the duty of care in assisting the loading of cattle by a stipulation that loading should be at shipper's risk, thereby exempted the carrier from negligence in its assistance as it was void. *Crawford v. Southern R. Co.*, 56 S. C. 136.

Although not insurers against injuries from inherent nature of stock intrusted to them, carriers are liable for injuries to it as if it were consigned. *R. Co. v. Wynn*, 88 Tenn. 320.

The law does not recognize shipping condition of cattle apart

their general or ordinary condition. *Felton v. Clarkson*, 103 Tenn. 457.

A carrier allowed a gate to a stock pen to get out of repair. While the shipper was attempting to fasten it the stock took fright at a passing train and stampeded through it, injuring themselves and him. The carrier was held liable for injury to the stock but not the injury to the shipper. *Texas &c. R. Co. v. Bigham*, 90 Tex. 223; rev'g s. c., 36 S. W. Rep. 1111.

The fact that an unusual number of cattle were being shipped over a railroad at the time did not excuse the carrier for failure to provide cars for the shipment of cattle offered under a statute requiring railroad companies to furnish cars within a reasonable time after stock is offered for shipment. *Davis v. Texas &c. R. Co.*, 91 Tex. 505.

Carrier was liable for loss by withholding cattle till payment of excessive freight. *St. Louis &c. R. Co. v. Williams*, (Tex. Civ. App.) 32 S. W. Rep. 225.

Carrier was liable for defective condition of receiving pens and lack of facilities therein for feeding and watering. *International &c. R. Co. v. Startz*, (Tex. Civ. App.) 33 S. W. Rep. 575.

That shipper was to care for stock did not relieve a carrier from liability for improper care, where, owing to a delay, it attempted to care for them, locking out the shipper. *Gulf &c. R. Co. v. Frost*, (Tex. Civ. App.) 34 S. W. Rep. 167, 169.

It was held that a shipper could not deliver cattle half starved and famished to a carrier for a five or six hours' journey and compel the carrier to feed them en route. In determining the statutory length of time between feedings, it was presumed that they had been fed before starting; and the carrier was not negligent in refusing to hold them for feed before delivering them to a connecting carrier. *Texas &c. R. Co. v. Stribling*, (Tex. Civ. App.) 34 S. W. Rep. 1002.

Carrier was liable for an unreasonable delay at a switch, though the inherent propensities of the animals carried contributed to their injury. *Galveston &c. R. Co. v. Herring*, (Tex. Civ. App.) 36 S. W. Rep. 129.

Shipper's knowledge of the unsafe condition of the stock pen was not contributory negligence, where the carrier undertook to give immediate facility for transportation. *Galveston &c. R. Co. v. Jackson*, (Tex. Civ. App.) 37 S. W. Rep. 255.

Though a carrier was not negligent in permitting a horse to break out of a stock pen, it was liable for its injuries, being an insurer. *Tezas &c. R. Co. v. Turner*, (Tex. Civ. App.) 37 S. W. Rep. 643.

A shipper undertaking the care of his cattle was not relieved of that duty by reason of an unnecessary delay by the carrier, especially where

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he continues to accept the benefits of his free passage. *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74.

A carrier assuming the duty of unloading was liable for its negligent performance. *Mexican &c. R. Co. v. Savage*, (Tex. Civ. App.) 41 S. W. Rep. 663.

The negligence of a carrier in allowing a mud hole in its stock pen whereby the cattle became sleek and wet, did not render it liable when the shipper overloaded the cattle to begin with and then, being in charge, he abandoned the train while they were down. *Missouri &c. R. Co. v. Belcher*, (Tex. Civ. App.) 41 S. W. Rep. 706.

A carrier of mares with foal was not allowed to set up the defense of an inherent defect beyond what ought to have been anticipated from the cause, especially where others, not mares, were also injured. *Gulf &c. R. Co. v. Staton*, (Tex. Civ. App.) 49 S. W. Rep. 277.

A carrier cannot relieve itself of the statutory duty to feed and water stock by tendering them to a connecting carrier which refused to accept them. *Texas &c. R. Co. v. Berchfield*, 19 Tex. Civ. App. 228.

In the absence of a special agreement the duty to unload, feed, water and rest cattle under U. S. R. S. sec. 4386, is the carrier's. *Texas &c. R. Co. v. Avery*, 19 Tex. Civ. App. 235.

That water tanks leaked upon the floor of the car during transit, was not sufficient evidence of horses having contracted catarrhal fever and pneumonia by reason of the carrier's negligence. *Weed v. International &c. R. Co.*, 21 Tex. Civ. App. 689.

Shipper loaded cattle and horses into the same car; the cattle were unloaded into "southern pens" and thus exposed to Texas fever by the initial carrier, on account of which the connecting carrier refused to take them, though it agreed to take the horses. Shipper could not recover for the delay as to the horses, when he refused to allow one to be taken without the other. *Missouri &c. R. Co. v. Wells*, 22 Tex. Civ. App. 255.

It is a carrier's duty to furnish stock pens that are sufficient to commodate ordinary shipments. *Texas &c. R. Co. v. Fambrough*, (Tex. Civ. App.) 55 S. W. Rep. 188.

Cattle injured each other while the train was standing, but it was shown that it occurred by reason of an unusual delay in standing. The carrier, held free from liability. *Texas &c. R. Co. v. Fambrough*, *supra*.

Carrier was liable for refusal without excuse to allow shipper to water and feed his cattle. *Missouri &c. R. Co. v. Leibold*, (Tex. Civ. App.) 55 S. W. Rep. 368.

Shipper complained of negligent handling of his cattle. It was error to charge that he could not recover if defendant used due care and



injury was by reason of weakness in the stock. *St. Louis &c. R. Co. v. Dickens*, (Tex. Civ. App.) 56 S. W. Rep. 124.

Failure to furnish cattle cars for eight days after time agreed upon, was unreasonable and the carrier was responsible for "shrinkage." *Texas &c. R. Co. v. Jones*, 23 Tex. Civ. App. 551.

Shipper under contract to load and unload at his own risk was not barred from recovery for damage from overloading cars, where the carrier failed to furnish enough cars and the shipper several times requested before and during the transit that the stock be reloaded. *International &c. R. Co. v. Pool*, 24 Tex. Civ. App. 575.

Shipper's negligence in overloading cattle did not preclude his recovery for injuries which were the direct result of handling of the cars and unnecessary delay in transportation. *Missouri &c. R. Co. v. Chittim*, 24 Tex. Civ. App. 599.

Carrier is bound to use such care, prudence and caution in transportation of horses as "an ordinarily careful, prudent and cautious man would have exercised under like circumstances." *Texas &c. R. Co. v. Tribble*, (Tex. Civ. App.) 67 S. W. Rep. 890.

Horses are included within a statute requiring the unloading of "cattle" to feed, water, rest, etc. "Other accidental causes" in U. S. R. S. section 4386 means inevitable accident causes, and not results traceable to negligence of the carrier. *Chesapeake &c. R. Co. v. American Exch. Bank*, 92 Va. 495.

That the shipper was to water and feed and that his drover receives free passage for the purpose did not relieve the carrier from the duty, under U. S. R. S. sec. 4386, to unload, feeding upon the cars being impossible. *Burns v. Chicago &c. R. Co.*, 104 Wis. 646.

Negligence is not imputable to a carrier from the mere fact that an unusual number of cattle died in transit to Europe, from no apparent cause, as against the fact that inspectors pronounced the accommodations and ventilation sufficient. *Montgomery v. Furness*, 56 Fed. Rep. 268.

A carrier of live stock was not liable for failure to feed, etc., where shipper assumed that duty and failed to perform it. *The Oranmore*, 92 Fed. Rep. 396; aff'g s. c., 24 Fed. Rep. 922.

Yards, constructed to facilitate loading and unloading, were used by a shipper as a place of detention awaiting shipment. The carrier was not held to the duty of a carrier, but only for ordinary care. *Missouri &c. R. Co. v. Byrne*, 100 Fed. Rep. 359.

## IX. Perishable Goods.

A carrier does not insure against the destruction of perishable goods, even though the decay of the same was hastened by a delay through stress of

weather, in the absence of negligence. Wharton on Negligence, sec. 567; Story on Bailments, sec. 492a; Brig Collinberg, 1 Black, 156; Clark v. Barnard, 12 How. (U. S.) 292; Powell v. Mills, 37 Miss. 691.

Property accepted as perishable should be forwarded in the first train unless the previous accumulation of the same kind of freight prevented such immediate action. Receipting for freight in good order does not conclude owner. *Tierney v. N. Y. C. & H. R. R. Co.*, 10 Hun, 568.

A carrier was not liable for the freezing of plants delayed during transportation as the delay was not the proximate cause thereof. *Siebrecht v. Pennsylvania R. Co.*, 21 Misc. 615; aff'g s. c., 20 id. 730.

Railroad by which orange trees were shipped, which runs through warm section, shipped them without notice by a northern route because of the impassable condition of its own road. It was held liable for damage to the plants by cold. *Pierce v. Southern P. Co.*, 120 Cal. 156.

Fruit was shipped in old cars necessitating their transfer by the connecting carrier, but, having no ventilator cars, they were transferred to an ordinary box car and thereby damaged. Consignee refused to accept them. He was not warranted in refusing to receive them at all, instead of accepting them and holding the carrier for the difference in value caused by its act. *Corso v. New Orleans & C. R. Co.*, 48 La. Ann. 1286.

A carrier of goods did not fulfill his duty of protecting perishable goods by simply following the custom in vicinity under similar circumstances. *Hinton v. Eastern R. Co.*, 72 Minn. 339.

Where consignors directed vent in car to be left open during season when freezing is liable to occur, they cannot complain of loss caused thereby. *Gillett v. Missouri & C. R. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 61.

Shipper of apples, knowing of the lack of facility for ventilation in the cars, assumed the risk of their decay. *Densmore Commission Co. v. Duluth & C. R. Co.*, 101 Wis. 563.

It was negligence to allow strawberries to remain without refilling ice boxes for seven hours, where a full ice box was necessary for proper refrigeration. *Lamb v. Chicago & C. R. Co.*, 101 Wis. 138.

## X. Inherent Defects—Undisclosed Dangers in Goods.

Common carriers of goods do not insure against injury to goods arising from inherent defects or undisclosed dangers or destructive quality. Wharton on Negligence, secs. 563, 564.

Citing *Blower v. R. R.*, L. R. 7 C. P. 662, and the cases there cited; Story on Bailments, sec. 492a; Smith's Mercantile Law, (8th ed.) 354. See, also, *Rohl v. Parr*, 1 Esp. 445; *Hunter v. Potts*, 4 Camp. 403; *Rixford v. Smith*, 52 N. H. 355; *Ship Invincible*, 3 Sawyer, 176.

*Brass v. Maitland*, 6 E. & B. 470; *Hutchinson v. Guion*, 5 C. B. N. S. 149; *Talley v. R. R.*, L. R. 6 C. P. 44, 51; *Gorham Man. Co. v. Fargo*, 35 N. Y. Supr. 434; 45 How. Pr. 90.

Carrier was not liable for the bursting of a hogshead of molasses by reason of the fermentation resulting from natural causes. *Faucher v. Wilson*, 68 N. H. 338; s. c., 39 L. R. A. 431.

Where carriers undertake the transportation of articles which they know or should know to be dangerous to property or health, they assume the risk of their proper handling. *Rouee v. Youard*, 1 Kan. App. 270.

## XI. Inevitable Accident and Vis Major

**Acts of God herein termed "inevitable accident," or Vis Major will excuse safe carriage and delivery.**

### (a) INEVITABLE ACCIDENT.

In an action for negligent failure to deliver goods by water, a carrier may show that navigation was closed by the weather. The question is when navigation *did actually* close and not when it *usually* closes, and evidence of latter is inadmissible. *McCotter v. Hooker*, 8 N. Y. 497.

Destruction by an accidental fire, not caused by lightning, is not the act of God, so as to excuse a carrier, although the proximate cause of the burning of the goods in his charge was a sudden gust of wind diverting the course of a distant fire so as to drive the flames in the direction of and upon them.

There was no evidence in this case to show how the fire, by which the property in question was destroyed, originated. *The presumption, therefore, was that it arose from some act of man.* Angell on Carriers, sec. 156. A loss arising from an accidental fire, or conflagration of a city, without any default whatever on the part of the carrier, it is well settled, furnishes no excuse for the carrier, for it does not fall within the exception. 2 Kent's Com. 602; Story on Bailments, secs. 507, 511, 528; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Gatliff v. Bourne*, 4 Bing. N. C. 314; *Hollister v. Nowlen*, 19 Wend. 234; *Miller v. Steam Navigation Co.*, 10 N. Y. 437.

Although an act of God makes precise performance impossible, yet, if it can be substantially carried out, it must be done.

A carrier's agreement to transport passengers between two points by a particular boat is incidental. If that boat be stayed by act of God, the carrier should use the diligence of a prudent and careful man in his own business in procuring another. *Williams v. Vanderbilt*, 28 N. Y. 217; overruling contrary doctrine in *Briggs v. Vanderbilt*, 19 Barb. 222; *Bonsteel v. The Same*, 21 id. 26.

consignee or his pledgee had not been notified. *Spiegel v. Pacific M. S. S. Co.*, 26 Misc. 414.

This rule does not apply to goods stolen. *Schieffelin v. Harvey Johns*. 170.

But if goods are delivered on mere presentation of a telegram from the sheriff, liability attaches, although, thereafter, sheriff appears with actual attachment.

The measure of recovery against a carrier for the loss of money delivered to it is the value named in the receipt or bill of lading. *Scammon v. Wells, Fargo & Co.*, 84 Cal. 311.

A carrier is not liable where goods are taken from his possession by legal process. *Savannah & C. R. Co. v. Wilcox*, 48 Ga. 432.

If bailee uses due diligence to escape or repel attack of public enemy it is a defense that goods were taken from him. *Watkins v. Roberts*, Ind. 167.

Riots along carrier's line excused delay in transporting hogs. *Barlow v. Pittsburg & C. R. Co.*, 94 Ind. 281.

Seizure under legal process was a defense in a suit for failure to deliver, although the owner and consignee was not the attachment defendant. *Indiana & C. R. Co. v. Doremeyer*, 20 Ind. App. 605.

Seizure by a game warden was no defense, where he did not have evident apparent authority. *Merriman v. Great Northern Ex. Co.*, 63 Minn. 543.

Carrier must show that process under which goods were seized was valid on its face and must give notice of the proceedings to the shipper. *Merz v. Chicago & C. R. Co.*, (Minn.) 90 N. W. Rep. 7.

Refusal to deliver to the owner and consignee goods attached as property of the consignor, on the ground that they were in the custody of the law, was held not to constitute a conversion of them. *Hettler v. Boston & C. R. Co.*, 69 N. H. 139.

A carrier is not liable for goods seized under legal process against the owner. *Jewett v. Olsen*, 18 Or. 419.

Goods in a carrier's possession as a warehouseman were seized under legal process as the property of the consignee, and, while in the custody of the law, were stolen. Consignor subsequently proved ownership and demanded the goods. He was allowed to recover only for the goods the carrier refused to deliver which were not stolen. *Frank v. Central Ex. Co.*, 9 Pa. Super. Ct. 129.

The seizure of goods in the hands of a carrier for non-payment of duties by the Confederate Government, of which the consignee had not notice, was held an act of the public enemy relieving the carrier. *Hubbard v. Harnden Ex. Co.*, 10 R. I. 244.

The Confederate army was not regarded as a public enemy in *some courts*. *Nashville &c. R. R. Co. v. Estes*, 7 Heisk. (Tenn.) 622; *Weakley v. Pearce*, 5 id. 401.

A carrier of goods is liable to the consignee for goods stopped *in transit* by the seller if the right of stoppage did not exist at the time. *Missouri P. R. Co. v. Heidenheimer*, 82 Tex. 195.

(c). CONCURRING NEGLIGENCE OF CARRIER.

If carrier's negligence contribute to the injury, doctrine of inevitable accident and *vis major* does not apply.

A common carrier, to exempt himself from liability for injuries happening to goods while he is engaged in transporting them for hire, must show that he was free from fault at the time the injury or damage occurred, and that no act or neglect of his concurred in or contributed to the injury.

If he has departed from the line of duty, and has violated his contract, and, while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier is not protected. *Michaels v. N. Y. Central R. R. Co.*, 30 N. Y. 564; *Read v. Spaulding*, id. 630.

From opinion.—“What is precisely meant by the expression, ‘act of God,’ as used in the case of carriers, has undergone discussion, but it is agreed that the notion of exception is those losses and injuries occasioned exclusively by natural causes, such as could not be prevented by human care, skill and foresight. All the cases agree in requiring the entire exclusion of human agency from the cause of the injury or loss. If the loss or injury happen in any way through the agency of man, it cannot be considered the act of God; nor even if the act or negligence of man contributes to bring or leave the goods of the carrier under the operation of natural causes that work their injury, is he excused. In short, to excuse the carrier the ‘act of God,’ or *vis divina*, must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God. *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 31 Barb. 38; affirmed in this court; *Smith v. Shepherd*, cited in *Abbott on Shipping*; *The Trent Navigation Co. v. Wood*, 3 Esp. R. 127; *Forward v. Pittard*, 1 Term. R. 27; *Campbell v. Moore*, 1 Harp. Law Rep. 468; *McHenry v. Railroad Co.*, 4 Harrington R. 448; *Sierdett v. Hale*, 4 Bing. R. 607; *New Brunswick St. Boat Company v. Tiers*, 4 Zabriskie, 697; *Edwards on Bailments*, 454; *Angell on Carriers*, sec. 156.”

When goods were delayed by negligence at terminus, before delivery to next carrier, and then injured by act of God, the first carrier was liable. Mistake in name of connecting carrier corrected, and first carrier agreed to send them on but was negligent in doing so. *Dennison v. N. Y. C. R. R. Co.*, 3 Lansing 265.

If the act of God intervene to injure goods, while common carrier himself in default, or by his negligent delay, carrier is liable. *Heyl v. Inman S. Line*, 14 Hun, 564.

A common carrier is bound to exercise ordinary care in the shipment and transportation of fruit or other perishable property.

Plaintiffs delivered a quantity of lemons to defendant for transportation, and tendered a shipping receipt stamped with the words "refrigerator car," which words were erased by defendant's agent. The agent stamped on the receipt the words "not to be loaded in refrigerator car." The lemons were shipped in an ordinary box car, although the temperature was below freezing point, and they became frozen and deteriorated in value. Held, that the fact that the agent erased the words "refrigerator car" did not operate to exempt the defendant from liability for loss occasioned by its own negligence. *Tucker v. The Pennsylvania Railroad Co.*, 10 Misc. 35. On appeal the judgment was reversed on ground that, as the plaintiff had selected the time of shipment, the defendant was not chargeable with negligence, because it failed to store goods till the weather was more favorable. *Id.* 11 Misc. 366.

Carrier liable for freezing of potatoes if diligence would have prevented it. *Wing v. N. Y. & C. R. Co.*, 1 Hilt. (N. Y.) 235.

By reason of customary course being frozen up another was taken and cotton shipped was lost on the voyage; carrier was liable. *Crawford v. Fitch*, 12 Conn. 410.

Loss of goods by an unprecedented flood does not excuse the carrier when, but for his negligent delay, the goods would have been removed to consignee before the time of said flood. *Richmond & C. R. Co. v. Benson*, 86 Ga. 203.

The jury decided the question of defendant's negligence where a load of wheat was destroyed by floods while standing on siding of defendant's track. *Balt. & C. R. Co. v. Keedy*, 75 Md. 320.

If a carrier contracts to deliver apples to another carrier by a certain day so as to insure their not freezing, he is liable to the shipper if he fails to deliver them as stipulated and they freeze on the second carrier's hands. *Fox v. Boston & C. R. Co.*, 148 Mass. 220.

Lameness of a canal horse causing a delay that subjected goods to loss by flood, does not render carrier liable. *Morrison v. Davis*, 20 St. 171.

The fact of a washout on defendant's road is no defense to an action for damages where the carrier had contracted to receive cattle on May 19th, but did not take them until May 23d. *Gulf & C. R. Co. v. J. C. Corguodale*, 71 Tex. 41.

Failure to send tobacco by one train rather than another does

make carrier liable for its loss in a freshet. *R. Co. v. Reeves*, 10 Wall. (U. S.) 176.

Ordinary negligence renders carrier liable when goods are taken by public enemy. *Holladay v. Kennard*, 12 Wall. 254.

Where the standing of a vessel is due to the negligence in not taking safe courses, it is liable for loss of goods. *Liverpool &c. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

Damage to a cargo caused by a tidal wave is not chargeable to carrier; but if he refuse to deliver it to the owner and damage occur through want of proper drying, he is responsible for such damage. *Pearce v. The Thomas Newton*, 41 Fed. Rep. 106.

Delay in transporting a carload of potatoes so that they froze, when they otherwise would not have done so renders carrier liable. *Blodgett v. Abbot*, 72 Wis. 516.

## XII. Limitation of Liability.\*

### (a) VALIDITY AND CONSTRUCTION OF CONTRACTS LIMITING LIABILITY.

#### 1. CARRIER OF GOODS, P. 237.

#### 2. CARRIER OF PASSENGERS, P. 259.

A common carrier may usually by contract, but not by notice, exempt himself from his liability as an insurer, and in several, but not the majority of the states, he may by specific and unequivocal agreement therefor also exempt himself from liability for injury caused by negligence; and there is, even in some states not allowing this exemption, a disposition to permit the shipper and carrier to modify the latter's liability even in respect to injuries arising from negligence, especially as to the amount to be paid in case of liability, loading, etc.

#### 1. CARRIER OF GOODS.

A shipping contract will not exempt a carrier from his own negligence, unless the intent is so plainly and distinctly expressed, that it cannot be misunderstood; and the exemption will not be inferred from the general words. The words "damage occasioned by delays from any cause or from change of the weather" do not include shipper's negligence. *Nicholas v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 370; 4 Hun, 327.

A carrier may, by express contract, restrict his common law liability. It is so understood in England (*Alleyn. v.* 93; 1 Vent. 190, 238; *Peake's N. P. C.* 150; 4 Burr. 2301; 1 Starkie's R. 186; 2 Taunt. 271; 8 Mees.

\* Note.—As to the benefit of stipulations for exemption among connecting carriers see "Connecting Carriers," *post*, p. 358.

As to who may make and what constitute valid stipulations for exemption see "Contracts of Shipment," *post* p. 272.

As to limitation of liability for care of animals see also "Carriage of Animals," *ante* p. 219.

& Welsby 443; 4 Co. 84), and in Pennsylvania (16 Penn. R. 67; Rawle 179; 6 Watts. & Serg. 495). In other states, where the question has arisen whether notice would excuse the liability of the carrier, seems to have been taken for granted that a special acceptance would so; and in *N. J. Steam Nav. Co. v. Merchants' Bank* (6 How. 382) was so held by the supreme court of the United States. For the current opinions of elementary writers in favor of this doctrine, see Story on Bail. sec. 549; Chitty on Cont. 152; 2 Kent. Com. 606; Ang. on Carriers, secs. 59, 220, 221. *Dorr v. N. J. Steam Navigation Co.*, N. Y. 492.\*

*Mynard v. S. & B. & N. Y. R. Co.*, 71 N. Y. 180.

A stipulation that the towing of boats should be "at the risk of the master and owners" of such boats, covers the perils of navigation, but not the gross negligence of servants of the owner of the towing boat. Stipulation in a contract to exempt from gross negligence must be specific and distinct. It will not be implied from a clause containing a general expression which might otherwise be so construed. *Wells v. Steam Navigation Co.*, 8 N. Y. 375.

*Alexander v. Green*, 7 Hill 544, approved.

Release "from any act, neglect or default of the pilot, master and mariners" does not relieve from gross negligence of mate, as where mate delivered goods to unauthorized carman. *Guillaume v. The Harburgh & Am. P. Co.*, 42 N. Y. 212.

See *Spinette v. Atlas S. Co.*, 14 Hun, 110.

A clause in a bill of lading releasing the carrier "from damage or loss to any article from or by fire" does not cover loss from such cause occasioned by the defendant's negligence. *Steinweg v. Erie Railway Co.*, 43 N. Y. 123.

Citing *York v. Central R. Co.*, 3 Wallace (U. S.) 107.

Release from loss, injury, damages, and other contingencies in loading, unloading, conveyance, and otherwise, or from failure by any particular train, or delivery, at any particular time, etc., does not cover switching cattle on a side track and leaving there for three days, where they could not be unloaded, fed or watered, which was not negligence but an abandonment of effort to carry. *Keeney v. G. T. R. Co.*, N. Y. 525.

\*Note - Chap. 565, L. N. Y. 1890. "Sec. 43. Rights and liabilities as common carriers. Every railroad corporation doing business in this state shall be a common carrier. Any one of two or more corporations owning or operating connecting roads, within this state, or partly within and partly without the state, shall be liable as common carriers for the transportation of passengers or delivery of freight received by it to be transported to any place on the line of a connecting road; and if it shall become liable to any person by reason of the neglect or misconduct of any other corporation it may collect the same of that corporation by reason of whose neglect or misconduct it became so liable."



A hidden stump, a recent obstruction in the Hudson river, causing an obstruction, is within the clause "dangers of the sea." *Redpath v. Vaughan*, 48 N. Y. 655.

An assumption by the shipper of the risk of injury from the heat covers the risk of such injury through the defendant's negligence. As the common law liability of carriers did not apply to live stock, but as they were only liable for negligence, the exemption must be deemed to relate to such negligence.

Defendant's servants neglected to water and cool hogs by wetting while in transit. *Cragin v. N. Y. C. R. Co.*, 51 N. Y. 61.

Plaintiff shipped goods of the value of about \$1,500, receiving a receipt therefor containing this clause: "The Adams Express Company are not to be held liable or responsible for the property herein mentioned for any loss or damage arising from the dangers of railroad, ocean, steam or river navigation, leakage, fire, or from any cause whatever, unless specially insured by them and so specified in this receipt; which insurance shall constitute the limits of the liability of the Adams Express Company in any event; and if the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss, or detention or damage to the property." No value was fixed by plaintiffs at the time. *Held*, that the first portion of the clause excluded all liability resulting from damages enumerated, save in the case of insurance; that the latter part related to other grounds of claim not included in the first, but that it did not include losses occurring through defendant's negligence; and to such losses the fifty dollars' limitation did not apply. *Magnin v. Dinsmore*, 56 N. Y. 168.

A release from negligence of pilot or mariners relates to the time of the voyage, and not to the time after the goods are unloaded and awaiting delivery. The agreement of the consignee to take them from alongside, or that the carrier might land at the consignee's risk, would not relieve the defendant from negligence, and the consignee was entitled to notice of arrival and a reasonable time for the removal of the goods. *Gleadell v. Thompson*, 56 N. Y. 194.

A stipulation that the carrier should not be liable for any loss of damage of any box, etc., for over fifty dollars, unless the *just and true value be given*, does not cover loss from negligence.

A receipt that the company would not be liable for loss or damage unless claim therefor was made in writing "within thirty days from the accruing of the cause of action," was not in the nature of a condition precedent to plaintiff's right to recover, as it assumes the existence of a cause of action which has accrued, but was in the nature of a limitation

and could not be availed of upon trial unless set up in the answer. *Quære* as to whether such time was reasonable. See *Adams Express Company v. Reagan*, 29 Ind. 21; *Southern Express Co. v. Caperton*, Ala. 101; *Westcott v. Fargo*, 61 N. Y. 542; 6 Lansing, 319; aff'd, Barb. 349.\*

A carrier may exempt itself from liability from negligence, but the language for that purpose must be unequivocal; so a release from damages or injury "from whatsoever cause arising," does not include the carrier's negligence. *Mynard v. S. & B. & N. Y. R. R. Co.*, 71 N. Y. 180; rev'g 7 Hun, 399, and distinguishing *Cragin v. N. Y. Central R. Co.* 51 N. Y. 61; and citing, *N. J. Steam & C. Co. v. Merchants' B. Co.* 6 How. U. S. Rep. 344; *Alexander v. Greene*, 7 Hill, 533; *Wellington Steam Nav. Co.*, 8 N. Y. 375; *Steinweg v. Erie R. Co.*, 43 id. 123.

However broad the contract of release, if it does not specifically refer to release in express terms release the carrier from his own negligence, there is no release, if the general words may operate without including negligence. Release from injuries "caused by the burning of hay, straw or other feeding material" does not cover burning through the defendant's negligence. *Holsapple v. R., W. & O. R. R. Co.*, 86 N. Y. 275.

Distinguishing *Cragin v. N. Y. Central R. R. Co.*, 51 N. Y. 61, and *Angell on Carriers*, 214; *Pratt v. Ogdensburgh, & C. R. R. Co.*, 102 Mass. 301; *Powell v. Penn. R. R. Co.*, 32 Penn. 414.

The plaintiff shipped various lots of cotton for transportation from Memphis to Liverpool via Jersey City, under contracts with dispatch companies of whose route the defendant's road formed a part, and a portion of the cotton was burned in its freight-house in Jersey City.

\*Note.—Validity of stipulations requiring written notice of claim or injury within a specified time as a condition of liability: *North British & C. Ind. Co. v. Central Vermont R. Co.*, 9 App. Div. 4; *Baltimore & O. R. Co.*, 165 Ill. 78; *Cleveland & C. R. Co. v. Newlin*, 74 Ill. App. 638; *Chicago & N. W. R. Co. v. Bozarth*, 91 Ill. App. 68; *Baltimore & C. R. Co. v. Ragsdale*, 14 Ind. App. 406; *Kramer v. Chicago & N. W. R. Co.*, 101 Iowa, 178; *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659; *Ohio & C. R. Co. v. Tabor*, 98 E. 100; *Brown v. Illinois C. R. Co.*, 100 Ky. 525; *Engesether v. Great Northern R. Co.*, 65 Minn. 168; *Case v. Eastern R. Co.*, 67 Minn. 188; *Richardson v. Chicago & C. R. Co.*, 149 Mo. 311; *Klaas & C. v. Wabash R. Co.*, 80 Mo. App. 164; *Dixie Cigar Co. v. Southern Ex. Co.*, 120 N. C. 848; *United States Watch Co. v. Southern Ex. Co.*, 120 N. C. 351; *Gulf & C. R. Co. v. Stanley*, 89 Tex. 42; *Norfolk & W. R. Co. v. Reeves*, 97 Va. 284; *Southern R. Co. v. Adams (Ga.)* 42 S. E. Rep. 35.

Time specified held reasonable: *American Grocery Co. v. Staten Island & C. R. Co.*, 23 Misc. 2d 100; *Kansas & C. R. Co. v. Ayres*, 63 Ark. 331; *St. Louis & C. R. Co. v. Hurst*, 67 Ark. 407; *Gulf & C. R. Co. v. White*, (Tex. Civ. App.) 32 S. W. Rep. 322; *Ginn v. Ogdensburg Transit Co.*, 85 Fed. Rep. 985.

Time specified held unreasonable: *Osterhoudt v. Southern P. R. Co.*, 47 App. Div. 146; *Southern P. R. Co. v. Bank of Tupelo*, 108 Ala. 517; *Cox v. Central Vermont R. Co.*, 170 Mass. 199; *Popham v. B. & O. R. Co.*, 77 Mo. App. 619; *Gulf & C. R. Co. v. Stanley*, 89 Tex. 42; *Texas & C. R. Co. v. Reeves*, 90 Tex. 496.

Waiver: *Osterhoudt v. Southern P. R. Co.*, 47 App. Div. 146; *Falkenburg v. Erie R. Co.*, 23 Misc. 2d 100; *Marrus v. New Haven Steamboat Co.*, 10 Misc. 421; *St. Louis & C. R. Co. v. Jacobs*, (Ark.), 68 Ark. 249; *Chicago & C. R. Co. v. Grimes*, 71 Ill. App. 597; *Cleveland & C. R. Co. v. Heath*, 22 Ind. 47; *Western & C. R. Co. v. Root*, 8 Kan. App. 642; *Super v. Pontiac & C. R. Co.*, 113 Mich. 443; *W. & M. Co. v. R. Co.*, 128 Mo. 426; *Richardson v. Chicago & C. R. Co.*, 149 Mo. 311; *Hamilton v. V. R. Co.*, 80 Mo. App. 195; *Wood v. Southern R. Co.*, 118 N. C. 1056; *United States Watch Co. v. S. Ex. Co.*, 120 N. C. 351.

bill of lading stipulated that none of the companies and their connections should be liable for loss by fire in transit, in deposit, or places of trans-shipment, depots, &c. Held, that the plaintiff could not recover unless he showed that the fire came from the defendant's negligence, which was not shown. *Whitworth v. Erie Railway Co.*, 87 N. Y. 413.

*Lamb v. Camden, &c. R. Co.*, 46 N. Y. 271; *Caldwell v. N. J. S. Co.*, 47 id. 282; *Cochran v. Dinamore*, 49 id. 252.

The bills of lading contained a general exemption from liability for loss by fire, and the loss having occurred from this cause, it was incumbent upon the plaintiff, in order to avoid the effect of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the defendant's duty. The burden was upon the plaintiff to show facts taking the case out of the operation of the exemption clause. (*Lamb v. Camden & Amboy R. R. Co.*, 46 N. Y. 271; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282; *Cochran v. Dinamore*, 49 id. 252.) *Whitworth v. Erie Railway Co.*, 87 id. N. Y. 419.

A stipulation that the carrier shall not be liable while the goods are at "any of their stations awaiting delivery," and that they must be removed "during business hours" means "awaiting delivery" after notice of arrival and adequate time for delivery. The goods arrived too late for removal on Saturday and were removed on Monday, and meanwhile injured by a mob. Defendant was liable as carrier. Liability remained until either the property transported was actually delivered at its destination, or until notice was given to the consignee and the expiration of a reasonable time for its removal. *Fenner v. B. & State Line R. R. Co.*, 44 N. Y. 511; 4 Am. Rep. 709; *Zinn v. N. J. Steamboat Co.*, 49 N. Y. 442; 10 Am. Rep. 402; *McAndrew v. Whitlock*, 52 N. Y. 40; 11 Am. Rep. 657; *Gleadell v. Thomson*, 56 N. Y. 194. Had he not been liable as carrier he would have been responsible as warehouseman for negligence. *McKinney v. Jewett, Receiver*, 90 N. Y. 267; 24 Hun, 19.

A shipper was released from the negligence of the carrier's servants for insecurity of the car. A defective car was used, although it did not appear but that other sound cars were provided, so that injury might have been caused by defendant's servants. Held, that no proof of defendant's negligence was proven and that injury was from negligence of the carrier's servants, and plaintiff did not recover. *Wilson v. N. Y. C. &c. R. R. Co.*, 97 N. Y. 87; 27 Hun, 149.

Proof of usage was held not to contradict the bill of lading, but simply to explain it. (*Hostetter v. Troy*, 11 Fed. Rep. 181; *Lowery v. Russell*, 8 Pick. 360; *Phillips on Ins.* 5th ed. 980.)

Usage of trade is always presumed to be within the knowledge of the

parties, and their contracts are supposed to be made with reference to it. *Robertson v. N. S. Co.*, 139 N. Y. 416.

A stipulation that the carrier shall not be liable for loss to an amount greater than \$50, unless expressed therein, or specially insured, was held not to apply to a negligent failure to stop goods *in transitu* at the order of shipper. *Rosenthal v. Weir*, 170 N. Y. 149; *aff'd* s. c., 54 App. 1. 275.

Limitation of liability to a certain amount for loss and damage does not cover damages for negligence for failure to deliver in time. It was also held (1), that, as the action was for negligence in delivering, and not for loss of or damage to the goods, the amount of the recovery was not limited by the stipulation in the receipt; (2), that, as it appeared that the goods had no market value at Chicago, the place of manufacture, the carrier was properly resorted to for the purpose of determining their value. *Vroman v. Am. Merchants' Union Ex. Co.*, 2 Hun, 512.

Under contract to carry meat in refrigerator of steamboat, the plaintiff shipped beef and mutton, both of which were put in the refrigerator, although the mutton was omitted from the bill of lading. Defendant was liable to carry both safely. Stipulation relieving from decay of property does not refer to decay from the defendant's negligent acts. Where the propeller shaft broke it was properly left to the jury to say whether the captain of the boat was negligent or reckless in continuing the voyage instead of turning back, whereby the meat was destroyed. *Sherman v. Inman S. Line*, 26 Hun, 107.

Stipulation in bill of lading relieving defendant for delays of goods to be carried beyond its route will not relieve from delays caused by negligence of its own servants, nor from failure to deliver goods to connecting carrier. It is the duty of the first carrier to use reasonable diligence to discover facilities for forwarding.

On the question of such negligence evidence, showing that the cargo was to ship to an intermediate port the goods received for the port to which those in question were destined, and that these goods might have been shipped at an earlier date to this intermediate port, is admissible. No presumption to carry beyond its own route arose from the consignee's address put upon the goods before their shipment at Buffalo. (*Root v. G. W. R. R. Co.*, 45 N. Y. 524; *Babcock v. L. S. & M. S. Co.*, 49 id. 491; *Rawson v. Holland*, 59 id. 611.) *McKay v. N. Y. & H. R. R. Co.*, 50 Hun, 562.

Bill of lading containing exemptions from loss by sweating, rust, spray, or inherent deterioration, or damage done while not actually in defendant's possession, held valid. *Robertson v. National S. S. Co.*, 54 App. Div. 61.

Under a stipulation that glass should be at shipper's risk, and relieving carrier from loss by breakage or improper package, carrier was not liable where a demijohn was negligently placed in a claret case without anything to indicate its contents. *Morris v. Wier*, 20 Misc. 586.

See, also, *Toy v. Long Island R. Co.*, 26 Misc. 792.

Under a restriction of liability to losses from gross negligence, proof that a violin case strong enough for ordinary traveling, without packing was additionally crated and was injured, was held *prima facie* evidence of gross negligence. *Campe v. Weir*, 28 Misc. 243.

A stipulation against liability above a specified amount, or in any event, above the true value of the article injured, did not operate to relieve the carrier from liability for negligence. *Marquis v. Wood*, 29 Misc. 590.

Exemption from liability for "loss or breakage" was held not an exemption from liability for negligence. *Hutkoff v. Pennsylvania R. Co.*, 29 Misc. Rep. 770.

Exemption from liability for loss of goods by breakage not allowed unless such loss was due to other causes than carrier's negligence. *Steele v. Townsend*, 37 Ala. 247.

Carrier cannot by special agreement, limit his liability for loss of luggage of free passenger from negligence, even as to value. *Mobile &c. R. Co. v. Hopkins*, 41 Ala. 486.

Carrier of goods may limit liability as common carrier but not that for loss from negligence. *South &c. R. Co. v. Henlein*, 52 Ala. 606.

Under special contract carrier will not be liable for damage to stock from their inherent nature; reduced rates in consideration of certain value agreed upon will determine carrier's limit of liability. *South &c. R. Co. v. Henlein*, 52 Ala. 606.

A limitation to twenty dollars per barrel of alcohol in consideration of reduced rates will not be enforced, when loss of the same is due to carrier's want of care, skill or diligence. *Ala. &c. R. Co. v. Little*, 71 Ala. 611.

Contract relieving carrier from liability for all but "gross or wanton negligence," will not be enforced. *Ala. &c. R. Co. v. Thomas*, 83 Ala. 343.

Where limitation as to value of furniture was in consideration of a reduced rate of freight, such limitation is a valid release from carrier's liability for negligence. *Louisville &c. R. Co. v. Sherrod*, 84 Ala. 178.

A clause limiting carrier's liability to \$5 per 100 lbs. without regard to the value of the goods not binding on the shipper. *Georgia Pac. R. Co. v. Hugbart*, 90 Ala. 36.

A stipulation for exemption from liability for loss by fire relieves

carrier of absolute common law liability but leaves it with the duty to exercise due care. *Louisville &c. R. Co. v. Gidley*, 119 Ala. 523.

Notwithstanding a provision that liability as a carrier should terminate immediately upon the goods reaching their destination, such liability is continued a reasonable time thereafter for their removal. *Tallasse Co. v. Western R. Co.*, 128 Ala. 167.

Where the value to which liability is limited is greatly below the true value, the stipulation is void, though founded on a reduced rate of freight. If the carrier is not informed as to the true value. *Southern R. Co. v. J. B. Smith* (Ala.) 31 South. Rep. 501.

Carrier of goods may limit liability as common carrier, but not as warehouseman for loss from negligence. *Little Rock &c. R. Co. v. Talbot*, 39 Ark. 397.

The fact that a contract limiting the carrier's liability was signed by the consignor under a mistake as to its contents, will not avail the consignor against the carrier if it has been acted upon by both parties. *St. Louis &c. R. Co. v. Wells*, 50 Ark. 397.

May restrict its liability to its own line. *Little Rock &c. R. Co. v. Odom*, 63 Ark. 326.

Carrier's receipt restricting its liability to that of forwarder; held valid to relieve it of liability for negligence of employes of a boat owner who were others but used by it in its business. *Hooper v. Wells*, 27 Cal. 11.

A carrier, being under no duty to carry dangerous articles can not limit its liability by any stipulation concerning the carriage of blasting powder it pleads. e. g. an exemption from loss by fire from any cause whatsoever. *California Powder Works v. Atlantic &c. R. Co.*, 113 Cal. 329.

Limitation of liability to \$50 unless value is stated, held reasonable in cases not involving gross negligence. *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683.

A stipulation for exemption "from responsibility as master over the acts of agents or servants" construed to apply to negligence of servants but not to cover a compliance by them with its orders. *Pierce v. Southern P. Co.*, 120 Cal. 156; s. c., 40 L. R. A. 354; aff'g s. c., 47 Pac. 874; s. c., 40 L. R. A. 350.

A stipulation confining liability for loss of goods to their value at the place of shipment held valid. *Id.*

No exemption from liability for loss of goods from negligence is allowed in Colorado. *Milton v. Denver &c. R. Co.*, 1 Colo. App. 307.

See *Merchants' Despatch, &c. Co. v. Comforth*, 3 Colo. 280; *Carr v. Southern P. Co.*, 15 Colo. 48; nor in the federal courts. *Monroe v. The Iowa*, 50 Fed. R. 561.

Carrier of goods may limit liability as common carrier but not as warehouseman for loss from negligence; but limitation as to value to be recovered is binding. *Hale v. N. J. S. Nav. Co.*, 15 Conn. 539.

*Lawrence v. N. Y. R. Co.*, 36 Conn. 63; *Peck v. Weeks*, 34 id. 145.

The breaking of the leg of a mare, is not covered by limitation of liability for damage to stock from "breaking" and "chafing." *Coup-land v. Housatonic R. Co.*, 61 Conn. 531.

Holder of stock pass containing exemption from liability allowed to recover for negligence. *Flinn v. Phila. &c. R. Co.*, 1 Houst. 469.

The spoiling of fish for lack of ice, when, during a gale, the steamer's steering apparatus became so damaged that it had to put into port for some time, and, being unable to restock, the ice gave out, held within an exemption from "perils of the sea." *Clyde Steamship Co. v. Burrows*, 36 Fla. 121.

No limitation of liability for injury to goods from negligence allowed. *Berry v. Cooper*, 28 Ga. 543.

In an action to recover the value of some cotton destroyed by the burning of defendant's boat, the defense was a special contract exempting from liability in case of fire. The burden of proof was on the defendants to show that they were not negligent. *Berry v. Cooper*, 28 Ga. 543.

For a consideration limitation allowed where damage occurred from overloading, suffocation, etc., of stock, i. e., things apart from conduct of train. *Mitchell v. Georgia R. Co.*, 68 Ga. 644.

Shipper can exempt from liability for damage to machinery caused by weather or rust, but if unreasonable delay result in damage from weather or rust, liability attaches. *Western &c. R. Co. v. Exposition Cotton Mills*, 81 Ga. 522.

Carrier of live stock may limit his liability, except for gross negligence. *Copper v. Raleigh &c. R. Co.*, 110 Ga. 659.

Assent by the shipper to a condition in a bill of lading made as receipt by the carrier, and limiting its liability, is a question of fact for the jury: but limitation in a contract signed by the shipper is to be construed by the court. *Coles v. Louisville &c. R. Co.*, 41 Ill. App. 607.

Contract exempting from liability for all but gross negligence is valid. *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Arnold v. Ill. Cent. R. Co.*, 83 Ill. 273.

Carrier cannot contract against gross negligence; but if loss of stock was due to ordinary negligence liability may be limited to \$100 a head as stated in the receipt. *Chicago &c. R. Co. v. Chapman*, 133 Ill. 96.

A receipt given by the railroad company for goods shipped is not a contract of shipment; and the shipper is not bound unsigned by conditions on its back limiting the carrier's liability. *Merchants' Despatch &c. Co. v. Furlthman*, 149 Ill. 66.

Limitation of liability for "decay of perishable articles, or injury by heat or frost" construed not to cover loss of hams from defective refrigerator car. *Chicago &c. R. Co. v. Davis*, 159 Ill. 53.

A carrier who failed to transfer a load of hogs within a reasonable time to a connecting carrier is liable for damage to them although had stipulated against liability for ordinary negligence. *Rock Island &c. R. Co. v. Potter*, 36 Ill. App. 590.

Restriction of the amount of recovery for loss of a horse not permitted to cover loss from negligence. *Chicago &c. R. Co. v. Grimmer*, Ill. App. 397.

Carrier not permitted to limit his liability for negligence. *Cleveland &c. R. Co. v. Newlin*, 74 Ill. App. 638; *United States Ex. Co. v. Mann*, 84 id. 491.

Carrier may limit his liability to injuries on his own line. *Chicago &c. R. Co. v. Smith*, 81 Ill. App. 364.

Where no reduction in rate of freight is made limitation of liability for loss by negligence is not allowed. *Adams Express Company v. Harris*, 120 Ind. 73.

Limitation of damages for loss, through negligence, of fruit trees not allowed unless in consideration of reduced rates. *Adams Express Company v. Harris*, 120 Ind. 73.

Stipulation for exemption from loss by fire, held valid to the extent that it did not include negligence. Railroad company not negligent in failing to put cars under fire and police protection. *Insurance Company v. North America v. Lake Erie &c. R. Co.*, 152 Ind. 333.

Carrier not permitted to exonerate itself by stipulation from liability for negligence, nor to limit amount of recovery; but may stipulate with shipper as to value. *Baltimore &c. R. Co. v. Ragsdale*, 14 Ill. App. 406.

That water froze in the pipe of an engine was not within an exemption of "stress of weather," where, though very cold, such weather was to be expected at that time of the year. *Cleveland &c. R. Co. v. Healy*, Ind. App. 47.

Limitation of liability for loss by fire did not limit liability for loss by negligence in placing open spaced cattle cars, bedded with straw, near an engine liable to emit sparks. *Parrill v. Cleveland &c. R. Co.*, 23 Ind. App. 638.

Company may limit its liability to the agreed value of the goods based on a valuable consideration and a sufficient understanding of the matter. *Adams Express Co. v. Carnahan*, (Ind. App.) 63 N. E. 245.

A phrase "contents and value unknown" did not restrict the recovery of knowledge gained from manner of shipment, which was such that the goods were visible and open to inspection. *Gulf &c. R. Co. v. Johnson*, (Ind. Terr. App.) 37 S. W. Rep. 208.



Limitation as to value was void under a statute prohibiting exemptions in cases where there was any common law liability aside from contract, and fraudulent representations by the shipper to get cheaper freight rates did not prevent proof of full value. *Lucas v. Burlington &c. R. Co.*, 112 Iowa 594.

See, also, *Grieve v. Illinois C. R. Co.*, 104 Iowa, 659; *Burgher v. Chicago &c. R. Co.* 105 id. 335.

Special contract in this particular case (shipper accepted it after having shipped according to general notice); did not restrict liability. *Kansas P. R. Co. v. Reynolds*, 17 Kan. 251.

Carrier cannot limit his liability by a contract signed by shipper, when no other alternative was given shipper. *Atchison &c. Tr. Co. v. Dill*. 48 Kan. 210.

A shipper must have the alternative of shipping under the common law liability or under liability for restricted value in consideration of reduced rates. *Atchison &c. R. Co. v. Dill*, 48 Kan. 321.

See, also, *St. Louis & R. Co. v. Piper*, 13 Kan. 505.

Stipulation against loss without permission or the order of board of railroad commissioners, as prescribed by statute, was void. *St. Louis &c. R. Co. v. Sherlock*, 59 Kan. 23; *St. Louis &c. R. Co. v. Tribbey*, 6 Kan. App. 467.

A stipulation requiring a shipper of stock injured to give notice of same before removal of the stock from place of delivery, is waived when the fact of the injury was known to the company. *Owen v. L. & N. &c. Co.*, 10 Ky. L. J. 554.

Damages for loss of goods destroyed by carrier's negligence not confined to the value given in the contract; the full value of such goods is recoverable. *Baughman v. L. E. &c. R. Co.*, 14 Ky. L. R. 775.

A stipulation against loss by "heat, water, dirt or fire" was not effective, where loss by fire was through negligence. *Louisville &c. R. Co. v. Plummer*, (Ky.) 35 S. W. Rep. 1113.

A stipulation in a through contract containing an exemption from loss on a connecting line was invalid as an attempt to avoid liability for acts of agents and not an attempt to limit its common law liability under Const. sec. 196. *Ireland v. Mobile &c. R. Co.*, (Ky.) 49 S. W. Rep. 188, 453.

A carrier cannot by a limitation as to value limit its liability for negligence. *Cincinnati &c. R. Co. v. Graves*, (Ky.) 52 S. W. Rep. 961.

Kentucky Constitution, sec. 196, prohibiting stipulations against a carrier's common law liability, does not apply to a corporation doing business outside of the state. *Tecumseh Mills v. Louisville &c. R. Co.*, (Ky.) 57 S. W. Rep. 9; s. c., 49 L. R. A. 557.

Nor prevent an initial carrier on a through contract from limiting liability to its own line. *Pittsburg &c. R. Co. v. Viere*, (Ky.) 68 Rep. 469; *Louisville &c. R. Co. v. Tarter*, 39 id. 698.

No liability for damage from rain, as per stipulation, when shippers were present at the loading of cotton, during a rain storm. *New Smoker*, 25 La. Ann. 303.

Stipulation against loss of cotton by fire did not limit carrier's liability for lack of care in preventing discharge of fireworks in the warehouse. *Maxwell v. Southern P. R. Co.*, 48 La. Ann. 385.

Liability may be limited as to value, but no limitation allowed for negligence. *Sager v. P. I. & P. R. Co.*, 31 Me. 228.

Carrier is liable for deficiency in weight of corn notwithstanding stipulation of lading stipulating against such liability, the action being based on carrier's negligence. *Willis v. Grand Trunk R. Co.*, 62 Me. 488.

Limitation as to value recoverable binding. *Brekme v. Dinsmore*, Md. 328.

Stock; contract exempting from liability for loss, delay &c. *Balt. &c. S. Co. v. Brady*, 32 Md. 333.

In consideration of reduced rates a common carrier of stock limits the owner's recovery to \$200 a head; owner to take risk from loss &c., and manner of loading. *Squire v. N. Y. &c. R. Co.*, 98 Mass. 304.

Carrier cannot by special contract exempt itself from liability for destruction through their negligence of "iron furnace cone." *District &c. v. Boston &c. R. Co.*, 102 Mass 552.

Delay, but for which goods would not have been injured, except by special contract although due to negligence. *Hadley v. No. Tra*, Co., 115 Mass. 304; and see as to value, *Hill v. Boston &c. R. Co.*, Mass. 284.

A stipulation in a bill of lading against liability unless written notice is presented within 30 days, held invalid, but a provision that suit must be brought within three months held valid. *Cox v. Central Vt.*, 170 Mass. 129.

Railroad company makes "delivery" within a stipulation releasing it from liability after delivery to a connecting carrier, by giving notice by letter to the steamship company in which the latter acquiesces, that the goods are ready on the railroad company's cars. *Washburn-Crosby Co. v. Boston &c. R. Co.*, 180 Mass. 252.

Exemption from liability for damage "in loading, unloading, conveyance or otherwise," does not extend to the furnishing of uncoupled cars. *Hawkins v. Great Western R. Co.*, 17 Mich. 57.

When defendant company took its charter, live-stock was not one of the kinds of property transported and therefore it could not be

common carrier of stock, unless by special contract, or by holding itself out as doing such business. *Michigan &c. R. Co. v. McDonough*, 21 Mich. 165.

*Lake Shore &c. R. Co. v. Perkins*, 25 Mich. 329.

A carrier may stipulate that the corporation will be liable as warehousemen only, for property when in their storehouse. *Feige v. Michigan C. R. Co.*, 62 Mich. 1.

A contract which states that "corporation will be liable as warehousemen only, for property when in their storehouse" concludes the owner suing for loss of goods by fire. *Feige v. Michigan C. R. Co.*, 62 Mich. 1.

Limitation of liability in a receipt to \$50, unless value is otherwise stated therein for loss by fire not due to its negligence, and while on contracting carrier's own line, held valid. *Smith v. American Express Co.*, 108 Mich. 572.

Carrier receiving goods billed through with limitation of liability to its own line, held not liable for delay due to negligent change of way bill by connecting carrier. *Hope v. Delaware &c. Canal Co.*, 111 Mich. 209.

Proof of delivery in good condition to a connecting carrier and injury through its neglect to promptly forward, throws upon it the burden to show contract limiting its common law liability. *Bonfiglio v. Lake Shore &c. R. Co.*, 125 Mich. 476.

Carrier cannot limit his liability for loss from negligence by special contract either for the whole or a part of the stock shipped. *Moulton v. St. Paul &c. R. Co.*, 31 Minn. 85.

Under a limitation in a contract for carrying a horse, of liability for loss "by jumping from the cars," if plaintiff left the horse tied in a car near an open door he cannot recover. *Hutchinson v. Chicago &c. R. Co.*, 37 Minn. 524.

To secure a reduced rate it was agreed in case of loss that the goods should be valued at a sum below the real value, at which the rate would have been much higher. The goods having been lost through negligence, the shipper was bound by the agreement. *Douglas Co. v. Minnesota &c. R. Co.*, 62 Minn. 288.

See, also, *Blair v. Northern &c. R. Co.*, 53 Minn. 160.

Stipulation fixing value as that at the place of shipment without reduction for freight received, was held unreasonable and void. *Shea v. Minneapolis &c. R. Co.*, 63 Minn. 228.

But it was valid, where the stipulation did not exclude from computation such freight charges. *Davis v. New York R. Co.*, 70 Minn. 37.

Carrier may limit its common law liability to a reasonable extent,

making the limit the basis of its right to compensation. *O'Malley v. Great Northern R. Co.*, (Minn.) 90 N. W. Rep. 974.

Notwithstanding contract of exemption, defendant liable for loss of barrel of whiskey. *So. Expr. v. Moon*, 39 Miss. 822.

Stock; common carrier's liability may be limited; no limitation of negligence allowed. *Chicago & C. R. Co. v. Abel*, 60 Miss. 1017.

Limitation as to value was valid when loss was not due carrier's negligence. *So. Exp. Co. v. Seide*, 67 Miss. 609.

Insufficient ventilation of a stock car is not a risk assumed by shipper under a contract relieving company from injuries to the animal in consequence of heat, suffocation, or other ill effects of being crowded in the cars. *Kansas City & C. R. Co. v. Holland*, 68 Miss. 351.

Exemption from liability for injuries caused by animals being vicious or weak or maiming one another may be contracted for. *Illinois C. R. Co. v. Scruggs*, 69 Miss. 418.

But it may by a fair and reasonable contract limit its common carrier's liability as insurer. *Newberger Cotton Co. v. Illinois C. R. Co.*, 70 Miss. 303.

A carrier cannot limit its liability for negligence. A limitation of liability to the value at the place of shipment, held invalid. *Illinois C. R. Co. v. Bogard*, 78 Miss. 11.

No exoneration from liability for the negligence of carrier's servant. *Doan v. St. Louis & C. R. Co.*, 38 Mo. App. 408.

Liability as insurer may be limited, but not for negligence. *Levermore v. Union Transp. Co.*, 42 Mo. 88.

Special contract will not avoid liability for negligence. *Clark v. St. Louis & C. R. Co.*, 64 Mo. 440.

Carrier cannot, under a statute imposing liability on a carrier for negligence of a connecting carrier to whom the goods are delivered, limit its liability to its own line, where it makes a "through shipment" over the route of a connecting carrier; but it may limit its duty to its obligation to transport over its own line. *McCann v. Eddy*, 133 Mo. 59; s. c., 35 L. R. A. 110; *State Nat. Bank v. Chicago & C. R. Co.*, 68 Mo. App. 82.

A stipulation restricting liability to a stipulated valuation is binding in absence of consideration. *Kellerman v. Kansas City & C. R. Co.*, 136 Mo. 177; aff'd s. c., 68 Mo. App. 255.

A constitutional provision "that the liability of railroad corporations as common carriers shall never be limited" construed not to prevent limitation of liability of a carrier to loss on its own line in case of shipment over the lines of connecting carrier. *Miller Grain & C. Co. v. Union P. R. Co.*, 138 Mo. 658.

Limitations as to value in consideration of special rates were not effective, where the regular rate was actually charged. *Ward v. Missouri P. R. Co.*, 158 Mo. 226.

Limitation of liability to actual expenses for food and water during a delay in transportation of animals from any cause whatever, held unreasonable and void as to delays caused by negligence. *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461.

Valid limitation of liability to its own line does not prevent recovery for loss on connecting line due to negligence of initial carrier. *Popham v. Barnard*, 77 Mo. App. 619; *Willock v. Missouri P. R. Co.*, 79 id. 76 (failure to stop *in transitu* resulted from delay of initial carrier); *Hall v. Wabash R. Co.*, 80 id. 463 (delay due to failure to give connecting carrier address of consignee and order to notify him on arrival).

Limitation as to value was valid where the carrier was sued on his common law liability. *Goodman v. Missouri &c. R. Co.*, 71 Mo. App. 460.

Limitation as to value was valid where it did not operate as a limitation of liability for negligence. *Wyrick v. Missouri &c. R. Co.*, 74 Mo. App. 406.

Provision that loss shall be computed at the place of shipment construed to refer to injury in carriage and not to delay therein. *Klass Commission Co. v. Wabash R. Co.*, 80 Mo. App. 164.

Special contract will not relieve carrier of stock from liability for damage to it through its own negligence. *Atchison &c. R. Co. v. Washburn*, 5 Neb. 117. By constitution, liability may not be limited.

Limitation of liability from loss "howsoever occurring, by fire or otherwise, or whether by negligence of said railway or transportation companies or of their officers, agents," &c., held void under a constitutional provision that "the liability of railroad corporations as common carriers shall never be limited." *Pennsylvania Co. v. Kennard Glass &c. Co.*, 59 Neb. 435.

No question of limitation by contract. *Hall v. Cheney*, 36 N. H. 26.

Person engaged in towing boats cannot exempt himself for liability for his own or his servant's negligence. *Ashmore v. Penn. Transf. Co.*, 4 Dutch. (N. J.) 180.

Exemption from loss during transportation or by delay after transportation was construed not to cover negligence. *Taylor v. Pennsylvania R. Co.*, 8 N. J. Law. J. 149.

Limitation as insurer valid, but liable for want of ordinary care, notwithstanding. *Smith v. R. Co.*, 64 N. C. 235.

Unreasonable delay is not contracted against by "at the convenience of the company." *Branch v. Wilmington &c. R. Co.*, 88 N. C. 573.

A regulation requiring notice to carrier of owner's claim for damage to stock before the removal of the same is reasonable. *Selby v. Wilmington &c. R. Co.*, 113 N. C. 588.

A carrier can not relieve itself from gross negligence by contract for exemption therefrom. *Wood v. Southern R. Co.*, 118 N. C. 1056.

The word "released" in stipulation limiting liability, construed to mean exemption from the common law liability as insurer and holder, is valid so far as it did not involve exemption from negligence. *Morgan Man. Co. v. Ohio River &c. R. Co.*, 121 N. C. 514.

A carrier cannot relieve itself of liability for negligence *pro tanto* by limiting the amount for which it is liable unless the agreement therefor is reasonable. Fixing the value of property worth \$218 at \$46.60 held not reasonable. *Gardner v. Southern R. Co.*, 127 N. C. 293.

Negligence cannot be contracted against. *Union Ex. Co. v. Graham*, 26 Ohio St. 595; *N. S. Ex. Co. v. Bachman*, 28 Ohio St. 144; *Cincinnati &c. R. Co. v. Berdan*, 22 Oh. C. C. 326.

Stipulation "that in case of any loss or danger, the liability of said company and of any connecting line shall not exceed \$100 per head" which involved a limitation of liability from negligence which was invalid. *Pittsburgh &c. R. Co. v. Sheppard*, 56 Ohio St. 68.

Limitation of liability to an agreed valuation, as distinguished from a limitation of liability regardless of value, was held valid though inapplicable to loss by negligence. *Cleveland &c. R. Co. v. Simon*, 15 Oh. C. C. 123.

Limitation of liability by a carrier to its own line was held valid. *Stevens v. Lake Shore &c. R. Co.*, 20 Oh. C. C. 41.

Mere recitation of words "not accountable for contents in a receipt" accepted by a shipper do not, in the absence of express assent, constitute an agreement to limit the carrier's liability. See *Seller v. Pacific &c. R. Co.*, 1 Ore. 409.

No exemption from liability for gross negligence. *Penn. R. Co. v. McCloskey*, 11 Harris (Pa.) 526.

Goods; liability may be restricted to that of bailee for hire, where ordinary care only is required. *Cotton v. C. & P. Co.*, 67 Penn. St. 2.

A receiving carrier can limit his liability for loss of goods while in the connecting carrier's hands to that of forwarder, i. e., reasonable care and diligence. *American Express Co. v. Second Nat. Bank*, 69 Pa. St. 3.

Loss of goods from negligence is not avoided by special contract exempting carrier. *Grogan v. Adams Ex. Co.*, 114 Pa. St. 523.

Stipulation that goods unloaded on a platform where the carrier maintains no building or agent shall be at shipper's risk, was valid. *Atkins v. Pennsylvania R. Co.*, 183 Pa. St. 174; s. c., 39 L. R. A. 535.

A horse, shipped from New York to Pennsylvania under a bill of lading limiting liability to \$100, was negligently injured in the latter state. The contract was construed according to the laws of Pennsylvania and held void, though it was valid in New York. *Hughes v. Pennsylvania R. Co.*, 202 Pa. St. 222.

Exemption from loss by "breakage" or "leakage" construed not to include loss occasioned by the head coming out of a barrel. *Menner v. Delaware &c. Canal Co.*, 7 Pa. Super. Ct. 135.

Carrier was not liable for the negligence of a connecting carrier, where it limited its liability to its own line. *Keller v. Baltimore &c. R. Co.*, 10 Pa. Super. Ct. 240.

Carrier was relieved of common law liability, where it limited its liability to the negligence of its servants or agents. *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47.

See, also, *Davenport Co. v. Pennsylvania R. Co.*, 173 Pa. St. 398.

Loss from cars, placed on tracks assigned for further transportation, but, before actual delivery to the connecting carrier, relieves the latter within an exemption from loss not occurring on its own line. *Adler v. Pittsburgh &c. R. Co.*, 29 Pitts. L. J. (N. S.) 409.

Stipulation that "all articles of freight, on arrival at place of destination, are at the risk and expense of the owner" did not exempt carrier from negligence. *Springs v. South Bound R. Co.*, 46 S. C. 104.

A provision that loading, unloading and transferring cattle shall be done by the shipper, with the assistance of the railroad employes, and at his own risk was held invalid as exempting the carrier for negligence as to its part therein. *Crawford v. Southern R. Co.*, 56 S. C. 136.

Where liability is limited to its own line, a carrier is not liable for loss on a connecting line. *Dunbar v. Charleston &c. R. Co.*, (S. C.) 40 S. E. Rep. 884.

Goods at "owner's risk" does not exempt from liability &c., from negligence. *Nashville &c. R. Co. v. Johnson*, 6 Heisk. 271.

Under a stipulation that the carrier should not be liable for loss of money unless a claim therefor was made within a certain time, plaintiff's action was not defeated if good ground for not making such claim was shown to exist. *Glenn v. Southern Exp. Co.*, 86 Tenn. 594.

No exemption allowed in whole or in part from liability for injuries to stock for negligence. *R. Co. v. Wynn*, 88 Tenn. 320.

Limitation of liability for loss of cotton by accidental fire held not valid for want of a *bona fide* consideration. *Railroad v. Gilbert*, 88 Tenn. 430; *Railway v. Manchester Mills*, id. 653.

Exemption from liability for loss by negligence cannot be stipulated for; but, for a consideration as, for lower rates, limitation as to value

of live stock shipped, although such value be less than that proved, is valid. *Railway Co. v. Sowell*, 90 Tenn. 17.

Bills of lading exempting from liability must be strictly construed, and loss of cotton, while in warehouse of express company, will be laid at carrier's door, although the contract exempted liability for burning of cotton while in depots or in transit. *Deming v. Merchants' Cotton-Press Co.*, 90 Tenn. 306.

A stipulation that "in case of loss, damage, detriment or delay, that shall alone be responsible" did not relieve a carrier of goods on a through road, in whose actual custody the goods were at the time of such loss etc. contract from the negligence of a connecting carrier employed by it resulting in delay. *Bird v. Railroads*, 99 Tenn. 719.

Initial carrier was liable for a delay caused by its misdirecting the goods, notwithstanding it stipulated against liability for loss occurring on other lines. *Illinois C. R. Co. v. Southern &c. Cabinet Co.*, 104 Tenn. 568.

Stipulation in contract exempting from liability for delay in transportation of beeves does not avail when negligence caused the delay. *Missouri P. R. Co. v. Cornwall*, 70 Tex. 611; *R. Co. v. Harris*, 67 id. 166.

Giving the value of goods consigned affords the carrier an opportunity to fix compensation for the labor and risk involved but it does not limit his liability for loss through negligence. *Southern Pacific Co. v. Madrox*, 75 Tex. 300.

A stipulation restricting carrier's liability for loss of cattle shipped to their value at the time and place of shipment is void. *Missouri P. R. Co. v. Edwards*, 78 Tex. 307.

See *Galveston &c. R. Co. v. Ball*, 80 Tex. 602.

Limitation of liability by contract in transportation of live stock cannot be for less than the value of the property injured. *Fort Worth &c. R. Co. v. Greathouse*, 82 Tex. 104.

A limitation, in the contract of a carrier receiving goods to be transported beyond its own terminus, exempting from liability except for damages received on its own line, is valid. *Nines v. St. Louis, &c. R. Co.*, 107 Mo. 475; *McCarn v. International &c. R. Co.*, 84 Tex. 352.

Upon the principle of strict construction against the carrier, it was held that a stipulation against liability for loss while "in transit or while in depot or place of transshipment, or of landing at place of delivery," did not cover loss on the platform of a compress company awaiting shipment. *Amory Man. Co. v. Gulf &c. R. Co.*, 89 Tex. 419.

A statutory prohibition against limitation of common law liability held not to prevent stipulation against liability for injuries by over



loading by owner, or inherent character in shipment of animals. *Texas &c. R. Co. v. Stribling*, (Tex. Civ. App.) 34 S. W. Rep. 1002.

Limitation by a carrier of its liability to its own line in case of an interstate shipment held valid. *Gulf &c. R. Co. v. Crossman*, 11 Tex. Civ. App. 622.

An exemption from loss by fire or dangers of the seas in an interstate shipment is valid to the extent that it does not cover negligence, and the amount may be limited to value at the place of shipment; but a provision that no presumption of negligence should arise from non-delivery is invalid. *Southern P. R. Co. v. Phillipson*, (Tex. Civ. App.) 39 S. W. Rep. 958.

Stipulation that shipper shall feed and water cattle carried, being recognized by statute, was valid, and not repugnant to a statutory provision forbidding limitation of common law liability. *Texas &c. R. Co. v. Davis*, (Tex. Civ. App.) 40 S. W. Rep. 167.

Limitation of liability by a carrier to loss on its own line was valid, though, in a through contract, it held itself out as partner of the connecting carrier. *Galveston &c. R. Co. v. Houston*, (Tex. Civ. App.) 40 S. W. Rep. 842.

Limitation as to value in shipment within the state was invalid under a statute prohibiting carriers in the state to limit their common law liability. *Pacific Ex. Co. v. Hertzberg*, 17 Tex. Civ. App. 100.

Limitation of liability to value at the place of shipment and exemption from loss by overloading held invalid under same statute. *International &c. R. Co. v. Parish*, 18 Tex. Civ. App. 130.

Limitation of liability to value at place of shipment, though beyond the state, is void as against public policy. *Southern P. R. Co. v. D'Arcais*, (Tex. Civ. App.) 64 S. W. Rep. 813.

Limitation of liability to value stated in an interstate contract made in Illinois where it was prohibited by statute, held void in Texas through which the goods were also transported. *Pittman v. Pacific Exp. Co.*, 24 Tex. Civ. App. 595.

Loss of goods; limitation of liability as common carrier allowed, but no exception of same for loss from gross negligence. *New Jersey S. Nav. Co. v. Bank*, 6 How. (U. S.) 344.

Carrier of goods liable for loss by fire from negligence notwithstanding limitation. *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

Recovery for loss of valuable race horses through negligence was limited to the value set upon them in contract between shipper and company. *Hart v. Penn. R. Co.*, 112 U. S. 331.

But the insurance company may not maintain an action against the carrier inconsistent with an agreement in a bill of lading giving carrier

the benefit of any insurance effected. *Phoenix &c. Co. v. Erie &c. Transp. Co.*, 117 U. S. 312.

Liability for loss of cotton by fire is not limited by bill of lading stipulating that "company shall have the benefit of any insurance which may have been effected upon said cotton," when action is brought before insurance is paid according to the agreement between the consignee and the insurance company. *Inman v. South Car. &c. R. Co.*, 129 U. S. 128.

An exemption from "accident to or mortality of animals from whatever cause arising" or "accidents of navigation of whatever kind or cause when occasioned by the negligence or default or error in judgment of the pilot, master or mariners," etc., did not cover a wrongful jettison of sound cattle, through a misapprehension of danger or perils of the sea. Nor was such negligence excused under the stipulation "on deck at owner's risk." *Compania de Navigacion la Flecha v. Brauer*, 129 U. S. 104.

Goods do not "await further conveyance" within a stipulation limiting liability under such circumstances to that of a warehouseman, when the connecting carrier unloads them upon its pier without notifying the next carrier. *Texas &c. R. Co. v. Reiss*, 183 U. S. 621; aff'd s. c., 190 Fed. Rep. 1006.

Nor was mere notice available, where according to custom, the lading did not take possession until a ship was sent to the pier for the purpose. *Texas &c. R. Co. v. Callender*, 183 U. S. 632; aff'd s. c., 98 Fed. Rep. 538.

Liability resulting from defective machinery cannot be limited by a clause in a bill of lading inserted in the midst of a long list of limitations, relating to matters likely to happen after the beginning of the voyage. *The Caledonia*, 43 Fed. Rep. 681.

Extraordinary damage to a cargo of beans from rats is chargeable on the carrier, notwithstanding the bill of lading exempted from liability damage by vermin. *Nordlinger v. Nelson*, 46 Fed. Rep. 859.

Provision in a bill of lading that notice of damage to goods shall be given carrier before removal from the ship is reasonable. *Angelo v. Cunard S. Co.*, 55 Fed. Rep. 1005.

Accident to train due to negligence will not relieve carrier for loss through failure to unload stock for more than twenty-eight consecutive hours. *Newport &c. Co. v. U. S.*, 61 Fed. Rep. 488.

Limitation of liability to one pound sterling for each animal shipped was not an agreed valuation nor a stipulation in liquidation of damages and did not prevent recovery for negligence or unjustifiable deviation. *Schwarzchild v. National Steamship Co.*, 74 Fed. Rep. 257.

Independent parts of a car such as axles, etc., unconnected with the operation of the locomotive are not within the term "accidents to boilers or machinery," stipulations limiting liability being strictly construed against the carrier. *Fairbank & Co. v. Cincinnati & C. R. Co.*, 81 Fed. Rep. 289; s. c., 38 L. R. A. 271.

A carrier cannot exempt itself from loss by fire through negligence. *Liverpool & C. Ins. Co. v. McNeill*, 89 Fed. Rep. 131.

Exemptions from defects in a refrigerating apparatus covered a loss, where a washer was inadvertently left in the pipes by the constructors, though a proper test had failed to reveal the defect. *The Prussia*, 93 Fed. Rep. 837; aff'g s. c., 88 id. 531.

Provision limiting liability upon delivery upon wharf from boats does not violate a statutory prohibition against limitation of liability of a carrier for loss by fire on board the vessel. *The City of Clarksville*, 94 Fed. Rep. 201.

Provision of a bill of lading that "cotton is excepted from any clause herein on the subject of fire and the carrier shall be liable as at common law." was construed to make the common law applicable to all provisions of the contract and not to those only which relate to fire. *Texas & C. R. Co. v. Callender*, 98 Fed. Rep. 538; s. c. aff'd, 183 U. S. 632.

Limitation of liability to an agreed value, held valid and not within a statute prohibiting a carrier from limiting its liability for safe delivery, etc. *Jennings v. Smith*, 99 Fed. Rep. 189. See, also, *Jennings v. Smith*, 106 Fed. Rep. 139.

Under a stipulation containing an exemption from loss by fire without its negligence and a provision that it should not be bound to carry beyond the convenient conduct of the business, a carrier was not liable for loss from fire, not due to its fault, where the goods were not transported by the first vessel on account of lack of room and they would not have been destroyed if so transported. *The Nutmeg State*, 103 Fed. Rep. 797.

Shipper is bound by an exemption from loss by fire without negligence, where he was chargeable with notice of the clause in the bill of lading. *Caw v. Texas & C. R. Co.*, 113 Fed. Rep. 91.

By contract a common carrier may limit its liability to that of private carrier in the transportation of stock. *Kimball v. Rutland & C. R. Co.*, 28 Vt. 247.

Goods: printed notices do not exempt, etc., for failure to use ordinary care. *Maine v. Birchard*, 40 Vt. 326.

Common carrier's liability may be limited; no limitation for negligence allowed. *Va. & C. R. Co. v. Sayers*, 26 Gratt. 328.

A stipulation containing an exemption from losses from "loading, unloading," etc., and requiring shipper to load and unload, did not exempt

a carrier from liability for failure to provide proper facilities thereunder under a statute imposing that duty on the carrier. *Chesapeake &c. Co. v. American Exch. Bank*, 92 Va. 495.

Limitation of liability by a carrier to its own line was permitted under a statute providing for such exemption by a contract in writing and requiring proof of proper delivery to connecting carrier within reasonable time after demand therefor by consignor. *Norfolk &c. Co. v. Reeves*, 97 Va. 284.

A shipper who has had the benefit of lower rates by reason of a valuation of his goods is estopped from claiming a higher value than he gave. *Zouch v. Ches. &c. R. Co.*, 36 W. Va. 524.

Cannot contract against negligence, but may against common law liability. *Berry v. West Va. &c. R. Co.*, 44 W. Va. 538.

Under a contract providing for the discharge of liability upon delivery to a connecting steamship company or on its pier, the putting of goods on its own wharf was not a sufficient delivery. *Lewis v. Chesapeake &c. R. Co.*, 47 W. Va. 656.

Carrier may contract against all risk of damage to live stock from whatever cause, it being a kind of carrying not known when railway originated. *Betts v. Farmers' &c. Trust Co.*, 21 Wis. 80.

Carrier cannot contract against gross negligence. *Annas v. Milwaukee &c. R. Co.*, 67 Wis. 46.

Limitation of liability as insurer, but not for negligence, allowed. *Scholler v. Chicago &c. R. Co.*, 97 Wis. 31.

Exemption from liability for injuries to animals by each other in loading and unloading, construed not to cover injuries from the drivering them loose into a pen instead of leading them separately. Limitation to an agreed value, held valid. *Loeser v. Chicago &c. R. Co.*, 94 Wis. 571; *Uhlman v. Chicago &c. R. Co.*, 112 id. 108.

Stipulation that shipper was to assume risk of insecurity of floors, did not cover defects patent to an experienced inspector but latent as to an ordinary person. *Leonard v. Whitcomb*, 95 Wis. 646.

Exemption from liability from loss due to changes in weather, or decay, construed not to cover loss of strawberries from delay in loading them during transportation. *Lamb v. Chicago &c. R. Co.*, 101 Wis. 571.

An exemption as to causes beyond its control as heat, etc., relieved the carrier, where loss by heat was not shown to have occurred by reason of its negligence. *Densmore Commission Co. v. Duluth &c. R.*, 101 Wis. 563.

Carrier, on valid consideration, may curtail its liability except for gross negligence. *Ullman v. Chicago &c. R. Co.*, 112 Wis. 150, 168.

## 2. CARRIERS OF PASSENGERS.

Unless there be an express agreement exempting it, the carrier of passengers, with or without compensation, is liable for negligence; yet, the compensation may have bearing on the degree of negligence, which will make the carrier liable. Plaintiff was a mail agent and claimed that contract made with the government inured to his benefit, whereby the defendant became obligated to carry him for a consideration; the court held otherwise; yet, although a gratuitous passenger, the carrier owed him such care at least as would be due from a gratuitous bailee, and would be liable for culpable neglect. *Nolton v. Western R. Co.*, 15 N. Y. 444, overruling demurrer to complaint.

Notwithstanding the disability attached to general notices, not only posted notices, but also the statement on the ticket were regarded as important as *against* the carrier in *Quimby v. Vanderbilt*, 17 N. Y. 306.

The contract between the defendant and a gratuitous passenger, exempting the defendant from liability for negligence slight or gross, is valid. The plaintiff paid no fare, but was carried under a free ticket, on which was printed the following words: "The person accepting this free ticket assumes all risks of accidents, and expressly agrees, that the company shall not be liable under any circumstances, whether of negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using this ticket." *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181, aff'g judg't for pl'ff. *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 id. 80.

**From opinion.**—"It is immaterial whether the negligence of the agents be slight or gross. The supposed distinction between different degrees of negligence, in respect to the liability of common carriers, is discarded as illusory and impracticable. See *Steamboat New World v. King*, 16 How. 474; *Wilson v. Brett*, 11 Mees. & Wels. 113; *Hintin v. Dibbin*, 2 Ad. & Ell. (N. S.) 646, 661; *Blyth v. Water Works*, 36 Eng. L. & Eq. 606; s. c., 11 Exch. 781; *Angell on Carriers* (3d ed.), secs. 22, 23."

A railroad company cannot exempt itself from liability to a passenger for an injury resulting from its own misconduct or recklessness, but as to a gratuitous passenger it may stipulate for exemption on account of even the gross negligence of its servants others than the board of directors and managers representing the company, for general purposes. As to the case of a trackmaster using rotten material on track. (*Quære.*)

Passenger had a pass with a condition. "NOTICE.—The person accepting this free ticket assumes all risks of accidents, and expressly

\*NOTE.—As to the form, validity and effect of stipulations for exemptions from liability for baggage, see "Contracts of Shipment," post p. 272.

As to who is a passenger, see also "Carriers of Passengers," post p. 368.

agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger, by the use of this ticket. \* \* \*” Had the passenger been riding on the passenger train, the carrier would be obliged to carry him carefully, but the exemption on pass relieved carrier from this responsibility. *Perkins v. N. Y. C. & H. R. Co.*, 24 N. Y. 196, rev’g judg’t for pl’ff.

The owner of cattle was transported on a railroad under contract. “Persons riding free to take charge of stock do so at their own risk, and are liable for personal injury from whatever cause.”

It seems that the owner of cattle, transported for hire on a railroad, and who goes along in charge of them, under a contract that “persons riding free to take charge of the stock do so at their own risk, and are liable for personal injury from whatever cause,” is not to be regarded as a passenger.

The owner was injured by the gross negligence of an agent of the carrier in using an unfit and dangerous car. The carrier was held liable. In a divided court, four of the judges going on the ground, that the contract for exemption from liability was void, as against public policy; and fifth, that the negligence, as it respected the machinery of transportation, is imputable to the carrier himself. *Smith v. N. Y. C. R. Co.*, 23 N. Y. 222, aff’g judg’t for pl’ff.

A common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract that the passenger will assume the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable.

If he paid, as passenger, the usual fare, without reduction on account of his engagement to assume such risk, the contract would, it seems, not be binding, as without consideration.

The provisions of the general railroad law (ch. 140 of 1850, as amended) do not add to the general responsibility as carriers, of the corporation, nor subject to it, nor deprive them of the power to make contracts in relation to such responsibility. Its object was to bring them within the principle of common carriers.

Plaintiff’s intestate was furnished with a ticket headed, “Cattle and Horse Owner’s Ticket on Passenger Train,” by which the defendant directed its conductors to “pass Taylor & Bissell, owners of two cars of live stock, from Buffalo to Albany.” On the back of this ticket was printed: “NOTICE.—The owner of stock receiving this ticket assumes the risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person or for any loss or injury to the property.”

of said owners shipped by stock or freight trains." *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 442, rev'g judg't for pl'ff.

See *Illinois Central R. Co. v. Reed*, 37 Ill. 484; *Kinney v. R. Co.*, 34 N. J. L. 513, s. c., 32 id. 407; *Central R. Co. v. Mundy*, 21 Ind. 48.

The plaintiff contracted for the transportation of sheep and that some one should go with them "who should take all the risks of personal injury from whatever cause, whether of negligence of defendants, its agents, or otherwise." He had a drover's pass and intended to go. After the sheep were loaded, the plaintiff was hit by wood from the engine which he was passing. The defendant was not liable. *Poucher v. N. Y. C. R. Co.*, 49 N. Y. 263, rev'g judg't for pl'ff.

Distinguishing *Stinson v. N. Y. Cent. R. Co.*, 32 N. Y. 333; and following *Northrup v. R. R. Pass. Assurance Co.*, 43 id. 516.

The settled doctrine in this state is that a carrier of persons as well as of property, and known as a common carrier, may, by contract, have protection against liability for injury caused by its negligence. *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; 10 Am. Rep. 364. The carrier of express matter is not exempt from liability for the death of an express messenger, because of a contract to that effect made with the express company, without the consent of the messenger. Such messenger takes the hazards incident to his business, but not such as arise from the negligence of the carrier. *Brewer v. N. Y., L. E. & W. R. R. Co.*, 124 N. Y. 59, aff'g judg't for pl'ff.

Distinguishing *Seybolt v. N. Y., L. E. & W. K. Co.*, 95 N. Y. 562.

The general words of the contract of a common carrier of persons, limiting its liability, will not be considered as exempting it from liability for negligence. A contract between an express company and a railroad company provided that the defendant should be "expressly relieved from, and guaranteed against, any liability for any damage done to the agent of" the express company "whether in their employ as messenger, or otherwise."

A messenger was killed through the negligence of the defendant. The contract *might* be read not necessarily as releasing or preventing an action by the employes of the express company for damages or injuries received while on the road, but to indemnify the defendant in the event of such an action. *Kenney v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 422, aff'g 54 Hun, 143, and judg't for pl'ff.

Exemption from liability for negligence in stock pass, covering transportation for both, issued to one of two persons in charge of the stock, held not to bind the other who was ignorant of it. *Coppock v. Long Island R. Co.*, 89 Hun, 186.

Exemption from liability for negligence in pass made out by for and given to conductor for transportation of his men after their work, held not to bind one ignorant of it. *Pendergast v. Union* 10 App. Div. 207.

Plaintiff's passage ticket was never delivered to him. Not having an opportunity to read it, he was not bound by the terms therein contained: e. g., a limitation of liability to £10 in the case of loss of baggage. *Wamsley v. Atlas S. S. Co.*, 50 App. Div. 199.

An assent by a passenger to limitation of the carrier's liability not be implied when such limitation is communicated to the passenger for the first time after he has paid his fare.

The contract of carriage is consummated when the passenger and the carrier accepts the fare; if no special agreement be then made, the conditions of carriage are prescribed by law; and any subsequent assent by the passenger, without a separate consideration, to a limitation of the carrier's liability is void. *Lechowitz v. The Hamburg American Packet Co.*, 8 Misc. 213. (New York Common Pleas.)

Limitation of doubtful import should be construed against the company making it. *Georgia R. & C. Co. v. Clarke*, 97 Ga. 706.

Carrier of passenger cannot limit its liability for negligence by contract. Ga. Civ. Co., sec. 2276, applies to goods only. *Southern R. Co. v. Watson*, 110 Ga. 681.

Nor can such liability be waived. *Central & C. R. Co. v. Lippman*, 101 Ga. 665.

Contract in free pass exempting from liability for all but gross negligence held valid. *I. C. R. Co. v. Read*, 37 Ill. 484.

Carrier cannot, by allowing shipper transportation with his goods, require that it be relieved of liability for all acts except gross negligence. *Illinois & C. R. Co. v. Beebe*, 174 Ill. 13; aff'g s. c., 69 Ill. App. 137; *Illinois Cent. R. Co. v. Anderson*, 184 Ill. 294; aff'g s. c., 81 Ill. App. 137; *Pennsylvania R. Co. v. Greso*, 79 Ill. App. 127.

Exemption from liability for negligence to express messengers, for the purpose of handling packages of an express company, held valid. *Blank v. Illinois C. R. Co.*, 182 Ill. 332; aff'g s. c., 80 Ill. App. 47.

Limitation of liability for all but gross negligence is binding when using a free pass stipulating for it. *Chicago & C. R. Co. v. Hawk*, 101 Ill. App. 327.

Not a question of contract; carrier liable to free passenger for negligence. *Gillenwater v. Madison & C. R. Co.*, 5 Ind. 339.

So where drover traveled on stock pass, he could recover although stipulated against liability. *Ohio & C. R. Co. v. Selby*, 47 Ind. 47.

Free pass stipulating that passenger assumes all risks, does not



lieve carrier from liability for injury through gross negligence, nor it seems, through slight negligence. *Indiana C. R. Co. v. Mundy*, 21 Ind. 48.

No limitation for liability for loss from carrier's own ordinary negligence is allowed. *Indianapolis &c. R. Co. v. Allen*, 31 Ind. 394.

Drover's pass. Limitation of liability not allowed; drover was a passenger for hire. *Ohio &c. R. Co. v. Selby*, 47 Ind. 471.

Free pass passenger has an action for injury through negligence notwithstanding endorsement on pass exempting carrier from liability for the same. *Louisville &c. R. Co. v. Taylor*, 126 Ind. 126.

Exemption from liability for negligence, held valid as to express messengers. *Louisville &c. R. Co. v. Keefer*, 146 Ind. 21; s. c., 38 L. R. A. 93.

And employés on sleeper. *Russell v. Pittsburg &c. R. Co.*, 157 Ind. 305; s. c., 55 L. R. A. 253.

Question of limitation, etc., for negligence, seems to be an open one California, Delaware, Florida, Nevada, Oregon and Rhode Island. *Louisville &c. R. Co. v. Nicholai*, 45 Alb. L. J. (Ind. App.) 412.

A limitation to \$100 for personal baggage did not relieve the carrier from liability where contract did not state \$100 to be the value of the baggage, nor that it was thus set in consideration of reduced rates. *Id.*

Liability for negligence may not be limited; notwithstanding free pass. *Rose v. Des Moines &c. R. Co.*, 29 Iowa, 246.

Exemptions from liability cannot cover gross and culpable negligence. *St. Louis &c. R. Co. v. Tribbey*, 6 Kan. App. 467.

Limitation of liability in a stock pass was held not to abridge right to recover for death from negligence granted by statute to next of kin. *Chicago &c. R. Co. v. Martin*, 59 Kan. 437.

Such a limitation in pass issued without consent of Railroad Commission held invalid under Gen. Stat. 1897, ch. 69, sec. 17. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

Shipper traveling on stock pass is passenger for hire and liability for injury to him cannot be limited. *Louisville &c. R. Co. v. Bell*, 100 Ky. 203.

Indictment lies for injury to passenger for gross negligence (killing passenger), notwithstanding indorsement, etc., on ticket. *Commonwealth v. R. R. Co.*, 108 Mass. 7.

A ticket containing writing and headed "Passengers' Contract Ticket" accepted by passenger on ocean steamship binds him to its provisions. *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553.

Exemption from liability for negligence in employé's pass, void. *Doyle v. Fitchburg &c. R. Co.*, 166 Mass. 492; s. c., 63 L. R. A. 844.

Free pass, no limitation etc., for gross negligence. *Jacobus Paul &c. R. Co.*, 20 Minn. 125.

That a news agent may not have been a passenger does not validly exempt from liability for negligence consisting of violation of contract. *Starr v. Great Northern R. Co.*, 67 Minn. 18.

Where the ticket stated that defendant acted only as agent beyond his own line, the omission to sign did not relieve holder of the effect of the condition, where the ticket was issued at a reduced rate and he had paid for it. *St. Clair v. Kansas City &c. R. Co.*, 77 Miss. 789.

Where the limitations are plainly printed on the face of the ticket, the passenger will be presumed to have read and assented to them. *Wabash R. Co.*, 80 Mo. App. 8.

Exemption from liability for negligence in stock pass, void. *Atchafalaya &c. R. Co. v. Tietken*, 49 Neb. 130.

Liability may be modified, but exemption, etc., for negligence "not" to be allowed. *Ashmore v. Pa. R. Co.*, 28 N. J. L. 180.

Traveler on a free pass, exempting from liability for injury resulting from negligence, is held to the stipulation. *Kinney v. Cent. R. Co.*, 34 N. J. L. 513.

Restriction as to amount and kind of baggage allowed, with limitation as to amount of value per pound in case of loss in a ticket, is not binding as to baggage carried by passenger. *Runyan v. Central R. Co.*, 6 L. 537; s. c., 43 L. R. A. 284.

Stipulation on drover's pass exempting from liability for negligence was not valid. *Cleveland &c. R. Co. v. Curran*, 19 Oh. St. 1.

The rules as to invalidity of stipulations exempting carriers from liability are not changed by the fact that the conveyance of passengers is upon a freight train. *Richmond v. Southern P. R. Co.*, (Or.) Rep. 947.

**From opinion.**—Defendant's counsel "concede that the rule is generally established by state and federal courts, except in Illinois and New York, that a common carrier cannot escape liability from the consequences of its negligence in carrying passengers on trains provided for that purpose; but they maintain that a freight way company, not being obliged to carry passengers on a freight train, is not bound by contract in relation thereto as a private carrier and that an agreement exempting it from liability is not violative of public policy." \* \* \* "Public policy forbids a railway company from relying upon the terms of a contract entered into with a passenger, whereby he releases it from liability resulting from its negligence while performing a duty it owes the public as a common carrier; but it may become a private carrier and escape such liability by contract, where the matter is a matter of convenience to, or by special agreement with a passenger, in which it takes to carry him by means not designated to accommodate the traveling public." *Railway Co. v. Keefer*, 146 Ind. 21. Thus an agreement of an expressman to assume all risks of accident, in consideration of being carried in a

car, to facilitate his own business, releases a railroad company from liability for injury resulting from a casualty, because the agent is not a passenger, and the carrier is under no obligation to transport him in such car. *Blank v. Railroad Co.*, 182 Ill. 332; *Railway Co. v. Maloney*, 148 Ind. 196; *Bates v. Railroad Co.*, 156 Mass. 506; *Railroad Co. v. Voight*, 176 U. S. 498." \* \* \*

"Where railroad companies, furnishing trackage and motive power, haul the cars of circus and managerie companies over their lines of railway, in consideration of the latter assuming the risk of injuries incident to the journey, it has been held that such companies and their employes, sustaining damages or injury, could not recover therefor from the railroad companies. *Railroad Co. v. Wallace*, 66 Fed. Rep. 506; *Robertson v. Railroad Co.*, 156 Mass. 525; *Coup v. Railroad Co.*, 56 Mich. 111; *Forepaugh v. Railroad Co.*, 128 Pa. 217. The reason assigned in these cases for enforcing the contracts of exemption from liability is that, as the railroad companies were under no legal obligation to haul such cars, they might lawfully enter into any contract to do so, and as a condition precedent therefor were authorized to limit their liability in case of accident, thus becoming private carriers in respect to such cars." \* \* \*

"The defendant was under no legal obligation to carry passengers on its freight trains, but, having notified the public that it would do so between the stations indicated, the train, as long as it was used for that purpose, was a mixed freight and passenger train, thereby imposing upon the defendant all the duties of a common carrier in respect to any passenger riding thereon. The train in question was designated by the defendant to accommodate the traveling public generally, and was not provided for plaintiff's advantage alone, nor did he enjoy any special privileges thereon that were not extended to others."

Drover's pass; limitation of liability not allowed, drover was a passenger for hire. *Penn. R. Co. v. Henderson*, 51 Pa. St. 315.

But special contract will relieve carrier from liability for all loss except that caused by its own negligence. *Farnham v. Camden &c. R. Co.*, 55 Pa. St. 53.

Passengers not allowed to contract against negligence. *Penn. R. Co. v. Butler*, 57 Penn. St. 335.

Liability may be limited except for negligence. (*Telegraph Co.*) *Wolf v. West. U. Tel. Co.*, 62 Penn. St. 83.

By signing and using a ticket, one of ordinary intelligence is held to have assented to its terms. *Daniels v. Florida &c. R. Co.*, 62 S. C. 1.

Reduced rate is notice that the ticket is sold subject to special conditions. *Watson v. Louisville &c. R. Co.*, 104 Tenn. 194; s. c., 49 L. R. A. 454.

Exemption from liability unless shipper accompanying his goods rides in the caboose, was inapplicable, where he rode in the car with the goods with carrier's consent. *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Cannot contract against negligence. *Ft. Worth &c. R. Co. v. Rogers*, 21 Tex. Civ. App. 605.

Where the condition, permitting only two persons to accompany ship-

ment, was printed on the back of the pass with no reference to it on the face, plaintiff was not chargeable with notice of the agent's exceeding authority in issuing it to three. *San Antonio &c. R. Co. v. Newmeyer*, 10 Tex. Civ. App. 606.

Recovery was allowed where plaintiff was a stockholder and riding on an invitation of president. *Phila. &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

Drover riding on free pass; no limitation allowed for negligence of carrier or servants. *Quære* is to whether the rule was same in case of one riding as a strictly free passenger. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Baltimore &c. R. Co. v. McLaughlin*, 73 Fed. Rep. 519.

Requirement in a drover's pass that he shall remain in the cattle car while the train is in "motion" does not apply to injury in a cattle car caused by a sudden jolt while the train is standing still, though he had previously have been in the cattle car while the train was in motion. *Texas &c. R. Co. v. Reeder*, 170 U. S. 530; aff'g s. c., 76 Fed. Rep. 519.

Express agent in special car, held bound by stipulations in an agreement between the express company and the carrier ratified and adopted in his contract of employment, relieving the railroad company from liability for negligence. *Baltimore &c. R. Co. v. Voigt*, 176 U. S. 530; rev'g s. c., 79 Fed. Rep. 561.

*Citing* *Bates v. Old Colony R. Co.*, 147 Mass. 255; *Hosmer v. id.*, 156 id. 156; *Robertson v. id.*, id. 526; *Griswold v. New York &c. R. Co.*, 53 Conn. 371; *Wabash R. Co.*, 56 Mich. 111; *Pittsburg &c. R. Co. v. Mahoney*, 141 Ill. 196; *Blank v. Illinois C. R. Co.*, 80 Ill. App. 475; s. c. aff'd, 182 Ill. 332.

*Distinguishing* *Brewer v. New York &c. R. Co.*, 124 N. Y. 59; *Kenney v. New York &c. R. Co.*, 125 id. 422.

**From opinion.**—"The Circuit Judge thought the case could not be distinguished from the case of *Railroad Co. v. Lockwood*, 17 Wall 357." \* \* \* "This court held that a drover traveling on a pass for the purpose of caring for his stock on the train, is a passenger for hire, and that it is not for a common carrier of such passenger to stipulate for exemption from responsibility for the negligence of himself or his servants. This case has frequently followed, and it may be regarded as establishing a settled policy. *Railway Co. v. Stevens*, 95 U. S. 655; *Liverpool Steam Co. v. P. & O. Ins. Co.*, 129 U. S. 397." \* \* \* "We think the law of to-day may be stated as follows: 1. That exemptions claimed by carriers must be reasonable and just, otherwise they will be regarded as extorted from customers by reason of circumstances, and therefore not binding. 2. That all attempts of carriers by general notice or special contract, to escape from liability for loss to persons, or injuries to passengers, resulting from want of care or faithfulness, shall not be regarded as reasonable and just, but contrary to a sound public policy, and therefore invalid. But are these principles, well considered and understood, they are, decisive of, or indeed applicable to, the facts presented for judgment in the present case? We have here to consider, not the case of an individual shipper or passenger, dealing at a disadvantage with a powerful corporation."

but that of a permanent agreement between two corporations embracing within its sphere of operation a large part of the transportation business of the entire country." \* \* \* "The relation existing between express messengers and transportation companies, under such contracts as existed in the present case, is widely different from that of ordinary passengers, and to relieve the defendant in error from the obligation of his contract would require us to give a much wider extension to the doctrine of public policy than was justified by the facts and reasoning in the *Lockwood* case." After citing state court cases as above to the effect that, when contracting as private carrier, public policy does not forbid exemption of liability for negligence, the court proceeds: "The same doctrine prevails in New York. *Bissell v. New York &c. R. Co.*, 25 N. Y. 442; *Poucher v. New York Central R. Co.*, 49 N. Y. 263. Though it must be allowed that the New York decisions are not precisely in point, as those courts do not accept the doctrine of *Railroad Co. v. Lockwood* to its fullest extent, but hold that no rule of public policy forbids contractual exemption from liability, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. As against these authorities there are cited, on behalf of the defendant in error, several cases in which it has been held that postal clerks, in the employ of the Government, and who pay no fare, are entitled to the rights of ordinary passengers for hire, and it is contended that their relation to the railroad company is analogous to that of express messengers. *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. Rep. 165; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435; *Ketcham v. New York &c. R. Co.*, 133 Ind. 346; *Seybolt v. Railroad Co.*, 95 N. Y. 562. There is, however, an obvious distinction between a postal clerk and the present case of an express messenger in this, that the messenger has agreed to the contract between the express and the railroad companies, exempting the latter from liability, but no case is cited in which the postal clerk voluntarily entered into such an agreement. To make the cases analogous, it should be made to appear that the government in contracting with the railroad company to carry the mails, stipulated that the railroad company should be exempted from liability to the postal clerk, and that the latter, in consideration of securing his position, had concurred in releasing the railroad company."

But that the messenger is not bound by such an agreement where he has no knowledge of it, see *Chamberlain v. Pierson*, 87 Fed. Rep. 420.

Doctrine of strict construction applied to a provision in a drover's pass, that the holder, in leaving the caboose and going along and over tracks, did so at his own risk, and held that it did not extend to anything beyond the ordinary hazards peculiar to running cattle and freight trains, and that a drover, who, while attempting to board a train beginning to move, was struck by a water spout, negligently allowed to remain close to the track, could recover. *Fitchburg &c. R. Co. v. Nichols*, 85 Fed. Rep. 945.

Exemption from liability for negligence no defense to statutory action by widow for herself and children or next of kin. *Clark v. Geer*, 86 Fed. Rep. 447; *Adams v. Northern P. R. Co.*, 95 id. 938.

Stipulation for exemption from liability except for gross negligence in stock pass issued to shipper held not to bind his minor son riding

in the car with, and in charge of, the stock. *Chicago &c. R. Co. v.* 92 Fed. Rep. 318.

Carrier of passengers cannot exempt itself from liability for negligence. *Williams v. Oregon Shore-Line R. Co.*, 18 Utah, 210; *Sauv.* *v. Southern R. Co.*, 13 id. 275.

Carrier, to bind a passenger to reasonable limitations, must show the latter assented to the terms thereof. *Ranchau v. Rutland R. Co.* Vt. 142.

Stipulation on a free pass exempting carrier from liability is binding upon the person traveling upon it. *Muldoon v. Seattle City R. Co.* Wash. 528.

Exemption from liability for negligence, void. *Davis v. Chicago R. Co.*, 93 Wis. 470.

#### (b). DISCLOSURE OF VALUE.

When interrogated as to the value of goods or notified that the carrier valued them for the purpose of limiting his liability, the shipper commits a legal fraud if he remain silent, and the carrier is discharged from liability for ordinary negligence; and so if the shipper falsely represents value of the goods to be less than they are.

But where there is no special contract limiting the common law liability of the carrier, nor any notice so specially brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods, unless he is asked thereof by the carrier; but the carrier has the right to make inquiry and to have a true answer, and if deceived by a false answer given he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to lead him, he is responsible for the loss, however great may be the loss. *Magnin v. Dinsmore*, 62 N. Y. 35.

*Batson v. Donovan*, 4 Barn. & Ald. 21; *Orange County Bank v. Brown*, 9 B. & C. 116; *Railroad Company v. Lockwood*, 17 Wall. 357, 380; *Crouch v. L. & M. Co.*, 14 C. B. 255; *Story on Bailments*, sec. 567; *Riley v. Horne*, 5 Bing.

See, *Thorogood v. Marsh* (Niel Gower, 105); and *Marsh v. Home* (5 B. & C. 322); *Pardee v. Drew*, 25 Wend. 459; *Warner v. West. Trans. Co.*, 3 C. B. 490; *Richards v. Westcott*, 2 Bows. 589; s. c., 7 id. 6; *Great Northern R. Co. v. Shepherd*, 14 Engl. L. & Eq. 367.

But, see contra, *Brooke v. Pickwick*, 4 Bing. 218; *Clay v. Willan*, 1 H. & C. 298; *Yate v. Willan*, 2 East 128; *Izett v. Mountain*, 4 id. 371; *Nicholson v. Willan*, 5 id. 507.

Where a carrier by his contract limits his liability to a specified amount, if the value of the property is not stated by the shipper, and the goods are of greater value than the amount specified, silence on the part of the shipper as to the real value, although there be no inquiry by the carrier and no artifice to deceive, is fraud in law, which charges the carrier from liability for ordinary negligence.

Where the shipper accepts carriage upon the terms of a limited liability, silence is the same as an assertion of little value; and the carrier is not only thereby deprived of his adequate reward, but is misled as to the degree of care and security which he should provide.

As to whether, in such case, the carrier will be relieved where his acts amount to a misfeasance or abandonment of his character as carrier, *quaere*.

This action was brought to recover the value of a package of watches.

The receipt given by the company contained this clause; "If the value of the property above described is not stated by the shipper, the holder hereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of or damage to the property aforesaid." Plaintiff's evidence tended to show that the goods were not delivered, but that the box which contained them was afterwards found empty at Gowanus, Long Island. Defendant gave evidence tending to show that a greater price would have been charged for transportation had the true value been stated; also that the package would have been put in the money and valuable package department, the packages in which were transported in safes locked and sealed, while where no value was stated it went in the freight department where such precautions were not taken. *Magnin v. Dinsmore*, 62 N. Y. 35.

**From opinion.**—"Where there is no special contract limiting the common-law liability of the carrier, nor any notice so specifically brought home to the knowledge of the shipper as to have that effect, the shipper is not bound to disclose the value of the goods, unless he is asked thereof by the carrier; but the carrier (for proper reasons, *Crouch v. L. & N. W. R. Co.*, 14 C. B. 255) has a right to make inquiry and to have a true answer, and if he is deceived by a false answer given, he will not be responsible for any loss. If, however, the carrier makes no inquiry, and no artifice is used to mislead him, he is responsible for loss, however great may be the value. Such is stated in *Story on Bailments* (sec. 567) to be the better opinion, and the cases there cited sustain the text. Where there is a special contract limiting liability, or other thing tantamount thereto, it is otherwise."

The disclosure of value, in such case, is a condition precedent to liability on the part of the carrier for mere ordinary negligence unaccompanied with any misfeasance or willful act.

An omission on the part of the carrier to make inquiry as to the value is not a waiver of the limitation in the contract.

To constitute a conversion of goods by a carrier, there must be a wrongful disposition of goods or withholding thereof; a mere non-delivery will not suffice, nor will a refusal to deliver goods on demand, if the goods have been lost through negligence or have been stolen.

Angell on Carriers, secs. 431-433; *Scovill v. Griffith*, 2 Kern. 509; *And*  
4 Esp. 157; *Ross v. Johnson*, 5 Burr. 2825.

Negligence alone is not misfeasance or an abandonment of the character of carrier, which will deprive them of the benefit of the limitation.

The act which will deprive the carrier of the benefit of a contract of limited liability fairly made, must be an affirmative, but not necessarily an intentional act of wrongdoing; and the onus of proving this is upon the party claiming it. *Magnin v. Dinsmore*, 70 N. Y. 410.

*Baldwin v. L. & G. W. Steam Co.*, 11 Hun, 496.

Where the property is of extraordinary value, a condition that the carrier will not be responsible for loss, if the true character and value of the articles are not stated and freight paid, will operate to exempt the carrier from liability even for his own negligence, unless the condition was fulfilled. He is not bound to speak unless notice of non-liability on the part of the bailee, in case he remains silent, is given. But from the record now here, it appears that some information was given by the plaintiff's agents and servants to the carrier at the time of shipment that the boxes contained marble statuary, and hence had a special value which would entitle the defendant to increased compensation for carriage, if it saw fit to exact it.

The shipment bill simply described two boxes of marble, "contents and value unknown," and contained a condition that no statuary would be carried at the defendant's risk unless a memorandum as above was delivered. There was no such memorandum, but the consignor's agent informed defendant that the boxes contained statuary. Boxes were marked "handle with care" and shipment was made in the usual manner on defendant's road. There was no actual or proposed concealment. Held, that a nonsuit was error; that if defendant was fully and truthfully informed as to the character of the property, and accepted it without requiring a written memorandum or extra compensation, it might be deemed to have waived other and further observances of the condition and that plaintiff was entitled to a submission to the jury of the question of waiver, of fraudulent concealment and of defendant's negligence. *Rathbone v. N. Y. C. & R. R. Co.*, 140 N. Y. 48.

A limitation of liability to a given amount, unless value is specified, was valid in the absence of fraud or gross negligence. *Toy v. Long Island R. Co.*, 26 Misc. 792.

Statement that a package containing valuable music, was merely music thereby obtaining transportation for less than would otherwise have been charged, was such fraud and concealment as relieved the carrier from liability for its loss. *Southern Exp. Co. v. Wood*, 98 Ga. 268.

Shipper voluntarily undervaluing goods was bound by a limitation of



liability to the agreed valuation. *Chicago &c. R. Co. v. Miller*, 79 Ill. App. 473.

Common honesty dictates that he who delivers property to a carrier, knowing that it requires peculiar care and attention to its safe transportation, should make known to him the necessity, in order that the proper precaution may be taken. *Wilsons v. Hamilton*, 4 Ohio St. 723, 741.

Citing *Orange Co. Bank v. Brown*, 9 Wend. 85; *Hardee v. Drew*, 25 Wend. 85; *Miles v. Cottle*, 6 Bing. 743. But disclosure of value need not be made unless asked. *Sewall v. Allen*, 6 Wend. 349; *Hollister v. Nowlan*, 19 Wend. 234; *Phillips v. Earl*, 8 Rich. 182; *Sleat v. Flagg*, 5 B. & Ald. 342.

Carrier, giving reduced rates on account of property being understated as to its value, was liable in full for its loss, where it did not limit its liability. *Louisville &c. R. Co. v. Levi*, 8 Ohio C. D. 373.

The fact that the weight of injured cotton exceeds that of the entire shipment, which was "estimated," did not exempt a carrier from liability as to that injured. *Springs v. South Bound R. Co.*, 46 S. C. 104.

There was no fraud or concealment in a shipment of negatives, marked "Photo goods," though, were their true value known, a higher rate would have been charged. *Southern P. R. Co. v. D'Arcais*, (Tex. Civ. App.) 64 S. W. Rep. 813.

#### (c). CARE REQUIRED IN CASE OF RELEASE.

**Carrier must use reasonable care although the goods are released.**

Accordingly, where goods, having been shipped upon the defendant's railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire or explosion of any kind," were destroyed by fire kindled by sparks from the locomotive hauling them,—*held*, that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks (2 Redfield on Railways, 3d. ed. 189, chap. 24, sec. 1, 176; *Ford v. London and Southwest R. Co.*, 2 Foster & Finlayson, Nisi Prius R. 730; *Hegeman v. Western R. R.*, 3 Kern. 9; *Field v. N. Y. C. R. R.*, 32 N. Y. 339); but, that the charge that, if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby insure combustible matter from ignition, and the defendant neglected so to construct this locomotive, they should find for the plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation," was error. *Steinweg v. Erie Railway Co.*, 43 N. Y. 123.

Citing *Sager v. P. S. &c. R. Co.*, 31 Me. 228.

A common carrier must use reasonable care although transportation is at the owner's risk.

Plaintiffs shipped under such a contract, by defendant's road at "eighteen boxes of jewelry, to be transported to "N. Y." The evidence tended to show that, owing to inefficient facilities or accumulation of freight from three to six days more than the usual time was taken for the transportation. Also, that before delivery to the consignee and while the boxes were in the possession of the defendant, one of them was opened and a portion of its contents abstracted. The court charged the jury that they could not find a verdict for the plaintiffs, except upon the assumption that the property had been stolen or lost while in the defendant's possession, and that such loss must be found to be attributable exclusively to the negligence of defendant in delaying the transportation. Held error. *Canfield v. B. & O. R. Co.*, 93 N. Y. 532.

S. C., 75 N. Y. 144.

If accommodations for loading horse on car are not suitable, the carrier is not excused by stipulation that loading is at the owner's risk. *Potter v. Sharp*, 24 Hun, 179.

Requiring a carrier to keep a "watch" over the goods, was too strict a measure of care, especially where there was a fire exemption clause, and in any event reasonable diligence was all that was required. *Louisville & C. R. Co. v. Gidley*, 119 Ala. 523.

### XIII. Contracts of Shipment.

#### (a) WHO MAY MAKE.

##### 1. ON BEHALF OF THE SHIPPER.

The presumption is that the consignee is the owner of the goods in the absence of any evidence on the subject, and is the proper party to sue for their injury or loss, and he or the person delivering the goods to the carrier may make the usual contract of shipment. *Sweet v. Barney*, 23 N. Y. 311; *Price v. Powell*, 3 Comst. 322; *Everett v. Salters*, 15 Wend. 474; *Angell & Carriers*, sec. 497; *Waldron v. Price*, 22 N. Y. 368.

See, *York Company v. Central R. R. Co.*, 3 Wall. 107; *Squire v. N. Y. C. R. R. Co.*, 98 Mass. 239; *Christenson v. American Express Co.*, 15 Minn. 400; *Hunt v. Wyman*, 100 Mass. 198; *Robertson v. National S. Co.*, 139 N. Y. 400.

Plaintiff, a merchant in New York, received from "N. & T. Rochester, an order in writing for certain goods to be sent them by canal." The goods were delivered to defendants, common carriers on the canal, consigned to "N. & T." pursuant to the order. The goods were lost en route. Held, that upon the delivery to the carrier, the

passed absolutely to the consignees, subject only to the right of stoppage *in transitu*, and that plaintiff, consignor, could not maintain an action for their loss. *Krulder v. Ellison*, 47 N. Y. 36.

See *Porter Mfg. Co. v. Edwards*, 29 Hun, 509.

A consignor's agent may stipulate terms for the transportation, and so a cartman has the power to release the carrier, and consignor to a distant consignee is the latter's agent to make stipulation. *Squire v. New York Central Railroad Co.*, 98 Mass. 239; *Christenson v. American Express Co.*, 15 Minn. 270; *Anderson v. Coonley*, 21 Wend. 279; *Jeffrey v. Bigelow*, 13 id. 518; *Nelson v. Hudson River R. Co.*, 48 N. Y. 498.

1 Red. Railways, 22; citing *London v. N. W. R. Co.*, 7 H. & N. 600; *Lewis v. G. W. R. Co.*, 5 id. 867.

An agent employed to ship goods to the owner has authority to make such contract with the common carrier as in the honest exercise of his discretion he sees fit. *Shelton v. The Merchants' Despatch Trans. Co.*, 59 N. Y. 258.

Persons who delivered potatoes for S. & Co., shippers, signed usual shipping bills filled out by defendant's agents. These limited defendant's common-law liability in various particulars. S. & Co. had no knowledge of and did not expressly authorize this; they, however, knew it to be the general custom of railroad companies to require it. In an action for the non-delivery of potatoes and for damages by delay in the delivery of the others, held, that conceding it to have been within the presumed authority to make or accept stipulations or conditions for the reception and carriage of the property, beyond that, so far as it was dependent upon such presumption of authority, the owners were not necessarily bound; that the provisions, so far as they may be otherwise construed, were not applicable to the shipments in question; and, therefore, only the terms and conditions, so far as *reasonable* and applicable to through transportation, were to be deemed within the terms of the contract. *Riley v. N. Y., L. E. & W. R. Co.*, 34 Hun, 97; *Babcock v. L. S. & M. S. Ry. Co.*, 49 N. Y. 491; *Condict v. G. T. Ry. Co.*, 54 id. 500; *Coffin v. N. Y. C. & H. R. R. Co.*, 64 Barb. 379, 56 N. Y. 632; *Bostwick v. Baltimore & O. R. R. Co.*, 45 id. 712; *Germania F. Ins. Co v. M. & C. R. R. Co.*, 72 id. 90; *Guillaume v. General T. Co.*, 100 id. 491; *Swift v. Pacific, &c. Co.*, 106 id. 206; *Park v. Preston*, 108 id. 434.

One of the conditions in the shipping bills was to the effect that no claim for loss or detention shall be allowed unless notice in writing and particulars of the claim be "given to station freight agent at or nearest to the place of delivery within thirty-six hours after the goods, in respect to which said claim is made, are delivered." Held, that this provision was applicable to shipments beyond the terminus of defendant's

railway; but that in view of the nature of the property and of the time specified for damages, the time specified *was unreasonable*; and so, was inapplicable to the shipments in question; and that a failure to give notice was not a bar to a recovery. *Jennings v. Grand Trunk of Canada*, 127 N. Y. 438; *aff'd* 52 Hun, 227.

**From opinion.**—"It is legitimate for a common carrier by contract to require the shipper to provide for a reasonable time within which notice of claim or damage shall be given as a condition of liability and the manner of giving it. *Express Company v. Caldwell*, 21 Wall. 264; *Southern Express Co. v. Nicutt*, 54 Miss. 566; 28 Am. Rep. 385; *Lewis v. Great Western Ry. Co.*, 104 & Norm. 867. In those cases the notices provided for were held to be reasonable, and that question is an open one for consideration. *Westcott v. Adams Express Co.*, 100 N. Y. 542, 551; *Adams Express Co. v. Reagan*, 29 Ind. 21-92 Am. L. 101. But see *So. Ex. Co. v. Caperton*, 44 Ala. 101.

The fact that the consignee of goods is the owner, and as such takes part in the negotiations with the shipper, as to the rate of freight, does not constitute him a shipper; and where the vendor accepts a bill of lading in which he is named as shipper, the acceptance of it constitutes a contract, fixing his relations as such and imposing upon him the obligations arising therefrom which the law has previously determined to be assumed by those entering into such a contract. Action by the consignor to recover demurrage for detention in unloading cargo from the plaintiff's boat. *Van Etten v. Newton*, 134 N. Y. 143.

The shipper's agent may make. *Zimmer v. N. Y. Central R. Co.*, 137 N. Y. 463.

*Belger v. Dinsmore*, 51 N. Y. 166; *Steers v. Steamship Co.*, 57 id. 1.

A vendee and consignee of lumber who authorized vendor to deliver it to the carrier and superintend the shipment, was held bound by the terms of the bill of lading taken by him containing an exemption from liability for loss through perils of the sea. *Donovan v. Standard Oil Co.*, 155 N. Y. 112; *aff'd* s. c., 82 Hun, 614.

A connecting carrier exempting its liability as to acts beyond its line properly delivered the goods to the next carrier. It was not liable because, owing to an arrangement with such next carrier by which the consignee, the goods were held until subsequently rejected by the carrier. *Hams v. Minneapolis & C. R. Co.*, 36 Misc. 181.

Right of action for loss of goods belongs to the consignor where the consignee is merely his agent or factor. *Louisville & C. R. Co. v. Louisville & C. R. Co.*, 113 Ala. 163.

Consignor may sue for damage to goods where consignee refused to accept them. *Savannah & C. R. Co. v. Commercial Guano Co.*, 590.

Right of stoppage in transitu was not a sufficient interest in the goods to enable consignor to sue in tort for their loss or damage. *Northern P. R. Co. v. Lewis*, 89 Ill. App. 30.

In the absence of proof to the contrary, the consignee of property shipped through a common carrier, and not the consignor is to be treated as the owner. *Benjamin v. Levy*, 39 Minn. 11.

Owner was not estopped to sue for damages, where his agent shipped the goods in cars contracted for by another, where the carrier knew of, and did not object to, that manner of shipment. *Atchison &c. R. Co. v. Bryan*, (Tex. Civ. App.) 37 S. W. Rep. 235.

## 2. IN BEHALF OF THE CARRIER.

Agent may contract to carry beyond terminus of line. *Riley v. N. Y. &c. R. R. Co.*, 34 Hun, 97. *Dorr v. N. J. S. Nav. Co.*, 11 N. Y. 490. (See Connecting Carriers, *post* ).

An agent, which a common carrier, an undisclosed principal, holds out as having authority to give shipping rates, was held to have implied power to insert in a bill of lading, a provision for insurance, which was usual at that port, without a declaration of value of the goods. The shipper was not charged with notice, that the agent had no authority to grant the insurance without a declaration, by the fact that a circular issued by the agent stated that insurance was free where the value of goods shipped was stated before sailing. The statement did not imply that insurance could not be made free by stipulation in the bill of lading, nor pretend to limit his general powers among which was the power to give bills of lading and write insurance. *Lowenstein v. Lombard &c. Co.*, 164 N. Y. 324; rev'g s. c., 17 App. Div. 408: distinguishing *Lein-kauf v. Lombard &c. Co.*, 12 App. Div. 302.

A carrier attempting to carry out an unauthorized contract is liable for its negligent performance. *Nashville &c. R. Co. v. Smith*, (Ala.) 31 South. Rep. 481.

A carrier was not liable where its agent, being instructed not to give a reduced rate to shippers without their signing bills of lading containing exemptions, exceeded his authority by himself taking advantage of the rate, as shipper, without signing a bill. *Central &c. R. Co. v. Felton*, 110 Ga. 597.

An agent of a connecting carrier has no implied power to extend the latter's liability after delivery to the carrier with whom it connects, so as to cover future safe delivery. *Illinois &c. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. 618.

Shipper was warranted in relying on the authority of one that, with the knowledge of a carrier, holds itself out publicly in a large city as

the carrier's agent. *St. Louis &c. R. Co. v. Elgin Condensed Milk*, 74 Ill. App. 619; s. c. aff'd, 175 Ill. 557.

Carrier was liable for the negligence of its agent in improperly billing goods. *Chicago &c. R. Co. v. Neimann*, 84 Ill. App. 272.

Carrier was bound by the waiver of verification of a claim, specified in the contract of shipment, by one whom it allowed to hold himself out as its freight claim agent. *Cleveland &c. R. Co. v. Heath*, 22 Ind. 47.

Shipper was not bound by a secret instruction to an agent not to make such an agreement, where it was apparently within his powers to make to deliver a car at a certain time and place. *Stoner v. Chicago &c. R. Co.*, 109 Iowa, 551.

The company ratifies unauthorized contract by acting upon it with knowledge of the facts. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

A local station agent has no implied power, in the absence of express authority, to extend the liability of a carrier beyond its own line by special contract. *Hoffman v. Cumberland Valley R. Co.*, 85 Md. 391.

It is within the general authority of an agent to deliver consignments upon the expiration of the usual period of shipments. *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568; s. c., 44 L. R. A. 415.

It is not within the implied authority of a general manager of a railroad to agree, in consideration of shipment over its line to a third party, to guarantee payments of the purchase price therefor. *Weikle v. St. Louis &c. R. Co.*, 64 Minn. 296.

A station agent authorized to receive and forward freight cannot bind his principal by an act within his apparent authority, where the shipper knows that he is exceeding his actual authority. *Ganley v. Chicago &c. R. Co.*, 72 Mo. App. 34.

Where consignee was under a contract with consignor to pay freight, carrier was estopped from collecting more, after it had rendered a bill negligently understanding the amount, which the consignee paid. Deducted from the purchase price and forwarded the balance to the consignor, a foreign corporation. *Central R. Co. v. McCartney*, (N. J.) 52 Atl. Rep. 575.

A local freight agent held to have no authority to bind his road or carriage beyond its lines and that it could not be implied for any previous conduct. *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp. (Pa.) 401.

Local agent had no implied authority to bind his principal for shipments beyond its own line and none was inferred by his having collected freight on a through contract. *Sutton v. Chicago &c. R. Co.*, 101 D. 111.

It is not within the implied power of a station agent of one place to contract for a shipment from another. Nor is it within the scope of employment of one station agent to inform another of special damages that will accrue through delay so as to charge the carrier with an increased liability therefor. *Missouri &c. R. v. Belcher*, 88 Tex. 549.

It was held not error to exclude a question as to specific instructions to an agent to make no oral contracts of shipment, in the absence of knowledge of them by the shipper, when such contracts were within the scope of his apparent authority. And in such case shipper was under no obligation to inquire as to particular limitations on agent's authority. *San Antonio & R. Co. v. Williams*, (Tex. Civ. App.) 57 S. W. Rep. 883.

A general live stock agent of a railroad company has apparent authority to agree to furnish cars for shipment. *International & R. Co. v. True*, 23 Tex. Civ. App. 523.

Where carriers operated in connection with other carriers each was held to be bound by the representations of the agent of the other, made to induce shipments over any part of the system. *Missouri &c. R. Co. v. Wells*, 24 Tex. Civ. App. 304.

Mistake in underrating merchandise for shipment bound the carrier, where the goods were sent over a different route than that agreed, which compelled the shipper to pay a higher rate. And the carrier cannot set up a violation of the Interstate Commerce Act to avoid the agreement. *Pond-Decker Lumber Co. v. Spencer*, 86 Fed. Rep. 846.

An agent held to have power to agree that his road would bear the expense of caring for stock during a delay owing to a strike, where the shipper was not originally under a duty in regard thereto. *Carstens v. Burleigh*, 20 Wash. 283.

It was within the apparent scope of authority of the agent of a carrier transporting goods into Canada to agree to advance the custom duties. *Waldron v. Canadian P. R. Co.*, 22 Wash. 253.

An agent had authority to contract for carriage from a place not contiguous to his company's tracks, where he and his predecessors had always made it a custom to do so. *Bigelow v. Chicago &c. R. Co.*, 104 Wis. 109.

#### (b). HOW MADE AND WHAT CONSTITUTES.

To the extent that courts permit a modification of the liability of a common carrier, the same may be effected, not by general notice published and posted, nor by mere *ex parte* unaccepted assertion, statement or notice by the carrier, but it may be made at the time the undertaking to carry is perfected by agreement with the shipper, either by express contract or by the terms of shipment demanded by the carrier in the particular instances, so fully and fairly brought to the knowledge of the shipper without his

dissent, that his agreement thereto may be implied, and a contract will be inferred from his acceptance of a bill of lading or shipping receipt, in those states where the statute prohibits such contracts to be made in such manner.\* The carrier cannot compel any modification of his non-law liability.

## 1. FREIGHT.

A common carrier cannot screen himself from liability by not whether brought home to the owner or not. Since the very full and learned discussion of that question in *Hollister v. Nowlen*, 19 Wend. 234, and *Cole v. Goodwin*, id. 251, it has been regarded as settled by mature deliberation, and the conclusion arrived at in those cases has been uniformly acquiesced in and followed. *Camden Co. v. Belknap*, 21 Wend. 354; *Clark v. Faxton*, id. 153; *Alexander v. Greene*, 3 Hill 7 id. 533; *Powell v. Myers*, 26 Wend. 594. These decisions rest on very satisfactory reasons, that the notice was no evidence of assent on the part of the owner, and that he had a right to repose upon the common law liability of the carrier, who could not relieve himself of such liability by any mere act of his own. But when the exception to the common law liability is made in the bill of lading, or receipt given for the goods, and delivered to the agent of the shipper, it must be deemed to have been agreed upon by the parties. *Blossom v. Dodd*, 1 N. Y. 264; *Kirkland v. Dinsmore*, 62 id. 175; *Dorr v. New Jersey State Nav. Co.*, 11 id. 490.

The meaning of this decision and of others, employing similar language is, that carriers cannot limit their liability by public or general notice, published, affixed, or displayed by posting in such manner as might attract the attention of a shipper and passenger. This had been permitted in England until the act of 11 George IV. and 1 William IV. (1830), known as the English Land Carriers' Act (*Hutchinson on Carriers* 230†), which prohibited the same, but did not prohibit special contracts with the carrier. (Id. sec. 232.) A special contract is limited to an express agreement signed by the parties, but includes any implied contract, or an assent to the terms proffered to or demanded of the shipper for his particular shipment. The simple question is whether the shipper assented to the terms, however such assent may have been manifested. By the English Land and Canal Traffic Act of 1854, the carrier was prohibited from limiting his liability as to all articles not mentioned in the carriers' act, unless the contract

\* NOTE.—Contract in one state to carry goods to another, when goods are lost, is governed by the law of the state where loss occurred. *Gray v. Jackson & Co.*, 51 N. H. 9. See also *Texas & C. R. Co. v. Payne*, 1 Tex. Civ. App. 58; *Mexican & C. R. Co. v. Ware*, (Tex. Civ. App.) 60 S. W. Rep. 843; *Pacific Exp. Co. v. Hertzberg*, 17 Tex. Civ. App. 100. When law of place of contract signed only by carrier, no evidence other than mere receipt by the shipper to show his assent, as in *Illinois*. (*Adams Ex. Co. v. Haynes*, 42 Ill. 89; *American Ex. Co. v. Schier*, 55 id. 140; *Illinois Cent. R. Co. v. Frankenberg*, 88 id. 88), and the law of the place where the suit is brought presumes conclusively such assent from the fact of receipt without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought. *Hoadley v. No. Transp. Co.*, 115 Mass. 304.

† NOTE.—The sections in *Hutchinson on Carriers* on this subject are clear and complete.



the court or judges to be just and reasonable, were signed by the shipper on Carriers, sec. 233). The English rule, in this frequent necessitating the shipper's consent to the contract, differs from that usually in America. Although in *Gould v. Hill*, 2 Hill, 623, it was held that could not limit his common law liability by contract or notice, such denying both the manner of doing it and a right to do it at all, was not followed, as will be seen from the decisions.

goods are shipped under a verbal agreement, such agreement inserted in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, and such bill limited the liability of the carrier and expressed on its face that by accepting it, the shipper agreed to its conditions. The shipper's omitting, through inadvertence, to examine the printed bill, do not conclude him from showing what the actual agreement was. *Bostwick v. B. & O. R. R. Co.*, 45 N. Y. 712.

*S. Co.*, 106 N. Y. 206; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418 (bill of lading was delivered after goods were in transit); *Am. Ex. Co. v. Spellman*, 115 U. S. 455; *Wilde v. Trans. Co.*, 47 Iowa, 247; *Louisville R. Co. v. Meyer*, 107 Ky. 7; *Cent. L. J.*, 1877, as to a ticket; *Wilson v. R. Co.*, 21 Gratt. 654. A receipt made when ticket is purchased, *Kent v. R. Co.*, 45 Ohio St. 288; *Rawson v. N. R. Co.*, 48 N. Y. 212; *Guillaume v. Gen. Trans. Co.*, 100 id. 498. If no contract had been made its legal effect was not changed by a receipt given by the consignee's clerk, who delivered the goods at the station and had no authority to modify same. *Filletown v. Grand Trunk R. Co.*, 55 Maine, 462; *Dinsmore*, 111 Mass. 45.

*Leiter v. R. Co.*, 115 U. S. 29; *Pomitt v. R. Co.*, 62 Mo. 527. A receipt limited value of trunk; shipper by accepting assented to it and was bound.

In the absence of fraud, concealment or improper practice, the legal effect of a receipt is that stipulations limiting its common-law liability, contained in a receipt given by such company for freight, were known and assented to by the party receiving it. *Steers v. Liverpool, &c. C. S.*, 107 Ky. 1; *Zimmer v. N. Y. Cent. &c. R. Co.*, 137 id. 460. *Wassman v. Dodd*, 63 Hun, 324.

When a shipper, upon delivery of property to an express company for transportation, receives, without dissent, a receipt, with the understanding that it contains a contract on the part of the company as to the liability in the absence of fraud or imposition, the company has a right to rely on its assent on his part to conditions in the receipt, not unusual and reasonable, limiting its common law liability as carrier; and he is estopped from denying it thereafter to the company's injury. *Collender v. Dinsmore*, 55 N. Y. 200; *Magnin v. Dinsmore*, 56 id. 168; *Hinckley v. Y. C. & H. R. R. Co.*, id. 429.

After a loss, therefore, it is too late for the shipper to object that he omitted to read the receipt, and was ignorant that it contained conditions. *Kirkland v. Dinsmore*, 62 N. Y. 171, rev'g 2 Hun, 1 T. & C., 304, distinguishing *Blossom v. Dodd*, 43 N. Y. 264.

*Morris v. Construction Co.*, 44 Wis. 405; *Jones v. R. Co.*, 89 Ala. 379; *Farnham v. R. Co.*, 55 Penn St. 53; *Snider v. Adams Ex. Co.*, 63 Mo. 376; *Merrill v. Express Co.*, 62 N. H. 514.

Where goods are delivered to a carrier for transportation and before the goods are shipped a bill of lading or receipt is delivered by the shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them.

To take a case out of this general rule, it must appear that before the delivery of the bill of lading the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *The Germania Fire Ins. Co. v. The Memphis & Charleston R. Co.*, 72 N. Y. 90, distinguishing *Bostwick v. The B. & O. R. Co.*, 45 id. 712.

**From opinion.**—"As a general rule, when goods are delivered to a carrier for transportation, and a bill of lading or receipt is delivered to the shipper, he is bound to examine it and ascertain its contents; and if he accepts it without objection, he is bound by its terms, and resort cannot be had to prior parol negotiations to vary them. *Long v. N. Y. Central R. R. Co.*, 50 N. Y. 76. Neither can he set up ignorance of its contents. *Belger v. Dinsmore*, 51 N. Y. 166; *Sturges v. Liverpool & C. S. S. Co.*, 57 id. 1; *Maghee v. C. & A. R. R. Co.*, 45 id. 514."

A bill of lading has a twofold character; first, that of a receipt, and second, that of a contract. *Pollard v. Vinton*, 105 U. S. 7.

The receipt as between the shipper and ship-owner is explainable, but parol evidence is not admissible to vary the terms of that portion constituting the contract. *Parsons on Shipping*, vol. 1, 190, and cases cited.

The acceptance of a bill of lading by the shipper, with knowledge of its contents, makes of that instrument a binding contract, and defines the rights and liabilities of the parties to it. *C., H. & D. & M. R. Co. v. Pontius*, 19 Ohio St. 221; *Germania Fire Ins. Co. v. Memphis & Charleston R. Co.*, 72 N. Y. 90; *Van Ellen v. Newton*, 134 id. 143.

A shipper is limited to an amount not exceeding the valuation stated in the contract made with the carrier, in the event of loss or injury to goods. It is incumbent upon a shipper to acquaint himself with the contents of a contract executed by him. *Zimmer v. N. Y. C. & H. R. Co.*, 137 N. Y. 460.

tion.—“Cases where parties, proposing to have articles of property by a common carrier, deliberately enter into some necessary contract the transportation, differ materially from those cases of travelers who for trunks or other articles of baggage, to an agent of some express or company, and receive at the moment some paper, which, as it has been said simply to a voucher enabling them to follow and identify their goods.” *Madan v. Sherard*, 73 N. Y. 329.”

It was held to have acquiesced in the terms of a bill of lading which limited the carrier's liability where, though the original shippers, from whom the goods were purchased after shipment, did not know of its contents the plaintiff was aware thereof and with that knowledge gave a receipt concerning the disposition of the goods. *North British & Central Vermont R. Co.*, 9 App. Div. 4; s. c. aff'd, 158 N. Y.

The issuance of a receipt, containing a limitation as to the value of the goods, stated, binds the shipper under a statute providing that one who signs a written contract with knowledge of its terms assents to the value as to valuation therein contained. *Michalitschke v. Wells*, 18 Cal. 683.

A carrier cannot by any act of his own, to which the other party does not assent, limit his liability; the parties may make an express contract for that purpose, and if they both have a *fair opportunity* to understand the terms of the contract entered into, they are bound by it. *Matthews*, 39 Ga. 633.

A carrier cannot in a receipt limiting liability when no value was stated as to the goods, bind on a shipper, unless he had expressly assented thereto by statute. *Wood v. Southern Ex. Co.*, 95 Ga. 451.

A carrier cannot limit its liability by a mere notice, not amounting to a contract. *Central & C. R. Co. v. Lippman*, 110 Ga. 665.

Where the agreed valuation was an arbitrary preadjustment of damages as honestly made on probable valuation, was for the jury. *R. Co. v. Horner*, (Ga.) 41 S. E. Rep. 649.

The common law rule in Illinois, where the statute has not changed it, is that a shipper is bound by the terms of receipt if he takes it with knowledge. *Adams Ex. Co. v. Haynes*, 42 Ill. 89.

*No. W. R. Co. v. Church*, 12 Ill. App. 17. *Chicago & R. Co. v. Mont*, 175

A carrier can limit his liability but not by contract expressed in receipt. *& C. R. Co. v. Chapman*, 133 Ill. 96.

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Illinois R. S. 1874, sec. 83, chap. 114 (and as to railroads, sec. 71) it is provided that when property is received by a common carrier to be transported from one place to another, within the State, it shall not be lawful for such carrier to limit his common law liability safely to the value of the property at the place to which the same is to be transported by any stipulation or limitation inserted in the receipt for such property.

Restrictions on a carrier's liability did not bind a shipper who did not accept the bill of lading, while understanding and assent to its provisions. *Chicago &c. R. Co. v. Davis*, 159 Ill. 53.

Restriction of a carrier's liability to its own line, contained in receipt delivered on acceptance of the goods for carriage consigned to another line, does not constitute a valid exemption. Such limitation may be accomplished by contract through the assent to them, when inserted in a bill of lading. Mere acceptance of the bill does not constitute assent. But it is a question of fact for the jury. *Chicago &c. R. Co. v. Simon*, 160 Ill. 648.

Carrier can not bind a shipper to the limitations of its liability contained in a bill of lading without the latter's signature or proof of positive assent thereto. *Illinois C. R. Co. v. Carter*, 165 Ill. 570; 131 Ill. R. A. 527; rev'g s. c., 62 Ill. App. 618.

To be bound, shipper must assent to the contract of limitation. *Chicago &c. R. Co. v. Calumet Stock Farm*, 194 Ill. 9; aff'g s. c., 96 Ill. App. 113.

Free transportation to care for stock construed not a consideration for an exemption from liability for loss by fire, but was a consideration for the assumption of the care of the stock by the shipper. *Baltimore & O. R. Co. v. Crawford*, 65 Ill. App. 113.

Assumption of the duty of feeding and watering stock by the carrier, and limitation of company's liability therefor was valid, though the contract was not signed until it had been nearly performed. *Illinois C. R. Co. v. Patterson*, 69 Ill. App. 438.

A shipper, entitled by his original contract to free transportation, who looked after his cattle, was not bound by the provisions of a subsequently executed hurriedly and under protest to gain the right secured by the original contract. *Wabash R. Co. v. Lannum*, 71 Ill. App. 84.

Subsequently issued bills of lading were held to be mere evidence of dates and quantities of shipment without effect in varying a prior contract for shipment. *St. Louis &c. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; s. c. aff'd, 175 Ill. 557.

Mere receipt of bill of lading does not show assent to conditions therein. Burden is on carrier to establish such assent. *Elgin Condensed Milk Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

Issuing bill of lading after loss with exemptions was ineffective to limit liability. *Cleveland &c. R. Co. v. Wilson*, 99 Ill. App. 367.

A reduced rate was sufficient consideration to support a limitation of liability, and the shipping contract was valid, though signed after the goods had started in transit, where that act was the concluding part of an entire transaction. *Stewart v. Cleveland &c. R. Co.*, 100 Ill. App. 218.

By shipper accepting and acting upon bill of lading, his knowledge of its stipulations, limiting carrier's liability to his own line, will be binding. *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 181.

Citing *McMillan v. M. S. & C. R. Co.*, 16 Mich. 80; *Kallman v. U. S. Ex. Co.*, 3 Kan. 205; *Hopkins v. Westcott*, 7 Am. Law. Reg. (N. S.) 533, and not approving Ill. rule.

Having concluded a verbal contract for the shipment of goods with no mention of limitation of liability, shipper put the receipt containing limitations of the carrier's liability in his pocket without looking at them. He was not bound thereby. *Stoner v. Chicago & C. R. Co.*, 109 Iowa, 551.

Though a carrier offers two rates, one without and a lesser one with a limitation of its liability, the shipper is not bound by the acceptance of the latter, where he has no freedom of choice, but is coerced into it. *Atchison & C. R. Co. v. Mason*, 4 Kan. App. 391.

Where shipper had been accustomed to ship subject to an exemption as to loss beyond the carrier's own line, he must be taken to have contracted in reference thereto though the specific contract was not read over to him. *Richmond & C. R. Co. v. Richardson*, (Ky.) 66 S. W. Rep. 1035.

Where an invoice of merchandise stated that it was at the risk of the bailee from fire or otherwise until returned, there was an implied promise on part of bailee to assume such risk. *Heinstein v. Watts*, 84 Me. 139.

Evidence is not admissible, in absence of fraud, to show that consignor did not read terms of bill of lading delivered to him by the carrier. *Rice v. Dwight Mfg. Co.*, 2 Cush. 80, 87.

Wharton on Negligence, § 586, citing, *Austin v. R. Co.*, 16 Q. B. 600; *Carr v. R. Co.*, 7 Exch. 767; *MacManus v. R. Co.*, 4 H. & N. 327; *Behrens v. R. Co.*, 6 id. 366; *Snyder v. Ex. Co.*, 63 Mo. 76; *Mulligan v. Ill. Cent. R. Co.*, 36 Iowa, 18; *Kallman v. U. S. Ex. Co.*, 2 Kan. 205.

The receipt, without dissent, of a bill of lading by which the carrier stipulates against liability for loss by fire, discharges carrier from such liability not caused by his own negligence. *Grace v. Adams*, 100 Mass. 508; *Hoadley v. No. Trans. Co.*, 115 id. 307.

He is presumed to understand its terms. *Hoadley v. No. Trans. Co.*, 115 Mass. 307, citing,

*Lewis v. Gt. West. R. Co.*, 5 H. & N. 867; *Squire v. N. Y. Cent. R. Co.*, 98 Mass. 239; distinguishing *Brown v. Eastern R. Co.*, 11 Cush. 97, and *Malone v. Boston & C. R. Co.* 12 Gray, 388, where limitation was in form of a notice printed on back of passenger ticket, and there was no presumption of assent by person at time of receiving the ticket; also, distinguishing *Buckland v. Adams Ex. Co.*, 97 Mass. 124, where the shipper employed a workman to deliver the package to the carrier, and the limitation was in the receipt delivered to him, contrary to the former usage between the shipper and carrier; *Perry v. Thompson*, 98 Mass. 249, where,

in the previous dealings of the parties, property had been received and carried without any notice relating to the carrier's liability, and from fact that parts of notice were so obscured by revenue stamp as not to be read intelligibly.

A contract and release, executed by a shipper months after the shipment was unenforceable, where it was not supported by a new consideration. *Hendrick v. Boston &c. R. Co.*, 170 Mass. 44.

Shipper had previously sent goods without expressed valuation, but was aware of increased rate for goods above \$50 in value, and, on this occasion, saw the receipt containing the limitation as to value unless expressed, and corrected an error as to date. Held, evidence of knowledge and assent to the limitation. *Graves v. Adams Ex. Co.*, 176 Mich. 280.

Under a statute forbidding railroad companies from limiting their liability as carriers, such liability may nevertheless be limited by special contract. But a company cannot refuse to carry unless a shipper enters into such an agreement. If not imposed upon or misled, a shipper is bound by limitations in a bill of lading which he accepts, though he does not read it and does not know its contents. The consignee is bound by the terms made by his consignor.\* *McMillan v. M. S. & N. I. R. Co.*, 179 Mich. 79.

**From opinion.**—COOLEY, J. "There are some matters in respect to which a carrier may qualify his liability by mere notice. Mr. Greenleaf says: 'It is well settled that a common carrier may qualify his liability by a general notice to all who may employ him, of any reasonable requisition to be observed on his part, in regard to the manner of delivery and entry of parcels, and the information to be given to him of their contents, the rates of freight, and the like; for example, that he will not be responsible for goods above a certain sum, unless they are entered as such, and paid for accordingly.' 2 Greenl. Ev., sec. 235; *Western Transportation Co. v. Newhall*, 24 Ill. 466. These are but the reasonable regulations which every man should be allowed to establish for his business to insure regularity and promptness, and to properly inform him of the responsibility he assumes. And it has been held that notice derived from the usage of the carrier may determine the manner in which he is authorized to make delivery. *Farmers & Mechanics' Bank v. Champlain Trans. Co.*, 16 Vt. 52; same case, 24 id. 131, and 23 id. 186. But beyond the establishment of such rules, the effect of a mere notice cannot extend. Subject to reasonable regulations, every shipper has a right to insist that his property, if of such description as the carrier assumes to convey, shall be transported subject to the common-law liability.

\* NOTE.—This case was decided in 1867. By sec. 5239 of Michigan Statutes (C. L. 1867 ch. 187) it is provided that "no railroad company shall be permitted to change or limit its common law liability as a common carrier, by any contract, or in any other manner, except by a written contract, none of which shall be printed, which shall be signed by the owner or shipper of the goods or property to be carried. And by §5239, providing for the incorporation of railroads, it is provided that: "Any railroad company organized under this act receiving freight for transportation, shall be entitled to the rights and subject to the liabilities of common carriers except as herein otherwise provided; but no such company shall be suffered to lessen or abridge its common law liability as a common carrier, unless by an agreement to be signed by both parties.

carrier has no right to refuse goods offered for carriage at the place, on tender of the usual and reasonable compensation, unless he assents to his receiving them under a reduced liability; and he is to be liable on his receiving the goods under all the risks and responsibilities which are annexed to his employment.\*

Railroads, 416. See *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Bennett*, 251; *Jones v. Voorhees*, 10 Ohio, 145; *Bennett v. Dutton*, 10 N. J. Steam Navigation Co. v. Merchants' Bank, 6 How. 382; *Moses v. Maine R. R. Co.*, 24 N. H. 71; *Kimball v. Rutland & Burlington R. R. Co.*, 3 Vt. 256; *Slocum v. Fairchild*, 7 Hill, 292; *Dorr v. N. J. Steam Navigation Co.*, 4 Sandf. 136; and 11 N. Y. 485; *Michigan Central R. R. Co. v. Chicago & North Western R. R. Co.*, 12 Mich. 243. The fact that a restrictive notice is shown to have been received or seen by the owner of the goods will not raise a presumption of assent to its terms, since it is as reasonable to infer that he intends to receive the goods on his own terms as that he assents to their qualification, and the burden of proof is on the carrier to establish the contract qualifying his liability, if he wishes to avail himself of it. *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How. 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

ence of such a contract in the present case consists, *first*, of the decision of doing business; *second*, of what are called in the case bills of lading which contain the supposed limitations. It is admitted by the defendants that all the contracts of affreightment, the instructions to the agents, the rules posted in all the depots and station houses of defendants for the last ten years, have contained clauses exempting them from liability for loss or damage, and providing that when goods are in the depot awaiting delivery, the company will be liable as warehousemen only, and not as carriers. That plaintiffs have been accustomed to do business with defendants, and have sent goods over their road under bills of lading of this description, is no answer.

There are several reasons why knowledge in plaintiffs of defendant's usage of restrictive contracts cannot control the present case. In the first place, it is no answer to say that such usage can in no case of the kind be allowed force beyond that which is given to notice of an intention on the part of the carrier to receive the goods, brought home to the party in any other mode: and we have no doubt that the force of such notices is exceedingly circumscribed. And it is not seriously claimed that the plaintiffs, by accepting restrictive contracts, have thereby debarred themselves from insisting upon their rights thereafter. In the second place, the defendants have no power to establish a usage restricting their liability; as that would come in conflict with the clause in the general railroad law heretofore quoted. In the third place, if this were otherwise, the usage would be irrelevant to the case, since the proof relates to dealings between the parties to this contract, and to usages understood by the plaintiffs here, while the contracts in question were in each instance made with consignor at a distance, and with cases by other railroad companies, whose usages do not seem to be

\* See, also, *Wallace v. Matthews*, 39 Ga. 633; *Chicago, &c., R. Co. v. Chapman*, 135 Ill. 96. See, also, *Gaines v. Union Trans. &c. Co.*, 26 Ohio St. 418; *Graham v. Davis*, 4 id. 362; *U. S. v. Mann*, 28 Ohio St. 144; *Verner v. Sweitzer*, 32 Penn. St. 208; *Railroad Co. v. Barrett*, 32

"It remains to be seen whether the conditions embodied in the bills of lading are to be treated as a part of the contract for transportation and to be regarded as assented to by the consignors, notwithstanding they may not have read them."

"A bill of lading proper is the written acknowledgement of the master of a vessel that he has received specified goods from the shipper, to be conveyed on the vessel therein expressed to their destination, and there delivered to the party therein designated. Abbott on Shipping, 322. It constitutes the contract between the parties in respect to the transportation; and is the measure of the rights and liabilities, unless where fraud or mistake can be shown. Redf. on Railways, 307-309, and notes. Ang. on Carriers, sec. 223. It has acquired the usage a negotiable character, and the carrier may be estopped, as against an indorsee for value, from showing mistakes in giving it. Redf. on Railways, 309. Whether the contracts which railroad companies are accustomed to give on receipt of goods for transportation, and which are usually called by the name, are subject to all the same incidents as the bills of lading proper, we do not now consider; but it will not be disputed that they fix the rights and liabilities of the parties when their terms have been agreed upon, and it is, *I think, the weight of authority, and certainly the rule in this state, that the carriers stipulate in them for a limitation of his common-law liability.* Michigan Central R. R. Co. v. Hale, 6 Mich. 243.

"Bills of lading are signed by the carrier only, and where a contract is signed only by one party, *the evidence of assent to its terms by the other party consists usually in his receiving and acting upon it.* This is the case with promissory notes, and with various classes of familiar contracts, and the evidence of assent derived from the acceptance of the contract, without objection, is commonly conclusive. I do not perceive that bills of lading stand upon any different footing. If the carrier should cause limitations upon his liability to be inserted in the contract in such a manner as not to attract the consignor's attention, *the question of assent might fairly be considered an open one,* (Brown v. Eastern R. R. Co., 11 Cush. 97.); and if delivery of the bill of lading was made to the consignor under such circumstances as to lead him to suppose it to be something else—for instance, a mere receipt for money—it could not be held binding upon him as a contract, inasmuch as it had never been delivered to and accepted by him. King v. Woodbridge, 34 Vt. 505. But, except in these and similar cases, *it cannot become a material question whether the consignor read the bill of lading or not.* The ground upon which it is claimed that this becomes important seems to be that parties generally receive these contracts without reading them, or inquiring into their terms, taking whatever the railroad companies see fit to give them, and that they are thus liable to be imposed upon and defrauded. If the courts interfere to protect them. Or if we may be allowed to state the thing in different words, as everybody is negligent in these matters, and will not give the necessary attention to their contracts that is essential to the protection of their interests, the courts must interfere to set them aside wherever extrinsic evidence of actual assent is not produced. If the courts possess any such power, and it is expedient to exercise it, it may be important to consider, at the same time, to what whither it will lead us. Bills of lading are not the only contracts that are received in this careless way. Deeds, mortgages, and bills of sale are even more often given and received without being read by the parties though they may contain provisions which have not been the subject of special negotiation. Policies of insurance, which more nearly resemble the instruments now in question, are more often received without examination. In the absence of fraud, accident,



mistake, no one ever supposed it was competent for the courts to reform such instruments in behalf of a party who would not inform himself of their purport. Nothing would be certain or reliable in business transactions if contracts were liable to be set aside on grounds like these. The law does not assume to be the guardian of parties *compotes mentes* in respect to the lawful contracts which they may make, but it proceeds upon the idea that where fraud has not been practiced, and mistake has not intervened, the general interests of the community are best subserved by leaving every man to the protection of his own observation and diligence.

It is argued that the consignor had no occasion to examine the bill of lading, because he had a right to suppose it recognized the common-law liability. But the common law does not establish the rates of freight or the place of delivery; and for stipulations respecting these, at least, every man must examine his bill of lading. Moreover, we cannot overlook the facts that a large proportion of these instruments are issued with restrictive clauses, and that carriers arrange their tariffs of freights in the expectation that they will be accepted. These facts are so well understood that a person exercising ordinary diligence in his own affairs, would not be likely to accept one of these instruments without examination, if he expected to hold the carrier to the liability which would rest upon him in the absence of special contract.

*"I do not find any case in which a court has assumed to set aside such a contract on the ground that the party had failed to read it. An exemption from liability from losses arising from specified causes, when embodied in the bill of lading, has been frequently recognized as a part of the contract, though it did not distinctly appear to have been brought to the consignor's notice. Davidson v. Graham, 2 Ohio, N. S. 131; Parsons v. Monteath, 13 Barb. 353; York Co. v. Central R. R. Co., 3 Wall. 107; Dorr v. N. J. Steam Navigation Co., 11 N. Y. 491; and in the case last referred to, it is said that the exemption, when embodied in the bill of lading, must be deemed to have been assented to by the parties. The same presumption would seem to have been acted upon in Moore v. Evans, 14 Barb. 524; Kallman v. Ex. Co., 3 Kan. 205, and Whitesides v. Thurlkill, 20 Miss. 599; and it is in accordance with the general rule applicable to written contracts."*

Acceptance of a bill of lading containing exemptions, without objection or insistence upon their omission, bound the shipper thereto. *Smith v. American Ex. Co.*, 108 Mich. 572.

A shipper's verbal contract was not varied by delivery to his clerk of a bill of lading which was never brought to his attention. *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568; s. c., 44 L. R. A. 415.

Where plaintiff voluntarily signed a bill of lading, which contained stipulations that were lawful, he cannot defeat it on the ground that it was signed without reading and had not his assent. *Hengstler v. Flint &c. R. Co.*, 125 Mich. 530.

In the absence of fraud or deceit, one signing a bill of lading is conclusively presumed to know its contents; but a limitation of liability as to an agreed valuation was not valid, where it was not made in consideration of reduced rates. *Kellerman v. Kansas City &c. R. Co.*, 136 Mo. 177; affg s. c., 68 Mo. App. 255; *Richardson v. Chicago &c. R. Co.*, 149 Mo. 311.

Where the rate exacted was the regular rate, the contract was with consideration and unenforceable and the fact that the shipper had signed the contract to get the rate was no evidence that it was not the regular rate. *Ward v. Missouri &c. R. Co.*, 158 Mo. 226.

Shipper is bound by the terms of the contract signed by him, though he failed to read it, unless there was fraud, mistake or duress, and a reduction of rates is a sufficient consideration to support a limitation of common law liability. *Wyrick v. Missouri R. Co.*, 74 Mo. App.

Recital of the fact of a reduced rate in consideration of a limitation of liability is only *prima facie* evidence of the fact. *Bowring v. Wabash R. Co.*, 77 Mo. App. 250.

Special rates was sufficient consideration to support a limitation of liability for delays of live stock to the extra expense for food and water. *Vaughn v. Wabash R. Co.*, 78 Mo. App. 639.

Bill of lading contained an agreed valuation far below actual value without offering in exchange a reduction of rate or an additional freight. The limitation was without consideration, unreasonable and void. *Gardner v. Southern R. Co.*, 127 N. C. 293.

See, also, *Hinkle v. Railway Co.*, 126 N. C. 932.

A bill of lading signed by company and accepted and acquiesced in by the consignor is binding upon the latter, although not signed by him, and terms and conditions of contract expressed therein cannot be contradicted by proof. *Gaines v. Union Trans. & Ins. Co.*, 28 Oh. St. 411.

Citing *C. H. D. R. Co. v. Pontius &c. R. Co.*, 19 Oh. St. 222.

The assent of the shipper or owner of goods to conditions limiting common-law liability, is not to be *implied* or *presumed*, but in each case of an action for a loss the assent must be shown by competent evidence as in other cases of contracts. As the carrier is bound to receive and transport all goods offered for a reasonable compensation, subject to the responsibility incident to the employment, the presumption is, in the absence of proof sufficient to remove it and to fix a different liability, that the shipper intended to insist on his common law right. *New York v. Merchant Bank*, 6 How. U. S. 344; *Graham v. Davis*, 4 Ohio 376; *Adams Ex. v. Noch*, 2 Duval, 563; *Railroad v. Man. Co.*, 16 Vt. 329.

In each case the question is, what are the terms of the contract of shipment? Are they such as the law prescribes, or such as the parties have agreed to? This being a question of fact, usage or custom cannot be set up to absolve the carrier from his ordinary duties, which pertain to his policy, his general undertaking, or his special promise may have bound him to do. *Cox v. Hiesley*, 19 Penn. St. 243; *McMasters v. Penn. R. Co.*, 69 Penn. St. 374; *The Sultana v. Chapman*, 5 Wis. 454; *Co.*

0 Ala. 608; Schouler on Bail. 442; *Railroad Co. v. Barrett*, 448.

of plaintiff's agent, on delivery of goods to carrier, received  
ter dray tickets reading "to be exchanged for the usual bill  
the company, notice of the terms of which is hereby admitted,  
property is received subject to all the provisions limiting lia-  
in contained," and nothing further was done. Such accept-  
draymen, in the absence of actual knowledge by plaintiff or  
did not bind the plaintiff to an assent to the limitations speci-  
v. *Great Western Despatch*, 2 Oh. C. D. 22.

Pittsburg &c. R. Co. v. Blakemore, 1 Oh. D. 26.

f shipper to notice valid limitations of a carrier's liability  
lading accepted by him, was not sufficient to invalidate its  
vens v. *Lake Shore &c. R. Co.*, 20 Oh. C. C. 41; s. c., 11  
68.

l notice of limitation must be such as amounts to actual  
nown to have been so conspicuous that the party sought to be  
t could not have failed to discover it without gross negligence.  
ing the general object on a check in large letters, but stating  
ion in small ones, is not sufficient. *Verner v. Sweitzer*, 32

y on Bailm. sec. 558; Angell on Carr. sec. 247-9; 2 Greenl. Ev., sec.  
aux v. Leech, 6 Harris, 232-3.

receipt, exchangeable for and subject to the regular bill of  
therein expressed to constitute a contract upon its acceptance,  
ereof, though not delivered until after the goods had started  
*Goodman v. Merchant's &c. Co.*, 3 Super. Ct. (Pa.) 282.

of a carrier was not limited by the delivery of a bill of  
aining limitations after transportation had begun. *Illinois*  
*Craig*, 102 Tenn. 298.

from liability for past negligence of carrier without consider-  
oid. *San Antonio &c. R. Co. v. Barnett*, 12 Tex. Civ. App.

f liability, in a release, for failure to furnish cars, of a re-  
as a consideration therefor, did not bind the shipper where  
o actual reduction made. *Missouri &c. R. Co. v. Darlington*,  
App.) 40 S. W. Rep. 550.

hipper, relying on an oral contract for shipment at a given  
d his goods, he can not be compelled to execute a written  
r an increased rate or a decreased liability, and if executed  
of starting because agent refuses to transport unless it was  
uress avoids it. In any event gift of a free pass could not

constitute a consideration for such limitations, as it was issued and to enable shipper to care for his cattle. *Texas &c. R. Co.* 19 Tex. Civ. App. 235.

See, also, *San Antonio &c. R. Co. v. Wright*, 20 id. 136.

A verbal contract of shipment was not varied by signing contract, after the goods had started and the freight was paid, reading it. *Galveston &c. R. Co. v. Botts*, 22 Tex. Civ. App.

Carrier sought to introduce a written contract limiting its liability on its own line, which the shipper claimed was without consideration. The question of failure of consideration was properly submitted to the jury. *San Antonio &c. R. Co. v. Botts*, (Tex. Civ. App.) 57 S. W. R.

Shipper was not permitted to avoid the limitations contained in the bill of lading, though signed in haste by his agent without reading it. Subsequent to a verbal contract of shipment, where he knew that he was to sign such contracts containing such stipulations. *Ft. Worth &c. R. Co. v. Wright*, 24 Tex. Civ. App. 291.

Although a common carrier may limit his common law liability by a special contract assented to by the consignor of the goods, and a general notice printed on the back of a receipt does not amount to a contract, though the receipt with such notice on it may have been assented to by the consignor without dissent. *Railroad Co. v. Manufacturers* 16 Wall. 318.

*Elmore v. Sands*, 54 N. Y. 512; *Blossom v. Dodd*, 43 id. 264; opinion in *Rawson v. R. Co.*, 48 id. 212; opinion *supra*; *Nevins v. Steamship Co.* 225; *Wilson v. R. Co.*, 21 Gratt. 654.

**From opinion.**—"In the *New Jersey Steam Navigation Company v. Merchants' Bank* (6 How. 344), and *York Company v. Central Railroad* (107), speaking of the right of the carrier to restrict his obligation by a special agreement, the judge said: 'It by no means follows that this can be the act of his own. The carrier is in the exercise of a sort of public office, and he should not be permitted to exonerate himself without the assent of the public concerned. And this is not to be implied or inferred from a general notice publicly limiting his obligation, which may, or may not, be assented to. The carrier is bound to receive and carry all the goods offered for transportation, subject to the responsibilities incident to his employment, and is liable to an action for refusal. If any implication is to be indulged from the delivery of goods under the general notice, it is as strong that the owner intended to limit his rights and the duties of the carrier, as it is that he assented to the limitation. The burden of proof lies on the carrier, and nothing short of a stipulation by parol or in writing should be permitted to discharge the carrier from the duties which the law has annexed to his employment.'"

See *Bank of K. v. Adams Ex. Co.*, 93 U. S. 174.

Limitation of liability to a stated valuation, unless otherwise provided, is valid, and binding, though made in the form of a notice printed on the bill of lading.

the back of a bill of lading, with a reference thereto on the face. *Cel-deron v. Atlas S. S. Co.*, 69 Fed. Rep. 574.

Acceptance of a bill of lading without signing is sufficient evidence of assent to its terms. *The Henry B. Hyde*, 82 Fed. Rep. 681.

A clause limiting carrier's liability stamped in red ink across one end of a shipping receipt at right angles to the body of the receipt, which was in black ink, held, not part of the contract unless brought within the shipper's knowledge and assent, though he signed the receipt. *New York &c. R. Co. v. Sayles*, 87 Fed. Rep. 444.

Limitation of liability was not effectual, where it was not based on any consideration whatever. *Berry v. West Virginia &c. R. Co.*, 44 W. Va. 538.

The presumption of assent of the shipper to the terms of a bill of lading raised by delivery to and acceptance thereof by him is not overcome, in the absence of fraud or deceit, by evidence of his failure to read it. And evidence that in many cases the same rate was charged when no bill of lading was issued, does not overcome the presumption of consideration for a special contract contained in the bill of lading. *Schaller v. Chicago &c. R. Co.*, 97 Wis. 31.

## 2. BAGGAGE.\*

Passenger in a railroad car, dimly lighted by a single light at one end, delivered two baggage checks to an express messenger and received in return a card or receipt on which the numbers of the checks were entered, and which also contained an agreement below the receipt and separated therefrom by a line drawn under it, limiting the liability of the company, printed in much smaller type than the rest of the card or receipt. It was not read by the passenger, and was in fact illegible where he was sitting. The card or ticket was not signed by any one, and did not appear like a contract, and would not from its general appearance be taken for anything more than a token or check, denoting the number of the baggage checks received, to be used for the identification of the baggage on its delivery, and Judge Church, in the conclusion of his opinion, says that no contract was proved:

1st. Because it was obscurely printed. (See *Verner v. Sweitzer*, 32 Penn. St. 208.)

2d. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper was a contract, and

3d. Because the circumstances attending the delivery of the card re-

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\* Note.—For other cases concerning baggage not connected with limitation of liability therefore see "Passengers," post p. 607.

pelled the idea that the plaintiff had such knowledge or assented to the terms of the alleged contract. *Blossom v. Dodd*, 43 N. Y. 264.

**From opinion.**—"This paper is subject to the criticism made by Lord borough, in *Butler v. Heane* (2 Camp. 415), in which he said that 'it attention to everything that was attractive, and concealed what was calculated to repel customers;' and added: 'If a common carrier is to be allowed to his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it.' \* \* \* \* In *Brown v. E. R.* (11 Cush. 97), where the limitation was printed on the back of a passenger ticket, the court say: 'The party receiving it might well suppose that it was a check, signifying that the party had paid his passage to the place indicated by the ticket.' In cases of *Prentice v. Decker*, (49 Barb. 21), and *Limbur v. Westcott*, (Id. 283), limitations were claimed upon the delivery of similar tickets by another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained such limitations. A different construction was put upon the delivery of a similar card, in *Hopkins v. Westcott* (6 Blatchf. R. 64); but I infer that the judge who delivered the opinion intended to decide that something short of a printed contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a ticket containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise a presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of *Grace v. Adams* (100 Mass. 560), relied upon by the defendant's counsel, decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from liability for loss by fire; and the court held that he knew the receipt contained the conditions upon which the money was to be carried, and was, therefore, presumed to have assented to them, although he did not read the paper. The court say: 'It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading.' So, in *Van Goll v. The S. E. R. Co.* (Eng. Com. Law R. 75), the same principle was decided. Willes, J., said: 'Assuming that the plaintiff did not read the terms of the condition, it is evident that he knew they were there.' Keating, J., said: 'It was incumbent on the company to show that such was the contract.' \* \* 'I think there was evidence that the plaintiff assented to those terms.'"

The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the ticket issued by it, stating the terms upon which baggage will be carried.

If, however, the passenger's attention is called to it when purchasing his ticket, or if he knew of it when he purchased, the law will presume, in the absence of any objection upon his part, that he assented to the terms.

The contract is made, and rights and duties of the parties are fixed, when the ticket is purchased. A discovery by the passenger of the notice after he had entered upon his journey does not affect the contract. *Rawson v. The Pennsylvania R. Co.*, 48 N. Y. 212.

**Opinion.**—"The question to be considered is, whether the matter printed on the face of the railroad ticket limited the liability of the defendant; and if not, is now too well settled to admit of dispute. *Blossom v. Dodd*, 43 N. Y. 401. The words thus printed do not purport to embody the contract between the carrier and the passenger. They are mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed on the face of the ticket than if they had been printed on the back of the ticket on a separate piece of paper posted up at the ticket office; and hence it is clearly within the rule that a carrier cannot limit his liability by a notice which he can do so only by express contract.

It may, however, be admitted, that if the railroad agent had called plaintiff's attention to this language, when he sold the ticket and took her money, or if it had been shown that she knew of this language when she paid her money and received the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed. But here she testified that she did not read this language, and there is no proof that she received the ticket under such circumstances that the law will presume that she must have known of the language, and assented to the terms. It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, reads the language printed upon it, and it would be equally unreasonable to presume that a passenger must take notice that the language upon his ticket constitutes a contract, or in any way limits the carrier's common-law liability.

The ticket does not generally contain any contract, and is not intended to. It is merely a token or voucher adopted for convenience to show that the passenger has paid for his fare from one place to another.

The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights."

The language on a ticket, signed by defendant's agent, that the defendant should be liable only for gross negligence, and then only to the extent of fifty dollars (\$50), unless a bill of lading were signed therefor, covering the articles, and that the money and jewels were at the owner's risk, if the trunk was not delivered or accounted for and the defendant was negligent and liable to the extent of fifty dollars (\$50). *Steers v. Pool, N. Y. & H. R. S. Co.*, 57 N. Y. 1. rev'g judg't for pl'ff.

When a traveler, on delivery of baggage to a local express company, receives a paper, which, from the circumstances of the transaction, he is entitled to regard simply as a receipt or voucher, to enable him to identify his property, and no notice is given to him that it contains the terms of a special contract, or is intended to subserve any purpose other than as a voucher, his omission to read the paper is not

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*per se* negligence, and he is not, as a matter of law, bound by its terms. *Madan v. Sherard*, 73 N. Y. 329, aff'g judg't for pl'ff.

The question whether, in a particular case, the party receiving a receipt accepted it with notice of its contents or with notice that it contained the terms of a special contract, so as to require him to acquiesce in itself with its contents, is one of evidence to be determined by the jury.

Defendant's agent came into a railroad car, in which plaintiff was traveling, and called for baggage; he received the check for plaintiff's trunk, with directions as to the delivery, and marked on a blank receipt the date, number of check and place of delivery, which he handed to plaintiff, without anything being said as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have seen the receipt; without looking at or reading it, he put it in his pocket. The receipt was marked upon the margin "domestic bill of lading," and purported to be a contract relieving defendant from, or limiting his liability in certain specified cases, and among others limiting its liability to save in case of a special contract, to \$100. The court refused to charge as a matter of law, that the delivery of the receipt created a contract for the carriage of the trunk under its terms, and limited defendant's liability to the amount specified, but submitted the question to the jury. There was no error; that defendant, in order to relieve itself from full liability, was bound to establish a contract upon the special terms contained in the receipt; that no such contract arose, as a matter of law, from the acceptance of the receipt under the circumstances.

Plaintiff, a passenger from Europe, able to read English, met the agent of the defendant on an open pier, in daylight, and delivered to him his trunk, received a receipt therefor and thereupon delivered the receipt to her brother, and neither of them objected to its terms, which limited the liability of the company to \$100, unless there was a special agreement in writing. The plaintiff was entitled to recover the actual amount of the damage to the contents of the trunk through the defendant's negligence, without limit. The burden was upon the defendant to show that the passenger assented to the terms of the receipt, which was not shown. *Grossman v. Dodd &c.*, 63 Hun, 324; aff'g judg't for pl'ff; aff'd. N. Y. 599.

**From opinion.**—"As stated in *Madan v. Sherard* (73 N. Y. 329), when a traveler, on delivery of baggage to a local express company, receives a receipt, which, from the circumstances of the transaction, he has a right to regard as a receipt or voucher to enable him to follow and identify his property, and notice is given to him that it embodies the terms of a special contract; and intended to subserve any other purpose than a voucher, his omission to read the paper is not *per se* negligence and he is not, as a matter of law, bound by its terms."



The question whether, in a particular case, the party receiving such a receipt accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so to require him to acquaint himself with its contents, is one of evidence to be determined by the jury. It will thus be seen that no such contract arises, as a matter of law, from the acceptance of the receipt, but the defendant, in order to relieve itself from full liability, is bound to establish a contract. *Sunderland v. Westcott*, 40 How. Pr. 469; *Blossom v. Dodd*, 43 N. Y. 264; *Rawson v. Penn. R. R. Co.*, 2 Abb. (N. S.) 220; *Limburger v. Westcott*, 49 Barb. 283; *Woodruff v. Sherrard*, 9 Hun, 323. \* \* \* These cases are to be distinguished from the cases of *Nicholas v. New York Central and Hudson River Railroad Company*, 89 N. Y. 370; *Guillaume v. The General Transportation Company*, 100 id. 498, and *Germania Fire Insurance Company v. Memphis, &c. Railroad Company*, 72 id. 93."

No contract limiting the liability of a carrier for loss of baggage arises from the mere acceptance of a receipt or ticket containing such condition, unless the attention of the owner of the baggage was called to such provision or he assented to it in some particular way, although it was not necessary that it should be read by him. *Lechowitzer v. Hamburg Am. Packet Co.*, 6 Misc. 536, aff'g judg't for pl'ff. (New York City Court.)

Defendant's passage tickets provided that baggage of a greater value than a certain sum must be specially mentioned and shipped under a bill of lading as cargo, and also that "a charge will be made for extra freight on shipboard" at a certain rate.

Plaintiff purchased her ticket and was charged the extra rate; such arrangement was out of the provision of the ticket contract and constituted a special agreement for the transportation of baggage, and the baggage not having been delivered, liability for the breach of the agreement was not avoided by the limitations in the contract. *Glovinsky v. Cunard S. S. Co.*, 6 Misc. 388, aff'g judg't for pl'ff. (N. Y. Common Pleas.)

Notwithstanding stipulation printed on ticket: "Passengers are not allowed to carry baggage beyond \$100 in value, and that personal, unless notice is given and an extra amount paid at the rate of a price a ticket for every \$500 in value," recovery was allowed for articles of traveler's baggage, although their value was more than \$100. *Nevins v. Bay State Steamboat Co.*, 4 Bosw. N. Y. 226.

*Woodruff v. Sherrard*, 9 Hun, 322.

Carrier cannot limit his common-law liability as to safety of baggage by notice; hence notice in a stage-coach "all baggage at the risk of the owner," will not protect him in an action for loss of trunk due to negligence. *Cole v. Goodwin*, 19 Wend. (N. Y.) 251.

*Clark v. Faxton*, 21 Wend. N. Y. 153; *Hollister v. Nowlen*, 19 Wend. 234. See *Dwight v. Brewster*, 1 Pick. 50.

A receipt, given by an express company in exchange for a check, containing stipulations limiting liability, held not binding taken with knowledge of its nature and contents. *Springer v.* 166 N. Y. 117; aff'g s. c., 19 App. Div. 366.

Failure to read a limitation of liability in a baggage receipt excuse in view of a statute permitting such a limitation when "with knowledge of its terms," where the circumstances would a prudent man to read it. *Merrill v. Pacific Transfer Co.*, 131

A railroad company may not exempt itself from liability for baggage beyond one hundred dollars, under Iowa Statute (C. 1308, 2184). *Davis v. Chicago &c. R. Co.*, 83 Iowa, 744.

But such provision does not apply to merchandise to be shipped in baggage. *Weber Co. v. Chicago &c. R. Co.*, 113 Iowa, 188.

Notice that carrier would not "be liable for the baggage of passengers beyond a certain amount, unless, etc.," printed on the baggage passage ticket, and detached from what ordinarily contains all material to the passenger to know does not raise a legal presumption that the party at the time of receiving the ticket and before leaving the station, had knowledge of the limitations which the carrier had attached to the transportation of the baggage of the passenger. It is for the jury whether the plaintiff knew of the notice before commencing the journey. *Brown v. East R. Co.*, 11 Cush. 97.

Citing *Camden &c. R. v. Baldauf*, 4 Harris, 67; *Butler v. Heane*, 2 C. C. 279; *Davis v. Willan*, 2 Stark. R. 279; *Kerr v. Willan*, id. 53; *Macklin v. House*, 5 Bing. 212.

No presumption of notice, where passenger receives a check of conditions on its back, and on its face "Look on the back." *M. & Boston &c. R. Co.*, 12 Gray, 392.

Common carrier cannot restrict his liability for loss of baggage without notice, even when such notice is brought to the knowledge of the passenger. Such restriction can only be made by agreement. *Davis v. Graham*, 2 Oh. St. 131.

*Cleveland &c. R. Co. v. Curran*, 10 Oh. St. 1; *Gaines v. Union T. & Oh. St.* 144; *Railroad Co. v. Campbell*, 36 Oh. St. 658. A railroad cannot make such an agreement. *Railroad Co. v. Campbell*, 36 Oh. St. 658.

Purchaser of railroad ticket does not, by his mere acceptance, intend to in and bind himself to all the terms and conditions printed thereon in the absence of actual knowledge of them. *Kent v. R. Co.*, 43 N. Y. 288.

*Rawson v. Penn. R. Co.*, 48 N. Y. 212; *Brown v. Eastern R. Co.*, 11 N. Y. 288; *Malone v. Boston & W. R. Co.*, 12 Gray, 388; *Camden & Amboy R. Co. v. Baldauf*, 16 Pa. St. 67; *Blossom v. Dodd*, 43 N. Y. 264; *Quimby v. V. R. Co.*, 17 N. Y. 306.

tification of rules of a sleeping car company, by a foreign government, that baggage while in the coach was at owner's risk, construed as a recovery for loss by negligence, unless it appears that the carrier's place allow exemptions from loss by negligence. *Stevenson v. Palace Car Co.*, (Tex. Civ. App.) 32 S. W. Rep. 335.

Question of the right to limit liability for loss of baggage is for the jury, though reasonableness thereof is for the jury. *Houston & Co. v. Seale*, (Tex. Civ. App.) 67 S. W. Rep. 437.

Carrier may restrict his liability as insurer of baggage exceeding a certain amount in value, by special regulation, brought to the knowledge of the passenger. *N. Y. & C. R. Co. v. Fraloff*, 100 U. S. 24.

Carrier's statement of value, not made as a basis on which to fix rates of freight, is not a statement of value, held contrary to public policy. *The Kensington*, 183 U. S. 1; rev'g s. c., 94 Fed. Rep. 885.

Passenger cannot read, he is not bound by the special conditions printed on the ticket sold him, which conditions were not explained to him. *Mauritz v. N. Y. & C. R. Co.*, 23 Fed. R. 765.

*N. Y. & C. R. Co. v. Baldauf*, 16 Pa. St. 67; see, however, *Fibel v. Livingston*, 100 U. S. 19.

Limitation in ticket limiting amount of recovery for baggage, held not enforceable unless passenger's attention is specially called to it. *Wiegand v. R. Co.*, 75 Fed. Rep. 370.

Carrier cannot relieve itself of liability for loss of baggage or delay in delivery by stating that the landing shall not be a part of the carriage. *The Kensington*, 110 Fed. Rep. 221.

When reasonable regulations of carrier in regard to the manner of delivery of baggage are brought to the knowledge of a passenger, his consent to them is not required to make them binding. *Gleason v. Goodrich L. Co.*, 85 U. S. 1.

#### VARIATION OF TERMS OF CONTRACT BY PAROL.

When the plaintiff sends to the office of a common carrier goods to be transported to another place, and a contract is there made for their transportation, and a receipt given simply specifying the receipt of the goods marked with the consignee's address, the receipt and parol contract cannot be given in evidence in an action against the carrier.

A receipt is not a contract embodying the previous oral engagement. *Cotter v. Hooker*, 8 N. Y. 497.

When a shipper of property takes from the carrier a bill of lading, or other voucher expressing the terms and conditions upon which the property is to be transported, the writing, in the absence of fraud or mistake, must be taken as the evidence, and the oral

evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior negotiations to vary its terms. *Long v. The New York Central R.* 50 N. Y. 76; *Hinckley v. N. Y. Cent. & C. R. Co.*, 56 id. 429.

**From opinion.**—"The rule that when a contract was reduced to writing course must be had to the instrument to ascertain its terms, and that resort not be had to prior negotiations to vary its terms, and that everything resting in parol becomes thereby extinguished, was applied to a contract for the sale of ship in *Mumford v. McPherson*, 1 J. R. 414; to a bill of lading in *Creery v. H.* 14 W. R. 26; to a charter of a vessel in *Renard v. Sampson*, 2 Kern. 561; to a contract for grading and paving streets in *Riley v. City of Brooklyn*, 4 N. Y. 444. The rule was recognized in *Bostwick v. Baltimore & Ohio R. R. Co.* N. Y. 712; but the case was taken out of the rule by the fact that the goods had been actually shipped under the verbal agreement, and the written agreement or bill of lading, was sent to the shipper one or two days after the property had been shipped, and after the owner had lost the control of the goods and was in no situation to object to its terms. *Renard v. Sampson*, *supra*, is cited with approval in other cases which have been held not within the rule, for the reason that the part of the contract still resting in parol was separable and distinct from that part which had been reduced to writing. *Whitbeck v. Waine*, 16 J. R. 532; *Barker v. Bradley*, 42 id. 316. Here the contract was entire and the written instrument was complete, making by itself a perfect contract, and was delivered and accepted by the plaintiff's agent at the time of the receipt of the goods by the defendant; and there are no circumstances in the case, as made, to authorize a resort to the prior verbal negotiations or agreement by the parties."

If language is explicit, it cannot be varied by parol, or a meaning given to it different from that called for by its terms. Nor can it be varied by proof of inconsistent custom and usage, although it may be explained in such way explained, when necessary. *Collender v. Dinsmore* N. Y. 200; but see *The Delaware*, 14 Wall. 579, 605-6.

Oral agreement with Red Line to transport in refrigerator car is modified by bill of lading sent to shipper too late to retake the goods where "refrigerator car" is omitted, and where the agent told the shipper "it would make no difference; that the car would go through all right." If shipping line consists of several carriers, and bill of lading limit liability of each carrier to his own line, no carrier is liable beyond his own line. *Ricketts v. Baltimore & Ohio R. Co.*, 59 N. Y. 637; *Belger v. Dinsmore*, 54 id. 166; *New Jersey & C. Navigation Co. v. Merchants' Bank*, 6 How. U. S. 384; *Dorr v. New Jersey Nav. Co.* Kern. 485; *Nicholas v. N. Y. C. & C. R. Co.*, 4 Hun, 329.

Agreement to send freight through in original car is not merged in shipping bill which provided for carrying the same to the terminus of the defendant's line. By change of car the freight was injured. Defendant liable. *Riley v. N. Y., L. E. & W. R. R. Co.*, 34 Hun, 97. *Shiff v. New York Central R. Co.*, 16 Hun, 218.

In an action to recover the damages resulting in the loss of certain potatoes which the plaintiff alleged the defendant had undertaken to transport from Avoca, N. Y., to Elkhart, Ind., the bill of lading given to Saltsman by the railroad company recited in the earlier portion thereof. "Notify D. Carpenter, Elkhart, Indiana;" and proceeded, in a subsequent part, as follows: "Which the N. Y., L. E. & W. R. R. Co. agrees to forward from Avoca, N. Y., to Buffalo, N. Y."

Held, that the plaintiff had a right to prove the oral agreement of the railroad company to transport the potatoes to Elkhart, Indiana, and that such agreement was not merged in the bill of lading. *Saltsman v. The N. Y. L. E. & W. R. R. Co.*, 65 Hun, 448.

Evidence of a local usage allowing longer than a reasonable time for removal of goods was inadmissible to contradict an express provision in a contract that liability as a carrier was to cease upon arrival of the goods; the custom being in vogue at the time and expressly stipulated against. *Tallassee Falls Man. Co. v. Western R. & Co.*, 128 Ala. 167.

Extrinsic evidence is admissible on the question whether a stipulation as to agreed valuation was fairly and honestly entered into. Circumstances held to warrant a jury in finding a verdict for \$125 though \$50 had been inserted in the contract as the agreed value. *O'Malley v. Great Northern R. Co.*, (Minn.) 90 N. W. Rep. 974.

In the absence of fraud or duress, a written contract for shipment was held to supersede previous oral understandings. *San Antonio & Co. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

Shipper, upon applying for transportation, had tendered him the usual bill of lading containing limitations, among others, as to value, such as he had before executed. On this occasion he objected to the statement as to value, but was told that it was merely formal though the bill expressly stated that the agent was without authority to vary its terms. Held not to show duress or fraud in procuring the contract. *Jennings v. Smith*, 106 Fed. Rep. 139.

## XVI. Deviation from Contract and Instructions.

When a carrier of goods deviates from the route stipulated in his bill of lading, he becomes an insurer, and so, responsible for all loss and damage to the goods, even from unavoidable casualty. *Maghee v. Camden & Amboy R. Co.*, 45 N. Y. 514.

Carrier forwarding goods beyond the terminus of the route is bound by the instructions of the owner, and he disregards them at his risk, unless safety, not convenience, requires it, and he must then notify the owner of the deviation. *Johnson v. N. Y. C. R. R. Co.*, 33 N. Y. 610; *Aekley v. Kellogg*, 8 Cow. 225; 1 Parsons on Cont., 69; *Forrester v. Boardman*, 1 Story, 43.

If the carrier materially varies the route, by which carriage was contracted to be carried, the carrier becomes an insurer. (*Danseth v. W* 2 Scam. 285; *Hartung v. Pepper*, 11 Pick. 41; *Steel v. Flagg*, 5 B. & Ald. 342; this last case is distinguished from the previous case *Bateson v. Donovan*, 4 B. & A. 20, on the ground that in this case carrier acted in direct contravention of his contract. *Jones on Bailments*, 28; *Coleman v. New York Central R. R. Co.*, 33 N. Y. 610.) In such a case the first carrier is liable for default of the connecting carrier.

But if it should be shown in such a case that the loss must certainly have occurred from the same cause, if there had been no default or deviation, the carrier should be excused. The burden of proof of the fact, however, is on the carrier.

Where the contract of a carrier is that the goods should be carried "all rail,"—held, that the *necessary* crossing of ferries, in the transportation was not a deviation, and that the contract to carry "all rail" would be performed by the transportation by rail as far as was practicable. If, however, the goods could have been carried by rail, the transportation by any other mode, even for a few miles, would render the carrier liable as an insurer. *Davis v. Garrett*, 6 Bing. 716; *Danseth v. Wade*, *supra*. Story on Bailments, sec. 509; Abbott on Shipping, 102; *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514.

A contract to transport goods from Havre to New York via London is open to the explanation that the contract necessarily meant by way to Southampton, thence by rail to London and there transhipment to New York; inasmuch as the business had been carried on in that manner for many years and the method for doing it was notorious and well known to persons dealing with defendant's agents at Havre. *Robertson v. National S. S. Co.*, 139 N. Y. 416.

Instruction to ship a consignment of lumber in one car was reasonable and binding, where the carrier had a car of sufficient size; carrier was liable for loss for deviation therefrom though loss of one of the cars was not through its negligence. *Uptegrove v. Central R. Co.*, 14 Misc. 14; aff'd s. c., 14 Misc. 460.

An action arises upon failure of carrier to carry cotton out of a certain port on a certain day, agreed upon by contract. *Richmond & Co. v. Bedell*, 88 Ga. 591.

Discretion as to the mode of shipment must not be knowingly exercised to the disadvantage of the shipper. *Stewart v. Comer*, 100 Ga. 100.

Defendant received goods for transit on the S. The boat left without them and escaped a fire which destroyed the C., the next boat which carried them. Liability as insurer attached upon deviation from the contract.

that though the same fire would have destroyed the goods had they been held for the next trip of the S. *Louisville &c. Co. v. Rogers*, 100 Ky. 594.

A car of onions delivered Tuesday to a carrier to be transported four miles, did not arrive until Saturday. Liability at their loss. *St. Clair v. Chicago &c. R. Co.*, 80 Iowa, 304.

A carrier, receiving goods billed over lines of certain connecting lines, is not liable as insurer for sending them over other lines. *Brown v. Pennsylvania Co.*, 63 Minn. 546.

A provision of liability expressed in a contract does not avail a carrier who transports animals by freight, instead of by passenger service as intended, and stock is injured by the rougher service. *Pavitt v. Allegheny R. Co.*, 153 Pa. St. 302.

A carrier was not liable for failing to follow instructions to carry fruit in a particular car, when it did not agree to do so, and it was not the less there was a full car load. *Davenport Co. v. Pennsylvania Co.*, 173 Pa. St. 398.

A carrier was liable for failure to notify the shipper of connecting car, and to accept the goods, and its delivery to another carrier. It was not liable as insurer for safe delivery. *Louisville &c. R. Co. v. Pennsylvania Co.*, 173 Pa. St. 61.

A carrier is held liable for negligence, but not conversion, for failure to follow the directions as to route to a connecting carrier. *Booth v. Louisville &c. R. Co.*, (Tex. Civ. App.) 37 S. W. Rep. 168.

A carrier is liable to the connecting carrier, where the only effect of the deviation was a failure to give prompt notice of arrival. *Southern P. Co. v. Texas &c. R. Co.*, (Tex. Civ. App.) 39 S. W. Rep. 510.

A carrier was liable for sending the goods over a different route than that provided for by the contract, whereby consignee failed to receive notice of their arrival. *Southern &c. R. Co. v. Booth*, (Tex. Civ. App.) 39 S. W. Rep. 585.

A carrier was liable for rough handling on another line over which it transported the goods in violation of the terms of the contract, though it was not liable for its liability to losses on its own line. *Texas &c. R. Co. v. Booth*, (Tex. Civ. App.) 40 S. W. Rep. 20.

A carrier, at liberty under the bill of lading to select the connecting line, was negligent in selecting, without necessity, one on which it was a strike in operation. *Houston &c. R. Co. v. Hour*, 15 Tex. App. 502.

A carrier is not reserved by a bill of lading to forward by the next boat, if prevented by any cause from going by the steamer specified, was re-imbursed where the goods (metal) were left for the next boat.

because of lack of room after stowing the perishable goods offered  
*Kansas*, 87 Fed. Rep. 766.

Delivery of cotton at West Wego, a place opposite New Orleans, terminus of railways from Texas and the place where consignments taken aboard steamers for transportation abroad, was not a departure from a contract to carry cotton to New Orleans for shipment to Europe. *Marande v. Texas &c. R. Co.*, 102 Fed. Rep. 246.

A carrier, under contract to carry goods direct to a given place, shipped them in a different direction and by another carrier to be by it shipped to the place specified. The former was liable for loss in the hands of the latter. *Seavey Co. v. Union Transit Co.*, 102 Fed. Rep. 394.

## XV. Loading and Care of Shipment.\*

It is the duty of the carrier to call the shipper's attention to a defect in the car, yet if the shipper neglects it under circumstances, that he is furnished with knowledge of its defects, the carrier is not liable for injury arising from such defects; but this will not excuse extraordinary detention. *Blackstock v. N. Y. & E. R. R. Co.*, 20 N. Y. 48.

The train conveying the cattle was detained sixteen hours at an intermediate station, in constant readiness to start when another train, which was belated, should arrive. The owner of the cattle proposed to take them out of the cars and water them, but refrained on being informed by the carrier that the cars might start within a period too brief for that purpose. Held, that it was a question for the jury whether this amounted to a refusal by the carrier to permit them to be taken out.

The carrier, having control of the train, is responsible for any injury to the cattle, from their not being watered at the place of detention. The owner was not required to demand that the train should pass, nor to persist in attempting to water the cattle until forcibly refused.

Where the freighter must submit to an injurious detention of his property or to the use of a vehicle having a visible defect from which but slight damage could result during a transit in a reasonable time, the election to use the vehicle is not such negligence as to exonerate the carrier from the further damages resulting through an extraordinary detention.

When the owner of property to be transported makes his own selection of the vehicles, under circumstances which charge him with knowledge of their capabilities and defects, the carrier is not responsible for any injury which may result exclusively from such defect.

\* NOTE - As to the care of cattle see also "Carriage of Animals," ante, p. 219.  
As to care of perishable goods, see also "Perishable Goods," ante p. 229.



er, however, is bound to see that the freightor has such  
He is not bound to enter the vehicles to examine them. To  
ne carrier he must show that defects not palpable and visible  
d out, or prove such circumstances as will justly charge the  
with knowledge of their existence. *Harris v. Northern*  
*Co.*, 20 N. Y. 232.

a carrier negligently delayed transportation of grain, yet,  
e it became heated through the neglect of its custodian to  
as his duty, the negligence of the carrier was not the proxi-

It was not the duty of the defendant to so stir the grain.  
was injured in the storehouse and not on board the defend-  
and the claim was that the defendants did not take and  
time and according to contract. Defendants had neither  
nor control of such storehouse. *Hamilton v. McPherson*, 28

per be responsible for the watering of cattle and be prevented  
it by the carrier, the latter is liable. *Penn. v. Buffalo &c.*  
ansing, 443.

endant, an owner of freight, agreed that it should be un-  
particular place. When the plaintiff's intestate was unload-  
engine came up on the neighboring track, without urgent neces-  
sightened the horses so that they ran away and killed the in-  
was a part of the agreement that the owner and his servants  
be molested while unloading the car. *Newson v. N. Y. C.*  
29 N. Y. 383, aff'g judg't for pl'ff.

ad company owes a shipper of freight, while loading, the  
ary care which every man owes to his neighbor to do him no  
negligence, while both are engaged in lawful pursuits. The  
intestate was assisting the defendant's servants to load a  
a car, when the engine backed suddenly against the car and  
The defendant was liable.

n in a contract of shipment that shipper is "to load, trans-  
nload said stock at his own risk," did not release defendant  
to shipper by backing car upon him while engaged in load-  
on v. N. Y. Central R. R. Co., 32 N. Y. 333.

ad company owes a stranger no duty either to guard him  
er or in any way to anticipate and save him from the conse-  
his own negligence. The plaintiff contracted to deliver to  
ant, upon a siding alongside of its own main track, a carload  
properly supported at the side by cross pieces. The defend-  
, in order to unload the lumber, disconnected the cross pieces  
ed a large portion of the lumber, and left over night a high,

narrow pile on the side toward the main track, which, in the absence of the cross pieces, was blown by a high wind upon the main track. The engineer of a train on the main track perceived the obstruction but was not in time to stop the train, and the locomotive and cars were broken and damaged thereby. Evidence justified the finding that the defendant was, and the plaintiff was not, negligent. The plaintiff owed no duty to the defendant to unload or care for the unloading of the car, and was not bound to anticipate any danger from it. *N. Y., L. E. & W. R. Co. v. Atlantic Refining Co.*, 129 N. Y. 597.

As a general rule, it is the duty of a railroad company to load freight delivered to it for transportation into its cars, and it may not deviate from this duty, by any regulations, upon the shipper, and it cannot legally make a condition of transportation, generally exact from the shipper, as a contract to place the freight upon its cars.

As to whether this rule applies to bulky freight, and whether as to the company may make a regulation requiring the shipper to load in bulk. *quære*. *London &c. Ins. Co. v. Rome, W. & O. R. Co.*, 144 N. Y. 598; aff'd s. c., 68 Hun, 598.

A carrier, undertaking to move machinery in the dark, was liable for failure to provide necessary lanterns for the purpose. *Jackson Works v. Hurlburt*, 15 Misc. 93; s. c. aff'd, 158 N. Y. 34.

Perishable articles (plants) were frozen during a delay in transportation. Carrier was not liable, where it was not shown that the delay was the cause of the freezing. *Siebrecht v. Pennsylvania R. Co.*, 21 N. Y. 615; aff'd s. c., 20 id. 730.

Under a contract providing that owner of stock shipper should load and unload them, no liability attaches to the carrier for injuries caused by improper loading. *Fordyce v. McFlynn*, 56 Ark. 424.

Carrier was negligent in its duty towards a shipment of cattle where it induced the shipper to load for a 10.42 train in the morning, but the train failed to move till 5.30 in the afternoon. *Kansas &c. R. Co. v. Adams*, 63 Ark. 331.

Delay by fog in transportation of poultry packed in ice, resulting in the melting of the ice and damage to the poultry, is chargeable to the carrier. *Peck v. Weeks*, 34 Conn. 145.

If a shipper agrees to feed and water his stock in case of delay in transportation, he will be held to the contract and no recovery will be allowed for deterioration of stock in consequence of failure to do so. *Boaz v. Cent. R. Co.*, 87 Ga. 463.

Negligence in conductor to fail to throw water on stock on learning of their heated condition. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 42.

Negligence, in providing an unsuitable refrigerator car to a shipper,

COMMON CARRIER OF GOODS. 555  
not excused upon inspection thereof by the shipper's vendor,  
the latter acted as the carrier's agent. *Chicago &c. R. Co. v.*  
Ill. 53.

who assumes the duty of loading does so at his own risk  
the agent of the carrier. *Pennsylvania Co. v. Kenwood*  
170 Ill. 645; aff'g s. c., 63 Ill. App. 145.

if furniture was found at its destination to be badly broken.  
in many cases suggested an accident or repacking in a  
carrier was liable. *Louisville &c. R. Co. v. Cunningham*, 88  
9.

ment of owners to take charge of animals shipped, throws  
the burden of showing that injuries done to stock were due  
negligence. *Terre Haute R. Co. v. Sherwood*, 132 Ind.

not negligence in a carrier of inflammable materials, not to  
be so as to be under the guard of the police or so as to be  
a case of fire. *Insurance Co. &c. v. Lake Erie &c. R. Co.*,  
3.

unruly a horse may be, car door should be strong enough  
struggles. *Smith v. New Haven &c. R. Co.*, 94 Mass. 531.  
every where plaintiff put combustibles in cars in violation of  
of company. *Pratt v. Ogdensburg &c. R. Co.*, 102 Mass.

not liable for damage by one horse to another during trans-  
om owner's failure to remove their shoes and negligence in  
their halters. *Evans v. Fitchburg*, 111 Mass. 142.

every was allowed for loss of horse when the owner failed to  
securely near the open door of a railroad car. *Hutchinson v.*  
*R. Co.*, 37 Minn. 524.

did not discharge his duty as to the care of perishable  
in transit by simply doing as others usually did under  
umstances, in regard to care of fruit. *Hinton v. Eastern R.*  
nn. 339.

is not entitled by right to "lay out" a car containing  
if the same are suffering from his negligent arrangement he  
over of the company for failure to afford a "lay out."  
*t. R. Co. v. Peterson*, 68 Miss. 454.

a shipment of horses, no "lay out" is provided for by con-  
they can be fed and watered in the car, the carrier is not lia-  
ble to stop the train so as to give shipper a chance to rest his  
rearrange them. *Illinois Cent. R. Co. v. Peterson*, 68 Miss.

Obligation of company to "lay out" a stock car containing cattle and hogs, when necessary, for saving the stock, is not avoided on the ground that place chosen by shipper did not have a safe stock pen for hogs, if cattle could have been unloaded separately. *Johnson v. Bama &c. R. Co.*, 69 Miss. 191.

Cost of erecting standards on flat cars for the carrying of live stock, same being done by shipper, cannot be charged to carrier. The carrier is not the judge of sufficiency of car accommodations. *Sloan v. Louis &c. R. Co.*, 58 Mo. 220.

A carrier was not negligent in failing to keep cars at small stations where a sufficient quantity was kept within a reasonable distance. *Union Bros. v. Wabash R. Co.*, 63 Mo. App. 671.

Carrier not answerable for injury to stock caused by overload of cars, even in the absence of contract exempting it. *Rixford v. N. H.* 355.

Carrier permitting combustible material to be used on its cars is answerable for damages to goods caused thereby. *Powell v. Penn. R. Co.*, 32 Pa. St. 414.

If pots consigned for shipment were carefully packed when delivered to the carrier and were found to be damaged on arrival at their destination, the inference is that the carrier was negligent in transporting them. *Phoenix Pot Works v. Pittsburg &c. R. Co.*, 139 Pa. St. 284.

The door of a car which was to be unloaded in a few hours was left open a short distance. A fire was communicated to it from a locomotive 23 feet away, within 20 minutes after it started. Carrier was not negligent. *Scott v. Allegheny Valley R. Co.*, 172 Pa. St. 646.

Live stock; no liability for delay from extraordinary snowstorm for overcrowding cars to the injury of stock, liability attaches to carrier. *Penn. R. Co.*, 3 Phila. 82.

Where the sudden starting of a train carrying cattle threw them off their feet and bruised them, liability attaches to the carrier. *Galveston R. Co. v. Ellison*, 70 Tex. 491.

Failure to transport stock within a reasonable time, and jerking the stock so that the cattle were crippled gives right of action. *Gulf &c. R. Co. v. Ellison*, 70 Tex. 491.

Carrier held to obligation to feed and water stock notwithstanding custom of the owners to do it. *Missouri P. R. Co. v. Fagan*, 127.

Carriers of live stock should provide proper facilities for loading and unloading same without extra charge beyond charge of transportation. *Central Stockyards Co. v. Keith*, 139 U. S. 128.

Damage to a consignment of plumbago from the leaking of oil

stored near it chargeable to carrier. *Braker v. The H. G. Johnson*, 48 Fed. Rep. 696.

A carrier of stock must provide suitable ventilation, and an action will lie for failure to take the number of cattle agreed upon, although the shipper refused to ship them because of defective ventilation. *The Alrah*, 59 Fed. R. 630.

Carrier was liable for negligently exposing cotton to an excepted peril, such as fire while in places of transshipment or while in depots, landings, etc. *Thomas v. Lancaster Mills*, 71 Fed. Rep. 481.

Carrier delivered cotton to a compress company to be compressed for shipment, and, when compressed, permitted it to remain on the platform an unreasonable time exposed to danger from fire from passing locomotives. It was liable for the destruction of the cotton by fire. *Missouri &c. R. Co. v. McFadden*, 89 Fed. 138.

Carrier was not excused from the consequence of defects in tank cars for oil, by the fact that they were hired from another. *Cincinnati R. Co. v. Fairbanks & Co.*, 90 Fed. Rep. 467.

Carriers were not released from their duty of care as to transportation by the fact that the cars were owned and maintained by another. *New York &c. R. Co. v. Cromwell*, 98 Va. 227; s. c., 49 L. R. A. 462.

Where conduct of owner of stock occasioned injury as where he left car door open, no liability attaches to carrier. *Roderick v. R. Co.*, 7 W. Va. 54.

Loading of wagon on car by owner under circumstances calculated to warn him of the danger of so doing, does not make carrier liable for loss caused by such negligent loading. *Milmore v. Chicago &c. R. Co.*, 37 Wis. 190.

It was negligence to allow strawberries to remain for seven hours before refilling the ice box, as was necessary for proper refrigeration. *Lamb v. Chicago &c. R. Co.*, 101 Wis. 138.

## XVI. Delivery.

I. If the consignee of goods be present upon their arrival, he must take them without unreasonable delay.

II. If he lives in the immediate vicinity, the carrier must notify him and then they must be taken without unreasonable delay.

III. If he is absent, unknown, or cannot be found, or refuses to receive them, then the carrier can place them in his freight house, and, if the consignee does not call for them in a reasonable time, the liability as a common carrier ceases. If the consignee has a reasonable opportunity to remove them and does not, he cannot hold the carrier as an insurer. *Powell v. Myers*, 26 Wend. 591; *Fisk v. Newton*, 1 Denio 45; *Jones v. The Norwich and New York Trans. Co.*, 50 Barb. 193; *Roth v. Buffalo and State Line*

R. R. Co., 34 N. Y. 548; Northrop v. Syracuse, B. & N. Y. R. Co., 3 App. Dec. 386.

IV. The liability of the intermediate carrier continues until that of the next carrier begins, *Miller v. Steam Nav. Co.*, 10 N. Y. 431; *Gould v. Chas. & A. Co.*, 20 id. 266; *Ladue v. Griffith*, 25 id. 364; *McDonald v. Western Railroad Corporation*, 34 id. 497; when for mutual convenience of consignor and carrier the carrier keeps goods over night, he is not an insurer. *Fennell v. Buffalo & State Line R. Co.*, 44 N. Y. 505.

A warehouseman delivered the plaintiff's wheat upon an order of certain brokers who were entitled to an equal amount of wheat deposited with the same warehouseman. Such brokers, the defendants, received the money for the wheat and paid it over to their principals, who, for the first time, were then apprised of the mistake. The brokers and their principals were jointly liable to the plaintiff for the value of the wheat. *Cobb v. Dows*, 10 N. Y. 335; *Olmstead v. Houghtaling*, 1 N. Y. 318; *Irving v. Motley*, 7 Bing. 543.

Any delivery that discharges the carrier as to the consignee, discharges him as to the consignor.

A common carrier of money from bankers in the interior to a bank in New York city, having no notice of the ownership, except what was implied from the address of the package, is authorized to treat the consignee as entitled to control the manner of its delivery.

Accordingly, where an express company entrusted with a package of money addressed "People's Bank, 173 Canal street, New York," by the direction of the bank, delivered the package in a distant part of the city to its agent, from whom it was stolen, held, that the consignor to whom the package belonged, could not maintain an action for its non-delivery. *Sweet v. Barney*, 23 N. Y. 335.

On the refusal of the steamboat proprietors to receive the property, the company should either have communicated the fact to the plaintiff and awaited further instructions, or it should have relieved itself of its liability by depositing the hemp for safe keeping in a suitable warehouse. *Forsyth v. Walker*, 9 Barr. 148; *Goold v. Chapin*, 20 N. Y. 259; *Fisk v. Newton*, 1 Denio 451. *Johnson v. N. Y. Central R. Co.*, 33 N. Y. 612.

A common carrier by water is not discharged from all responsibility by the discharge from a vessel at a proper place, reasonable hour and on due notice, where a wharf has not been secured by the owner or consignee for storing the goods. If the consignee does not appear to receive the goods or is unable or refuses to receive the goods, the carrier should deposit them on proper deposit or in proper custody. (Story on Bailments, sec. 545; *Ostrander v. Brown*, 15 J. R. 39; *Mayell v. Potter*, 2 J. R. 39.)

*v. Newton*, 1 Den. 45; *Richardson v. Goddard*, 23 How. 28.

consignee is entitled to reasonable time to remove the goods and, if they are at the risk of the carrier, who has no right to put them back for the consignee. *Redmond v. Liverpool & Philadelphia*, 6 N. Y. 578.

20th the plaintiff consigned some unmarked packages of butter to himself and also wrote "S."; "The roll sent you to-day, the butter will find of very good quality." On this letter, presented to the defendant, "S." obtained the butter. It should have been submitted to the jury to determine whether the plaintiff was negligent. *Wine v. Viner*, error. *Viner v. N. Y., A. G. & M. S. R. Co.*, 50 N. Y. 168.

21st jewelry was shipped by defendant's express company and was not delivered. On account of the non-delivery of the goods to the consignee, and several months after shipment the box which had contained them was found up empty. No explanation of non-delivery was shown. These facts warranted the submission of the question of negligence to the jury; and a refusal so to do was error. *Magnin v. Dins-*

*Case*, 70 N. Y. 417, the court said: "It would have been error to submit to the jury that they might find a conversion upon the evidence before them, merely that the goods had not been delivered to the consignee, and that the goods which they had been delivered to the carrier had been found in the harbor near New York harbor, a year or thereabouts thereafter. The last fact did not add to the proof of non-delivery as tending to show in what manner the loss had occurred, whether the box had been stolen or had been lost by ordinary negligence lost and rifled of its contents, and thrown away." (*Wine v. Nye*, 10 Cush. 416.)

*Case*, 70 N. Y. 410; *Gleadell v. Thompson*, 56 id. 194.

22d per bill of lading, were to be taken alongside of vessel or at risk and expense of the consignee in the defendant's warehouse. At the arrival, the consignee got a permit for landing but did not land; the defendant put the goods in the warehouse and then refused to deliver them to the wrong person. The defendant was liable. *Colburn v. Colburn*, 63 N. Y. 1.

23d duty of carrier to deliver within reasonable time after due diligence. It is not only his duty thus to transport the goods, but he has entered into his contract as carrier until he has delivered or offered to deliver to the consignee, or done what the law esteems equivalent.

When the consignee is unknown to the carrier a due effort to find him and notify him of the arrival of the goods is a condition precedent to the right to warehouse them; and if a reasonable and

diligent effort is not made, the carrier is liable for the consequences of the neglect. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254.

"W.," the owner of grain in storage, gave "N." an order on a warehouseman to deliver the same to the defendant, common carrier, subject to order. The defendant, without right, gave "N." a bill of lading stating that the grain was shipped by "N." subject to the plaintiff's order. "N." obtained advance from the plaintiff, and sold it for advances. The plaintiff was sued by "W." for conversion, and a verdict having been obtained against him, the plaintiff paid and bought the present action to reimburse itself. Held, that the action could be maintained. *The Farmers & Merchants' Bank of Buffalo v. Erie R. Co.*, 72 N. Y. 188.

See *McKinney v. Jewett*, 90 N. Y. 267.

There was evidence tending to show the non-delivery of a portion of certain goods shipped. The court said: "Had it not been for the rulings of the court below in this case we should have considered the law to have been settled beyond controversy, that proof of the non-delivery of property by a bailee upon demand, unexplained, makes out a *prima facie* case of negligence against such bailee in the care and custody of the thing bailed, and, in the absence of any evidence on his part, excusing such non-delivery, presents a question of fact as to the negligence of the bailee for the consideration of the jury." *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 185; 6 Am. Rep. 61; *Magnin v. Dinsmore*, 56 N. Y. 168; *Steers v. Liverpool, N. Y. & P. S. Co.*, 57 id. 6; 15 Am. Rep. 453; *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; *Clafin v. Meyer*, 75 id. 260; 31 Am. Rep. 467; *Schmidt v. Blood*, 9 Wend. 268; *Moore v. Evans*, 14 Barb. 524. The principle upon which this rule is founded embraces as well the case of a partial as of a total failure to deliver the subject of a bailment. *Canfield v. B. & O. R. R. Co.*, 93 N. Y. 532.

See "Bailments," *ante* 97.

The consignor sent gold to the consignee, "152, etc., Bleckert street, New York, Utica, America;" November 26th a bill of lading was made out for delivery at 152 Bleckert street, New York, and sent to the consignor, to which he made no answer. The ship sailed on the 28th and two days were needed for the bill of lading to reach the consignor. Contributory negligence was for the jury.

As a general rule, when goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered by him to the shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he cannot set up ignorance of its contents, and resort cannot be had to prior parol negotiations to vary them. To take a case out



of this general rule, it must appear that before the delivery of the bill of lading the goods have been shipped, so that the shipper could not have reclaimed them had he objected to the contents of the bill of lading. *Germania Fire Ins. Co. v. Memphis & Charleston R. R. Co.*, 72 N. Y. 90.

This rule, however, has no application where there was a contract which had been acted upon, and where goods had actually been shipped under such parol contract, the subsequent receipt of a bill of lading, and the neglect to act thereon did not conclude a party from showing the parol contract. *Bostwick v. Baltimore & Ohio R. R. Co.*, 45 N. Y. 712.

In 72 N. Y., *supra*, Rapallo, J., in commenting upon the case last cited, says:

"Whether he read it (the bill of lading) or not was immaterial, except upon the question whether his retention of it was evidence of an actual consent to vary the contract under which he had shipped the goods. He was in no situation to object to its terms and could not have reclaimed his goods."

See *Hill v. S. B. & C. R. R. Co.*, 73 N. Y. 351.

*Guillaume v. General Transportation Co.*, 100 N. Y. 491.

The defendants as common carriers, received merchandise for transportation from the plaintiff, addressed to a consignee at W., which they carried to C., the terminus of their route, and delivered to an irresponsible warehouseman, a common agent in that respect, for several other carriers and for themselves; from the premises of the warehouseman it was taken by a teamster, such being ordinarily the means of transportation between C. and W., and left, in the absence of the consignee, on his premises, with notice to, and in the presence of a member of his family; the consignee afterward refused to receive it, and notified the teamster thereof, who returned it to the warehouse of C., without notice of any kind to the warehouseman where it was lost, and the plaintiff brought a suit to recover its value. Held, that he was properly non-suited. *Salinger v. Simmons*, 2 Lansing, 325.

See *Waggner v. Finch*, 1 Hilt. 213; 1 N. Y. 145.

When goods delivered to express company, receipted and entered on bill, the burden is on the defendant to show absence of negligence in case of non-delivery. *Westcott v. Fargo*, 6 Lansing, 319.

A broker applied to the plaintiff to purchase certain goods, claiming to act for the defendant. Plaintiff agreed to sell them, gave an invoice of them to the broker, and delivered the goods, by his own carman, at the defendant's store, the clerk receiving them gave a receipt, which stated that the goods were received from the plaintiff. The broker, having fraudulently induced the defendant to believe that the goods were his, received from them their full value; held, that the plaintiff had not invested the broker with any evidence of title, nor put it in his power

to deceive the defendant and induce him to purchase the goods on the belief that they were the broker's property, and that plaintiff recover of the defendant the purchase-price of the goods.

The person who received the goods and signed the receipt, testified that he did not notice that it stated the goods were received from plaintiff. Held, that it was negligence, on his part, not to have observed that fact, and that the consequences of his negligence must be borne by the defendant. *Bassett v. Lederer*, 1 Hun, 274.

A carrier by water may relieve himself from liability by delivering merchandise upon a wharf with notice thereof to the consignee, in a reasonable time to him to remove it has expired. *Price v. Powell*, 10 Comst. R. 322; *Redmond v. Liverpool, N. Y. & Phila. S. Co.*, 46 N. Y. 583; *McAndrew et al. v. Whitlock, Jr.*, 52 id. 45.

He must, it would seem from these cases, give the consignee due notice before unloading and a reasonable time to take charge of and secure the goods. The propriety of such a rule is manifest, from the facts in the case, from which it appears that the ship was several weeks unloaded. If the consignee or owner, after such notices, and the expiration of a reasonable time, does not remove the goods, they may be stored by the carrier, and his liability thereby ended. *Robinson v. Chittenden*, 1 Hun, 133; s. c., rev'd on another point, 69 N. Y. 525.

Carrier delivered freight to wrong person; it insures delivery to the consignee, hence liable. Story on Bailments, sec. 545b; *McEntee v. Jersey Steamboat Co.*, 45 N. Y. 34. *Scheu v. Erie R. Co.*, 10 Hun, 10.

If carrier deliver goods contrary to instructions and thereafter the shipper takes again such goods, makes repairs on them and retains them, it is a ratification of first delivery. *Brooks v. American Ex. Co.*, 14 N. Y. 364; *Green v. Clark*, 5 Denio, 497.

Although consignee receipted goods as in good order, it is not estopped for damage thereto by negligence of carrier, unless latter prejudiced thereby. Notice of claim for damages to second carrier is notice to contracting carrier. *Monell v. N. C. R. R. Co.*, 16 Hun, 585.

Under chapter 326 of Laws of 1858 and chapter 353 Laws of 1859, freight carried under a bill of lading cannot be delivered by carrier except upon surrender and cancellation of bill of lading; but if property be actually delivered to owner of bill of lading before he cancels it, with same, subsequent purchaser has no action for conversion for the part, but only so much as may have remained undelivered. *Merchants' Bank of Canada v. Union R. R. Co.*, 69 N. Y. 373; *Bank v. Rome, &c. R. R. Co.*, 43 id. 136; *National Bank v. Deane*, 115 Mass. 219. By the transfer of these bills of lading the plaintiffs were directly substituted in the place of the consignee, having his

erty and no others. *Trustees, &c. v. Wheeler*, 61 N. Y. 88, *v. Turner*, 67 id. 437; *Colgate v. Pennsylvania Co.*, 31 Hun, 102 N. Y. 120.

ived by defendant's road; within half an hour all of consignees began removing the goods; they stopped at the usual point. Before morning the remainder of the goods were delivered. Verdict directed for plaintiff was sustained. *Dunham v. R. Co.*, 46 Hun, 245.

*Faulkner v. Hart*, 82 N. Y. 413; *Moses v. Boston & Maine R. R. Co.*, 18 Wis. 345; *Wood v. Milwaukee &c. R. Co.*, 27 id. 689; *Louisville, Lexington & Gallop v. Maris*, 16 Kas. 333; disapproving *Norway Plains Co. v. Boston &c. R. Co.*, 118 Mass. 201; *Reed v. Richardson*, 98 id. 263.

of machinery, shipped for delivery only on performance of a condition precedent by the consignee, without such performance was a breach of contract. The attempt by shippers to collect the purchase price of the goods was not an acquiescence in the delivery or a waiver of the right to return the goods where they never assented to the delivery and always insisted on the carrier for damages. *McSwegan v. Pennsylvania R. Co.*, 100 Pa. 301; rev'g s. c., 16 Misc. 157.

Goods tendered to the consignee who rejected them. They remained in the warehouse four or five weeks and then put out on storage. Liability ceased, on tender to consignee and as warehousemen, when the goods were removed, and though carrier gave consignor no notice of the rejection of the goods, the latter had notice through the consignees and was bound to take any steps in regard to the goods for a year. *Manhattan R. Co. v. Chicago &c. R. Co.*, 9 App. Div. 172.

Delivery was directed by the consignee to carry stone to New Orleans and deliver it to a connecting carrier. Delivery to the latter was not a delivery to the consignee, so as to relieve first carrier for non-delivery in failing to properly deliver by the second carrier. *Osterhout v. Southern P. Co.*, 47 App. Div. 146.

Carrier was liable for delivery of goods, when it had undertaken to deliver them *transitu* and had not used reasonable care in securing their safe delivery, especially where plaintiff was informed that there was a delay of time and paid for a telegram for the purpose. *Rosenthal v. N. Y. C. & H. R. Co.*, 170 N. Y. 148.

Carrier, without making inquiries, placed a barrel of whiskey containing a woman at a certain place in the cellar of the building which was the defendant's husband's saloon, where he kept his liquor. Defendant was not to know at his peril that he had made a proper delivery and that the facts did not establish that the husband was her

agent for the purpose of receiving it. *Sonn v. Smith*, 57 App. 372.

Where the door of an office at which goods are directed to be delivered is locked, with a notice thereon that articles for the occupant should be delivered to the janitress, a delivery of the goods at the door, with a statement to the janitress that they are for such occupant, is sufficient to relieve the carrier from liability. *Ruffin v. Ruggiero*, 10 Misc. (New York Common Pleas.)

A custom of delivering goods to a consignee's agent upon the production of a notice of arrival did not justify delivery upon its production by a third party. *Sinsheimer v. New York &c. R. Co.*, 21 Misc. 45.

Delivery of three boxes, one larger than the others, with instructions to bill two together, did not make the carrier negligent in not assuming that the shipper's intent was to have the larger one billed separately. *Feldstein v. Old Dominion S. S. Co.*, 21 Misc. 60.

A carrier, upon request of consignor to use all available means to deliver goods *in transitu*, secured the return of part of the goods from a connecting carrier, but damaged. Carrier was not liable, in the absence of proof of negligence on its part. *Ryer v. Pennsylvania R. Co.*, 26 N. J. 715; aff'g s. c., 25 id. 289.

Consignor, to whom goods had been returned, was not precluded from having a reasonable time to inspect the goods before acceptance, whether they were delivered in such a condition as to make it impossible to determine whether they were damaged or not. *Brand v. Weir*, 27 Misc. 212.

Consignor can not recover for the non-delivery of goods where they are returned and tendered to him after two months, on failure to deliver to the consignee, the goods not having depreciated in the meanwhile. *Brookston v. Westcott Ex. Co.*, 29 Misc. 634.

A provision in a bill of lading that a carrier might deliver without requiring the production of the bill of lading, did not excuse delivery to a complete stranger. *Marrus v. New Haven Steamboat Co.*, 62 N. H. Supp. 474; rev'g s. c., 60 id. 994.

A carrier of a trunk, to be delivered to another carrier, deposited it near the latter's baggage room door on a platform provided for the purpose, calling the latter's attention to it and giving instructions as to its shipment. Was not negligent. *Anniston Transfer Co. v. Gurley*, 10 Ala. 600; s. c., 34 L. R. A. 137.

Goods were directed to Lakeview, Fla., via Crest View, the nearest station thereto on defendant's line. Carrier's agent, owing to mistake in its guide book as to proper place for delivery of shipments to Lakeview, forwarded the goods to Evergreen, Fla. Held to be a misdelivery. *Louisville &c. R. Co. v. Bernheim*, 113 Ala. 489.

A carrier was not liable for delivery to a consignee without production of a bill of lading, where it had been forwarded without notice to a bank with a draft for collection, as the carrier's right of delivery in such case was not affected by the Ark. Stat. making bills of lading negotiable, etc. *Nebraska Meal Mills v. St. Louis &c. R. Co.*, 64 Ark. 169.

Bill of lading provided that delivery should be complete upon side-tracking the car in places where there was no freight agent or depot. It was held that delivery was complete upon side-tracking the car in front of the office of the party in interest and carrier was not liable for the latter's breaking open the car and taking away the goods before paying a draft therefor. *Hill v. St. Louis &c. R. Co.*, 67 Ark. 402.

Carrier was liable for a misdelivery to one who, having possession of the duplicate bills of lading sent to the consignee, impersonated the consignee. *Cavallaro v. Texas &c. R. Co.*, 110 Cal. 348.

Goods were properly delivered upon putting them into the hands of the real consignee's agent to whom the shipper intended to send them but which were ordered by one impersonating the latter and who finally obtained them through such agent. *Southern Ex. Co. v. Williams*, 99 Ga. 482.

A carrier was liable where having delivered goods to one ultimately entitled thereto, without producing the bill of lading but upon receiving an indemnity check, it surrendered the latter upon the production of the bill of lading by one whom it was to notify upon arrival of the goods. Negligence of the plaintiff to whom the bill of lading was consigned in losing it was no defense. *Raleigh &c. R. Co. v. Lowe*, 101 Ga. 320.

Goods were properly delivered to the assignee of a firm upon the written order by one of the partners apparently for the firm, though secretly intended otherwise. Failure to require the surrender of the bill of lading upon delivery to the consignee was not a breach of any duty owing to the consignor. *Chicago Packing &c. Co. v. Savannah &c. R. Co.*, 103 Ga. 140; s. c., 40 L. R. A. 367.

A carrier's breach of duty to the consignor for failure to require the surrender of the bill of lading upon delivery as agreed, was waived by obtaining with knowledge thereof, acceptance of a draft on the consignees drawn against the shipment. *Southern R. Co. v. Kinchen*, 103 Ga. 186.

Carrier was liable to the *bona fide* holder of a bill of lading for seizure of the goods made possible by an arrangement by the carrier with the consignor and another, to which such holder could in no way be made

A carrier being an insurer was liable for delivery to one impersonating a party. *Western &c. R. Co. v. Ohio Valley &c. Co.*, 107 Ga. 512.

himself to the consignor as the consignee. *Pacific Ex. Co. v. Shear*  
160 Ill. 215; s. c., 37 L. R. A. 177.

A bank, to secure advances, obtained a bill of lading of cattle with  
itself as consignee, while they were in transit billed to the owners with  
out restriction. Carrier was not liable to it for delivery to the original  
consignees. *Lake Shore &c. R. Co. v. National Livestock Bank*, 178  
506; rev'g s. c., 59 Ill. App. 451.

Fraud will not relieve a carrier from liability for loss of goods;  
when money was delivered to wrong person on fraudulent representation  
the express company was liable. *Shearer v. Pacific Ex. Co.*, 43  
App. 64.

Consignor directed shipment to him at places designated by a third  
party. Carrier was liable, when, instead it delivered the goods to the  
latter. *Illinois C. R. Co. v. Carter*, 62 Ill. App. 618.

Goods consigned, care of "B's Express," were delivered to the con-  
signee without the production of the bill of lading. Carrier was  
liable. *Schlesinger v. West Shore R. Co.*, 88 Ill. App. 273.

Where consignee, because of delay, refuses to receive goods, a carrier  
does not convert them by failing to return them to consignor. *Louisville  
&c. R. Co. v. Heilprin*, 95 Ill. App. 402.

Carrier, in defense of a failure to deliver to party named in the  
bill of lading, set up delivery to the rightful owner. The reply stated  
latter obtained them on false pretenses. It was held sufficient on  
murrer. *Cleveland &c. R. Co. v. Moline Plow Co.*, 13 Ind. App. 235.

Consignee, being presumptively the owner, has a right to control goods  
in transit. *Tebbs v. Cleveland &c. R. Co.*, 20 Ind. App. 192.

Possession of a bill of lading does not vest ownership of the goods  
so, a carrier who delivered canned goods to one who produced a bill  
of lading, showing that the consignors were also consignees of the same,  
is liable. *Weyand v. Atchison &c. R. Co.*, 75 Iowa, 573.

Delivery of a car upon a side track, the usual place of delivery, to  
consignee's assignee, consignee having been paid, was complete, though  
without the production of the bill of lading or notification of arrival.  
*Anchor Mill Co. v. Burlington &c. R. Co.*, 102 Iowa, 262.

A carrier, having misdelivered goods, was liable therefor, though  
though the shipper agreed to await the return of the station agent, no  
effort was made for seven days after his return to recover and deliver  
them. A tender was thereafter ineffectual. *Hamilton v. Chicago  
R. Co.*, 103 Iowa, 325.

Carrier may show that car remained sealed from time of receipt  
of the goods to its delivery on an issue of complete delivery. *Missouri  
R. Co. v. Simonson*, (Kan.) 68 Pac. Rep. 653.

holding goods without charge for storage, was liable for sub-  
delivery to a third party without production of the bill of  
*Missouri P. R. Co. v. Weil*, 8 Kan. App. 839.

must deliver goods to the rightful owner; but if pledgee of  
ing for grain permits pledgor to exhibit them as his own no  
be had against the carrier for delivery to the pledgor. *Doug-*  
*le's Bank*, 86 Ky. 176.

instructed not to deliver except upon the production of the  
ing and draft annexed was liable for disobedience. In such  
s no presumption that the consignee is owner. *Louisville &c.*  
*Cartwell*, 99 Ky. 436.

was liable for delivery to an imposter, representing himself  
consignee, after notice by the consignee that he has not ordered  
*Louisville &c. R. Co. v. Ft. Wayne Electric Co.*, (Ky.) 55  
918.

duty of the consignee to receive the consignment and test  
liability for damage, not to refuse to receive it. *Corso v.*  
*as &c. K. Co.*, 48 La. Ann. 1286.

ge, intrusted with a carrier for transmission to the Secretary  
sury (U. S.) to be delivered before a given time, was properly  
the customary place for delivery of such packages before that  
h it did not reach him in person until long after. *Aldrich*  
*American Ex. Co.*, 117 Mich. 32.

was liable for delivering goods at an intermediate station,  
per, who consigned them to himself with direction to notify  
rty, without the surrender of the bill of lading, where the  
l secured an advancement thereon. *Ratzer v. Burlington &c.*  
Minn. 245.

was not liable for a failure to follow the directions of the  
where the goods were delivered to the actual owner thereof  
of possession. *Thomas v. Northern P. Ex. Co.*, 73 Minn.

here is a reasonable doubt as to a stranger's demand, carrier  
e for a reasonable delay to investigate. *Merz v. Chicago &c.*  
inn.) 90 N. W. Rep. 7.

was liable for a delivery to the shipper upon the production  
ate bill of lading, though in good faith, and acting on a cus-  
river to consignee after six days, where the original bill of  
cted delivery to the shipper or his order and had been indorsed  
and the indorsee had no notice that the carrier intended to act  
atom. *Midland Nat. Bank v. Missouri P. R. Co.* 132 Mo. 492.

was not liable for delivery to consignee, not having been noti-

fied that the goods were not sold but merely consigned. *Evans G. Cultivator Co. v. Missouri &c. R. Co.*, 64 Mo. App. 305.

Carrier was not liable at suit of shipper for delivery to the consignee without presentation of the bill of lading, where the goods were delivered to shipper's order and telegrams from an agent of the shipper were sent in support of the apparent authority of consignee. *Schwarzchild &c. v. Savannah &c. R. Co.*, 76 Mo. App. 623.

Carrier who received an indemnity bond was liable for failure to deliver goods *in transitu*, where it prevented the shipper from sending a telegram over the public wire and negligently delayed sending it over its own wire until that delivery of the goods intervened. *Willock v. Missouri &c. R. Co.*, 79 Mo. App. 76.

Side tracking a car was not a proper delivery where there was a warehouse or warehouse where goods were usually unloaded. *Klass Comm. Co. v. Wabash R. Co.* 80 Mo. App. 164.

Instruction to notify one not the consignee of the arrival of the goods did not authorize a delivery to him without the production of the bill of lading. *Union &c. Co. v. Westcott*, 47 Neb. 300.

A carrier of goods to end of its line consigned to a point beyond its line was bound to make delivery to the connecting carrier, but upon delivery its liability by the common law and by statute ceased. *Fremont &c. R. Co. v. Waters*, 50 Neb. 592.

Refusal to deliver by a station agent until he received further instructions as to whether a doubtful charge was valid and would be incurred on by the company, was held not a conversion. *Hett v. Boston &c. R. Co.*, 69 N. H. 139.

Parties fraudulently induced consignor to ship goods to a responsible consignee and, impersonating the latter, they obtained the goods from the carrier. The carrier was liable. *Oskamp v. Southern Ex. Co.*, 61 Mo. St. 341; rev'd s. c., 14 Oh. C. C. 176.

Carrier was not liable for delivery to a consignee producing the bill of lading and voices sent to him by the consignor, under the impression that he was another customer of the same name. *Lake Shore &c. R. Co. v. Lucas*, 14 Oh. C. C. 543.

Option as to place of delivery was waived by refusal to deliver at a place. *Buckeye Pipe Line Co. v. Fee*, 15 Oh. C. C. 637.

A carrier acts at his peril upon stopping goods *in transitu* in delivering to either party. He may bring the goods into court and compel the claimants to settle their rights. *Howe v. Cincinnati &c. R. Co.*, 15 Oh. C. C. 333.

Under a bill of lading for carriage by a carrier over its own route, delivery to a connecting carrier, it was liable for loss on a wharf beyond its line.



goods were placed for transfer. *American Roofing Co. v. c. Packet Co.*, 5 Oh. N. P. 146.

was not liable for unloading goods in a storm upon an open ere being no building there. *Allam v. Pennsylvania R. Co.*, 174; s. c., 39 L. R. A. 535.

o notify consignor of inability to find the consignee, was not where the former failed to put his name and address on the that purpose. *Walsh v. Adams Ex. Co.*, 15 Pa. Super. Ct.

sent on his bill of lading in plain form, with draft attached, n. The bill of lading stated, unless the word "order" was connection with the consignee's name, it might deliver with- g production of the bill of lading. Carrier was not liable without such production, in the absence of notice of the *Weisman v. Philadelphia &c. R. Co.*, 22 R. I. 128.

r drew a draft upon the consignee for the goods and indorsed lading, in which the goods were billed to consignor's agent, tiff as security for the payment of the draft. Carrier was e latter for delivery to the consignee without the production and bill of lading. *Stone v. Chicago &c. R. Co.*, 8 S. D. 1. n carrier is liable to consignor of goods for failure to identify presenting the bill of lading as the consignee. *Sword v. Tenn.* 126.

was not liable for delivery, without surrender of the bill of e consignee who was the actual owner and who paid for the gh the consignor's agent failed to turn over the proceeds to al and the bill of lading provided that no delivery should hout its production. *Witt v. Tennessee &c. R. Co.*, 99 Tenn.

hould deliver goods on presentation of bill of lading by con- yer v. Gulf &c. R. Co., 69 Tex. 707.

was not liable for refusal to deliver to one other than the whom it did not know to be the real owner and the only evi- was a telegram from the shipping agent that another person that the property should have been billed to such claimant "presumed" that delivery to him would be all right. *Gulf v. Fowler*, 12 Tex. Civ. App. 683.

as not liable for delivery to a drayman apparently authorized gnee to receive the goods. *St. Louis &c. R. Co. v. Crawford*, App.) 35 S. W. Rep. 748.

of a carrier of a trunk to be delivered to another carrier, for t at the latter's usual place of delivery in the absence of the

owner, where there was conflicting evidence as to whether he stated he would be on hand to look after it, was properly left to the jury. *Worth Transfer Co. v. Isaacs*, (Tex. Civ. App.) 40 S. W. Rep. 39.

Request to deliver a coop of chickens through a side gate instead the front was reasonable and the carrier was liable for a refusal to ply therewith. *Gary v. Wells & Co. Ex.*, (Tex. Civ. App.) 40 S. W. 845.

A connecting carrier refused to receive goods which had been injured by the prior carrier. The shipper, notified of its inability to forward the goods beyond that point, was not bound to receive the goods and make an attempt to prevent further damages. *Gulf & Co. R. Co. v. Frank Co.*, (Tex. Civ. App.) 48 S. W. Rep. 210.

Defendant was negligent in delivering goods to a person impersonating a well known resident, especially without other identification than production of the letters with which he fraudulently procured the shipment to him, and without requiring production of bill of lading. *Pacific Ex. Co. v. Hertzberg*, 17 Tex. Civ. App. 100; *Pacific Ex. Co. v. Critzer*, (Tex. Civ. App.) 42 S. W. Rep. 1017.

Under a bill of lading providing that carrier's liability was to terminate upon the arrival of the goods and permitting their removal and storage at owner's expense within 24 hours thereafter, the railroad company was liable for removal of the car, about 24 hours thereafter and delivery to a third party without the owner's consent. *St. Louis & Co. R. Co. v. & Co. Mach. Co.*, 23 Tex. Civ. App. 211.

Plaintiff was not obliged to receive cattle at midnight, where he was a stranger in the city and had not money for the freight with him. Carrier's liability did not cease upon unloading at such time, especially in view of a statute requiring company to have suitable places for protection of freight when unloaded. *Houston & Co. R. Co. v. Trammell*, (Tex. Civ. App.) 68 S. W. Rep. 716.

Shipper recovered damages to cattle during detention by carrier for his refusal to pay a higher rate than he had originally agreed to. *Gulf & Co. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. Rep. 1.

Where goods were misdirected and reforwarded partly over defendant's line, it has a right to hold them against freight charges though they exceed the value of the goods. *Texas & Co. R. Co. v. Klepper*, (Tex. Civ. App.) 69 S. W. Rep. 426.

Carrier was not bound to turn over heavy castings upon their delivery for the convenience of the consignee. *Hudson River Lighterage Co. v. Wheeler & Co.*, 93 Fed. Rep. 374.

Consignor by agreement was to ship goods to consignee and charge the same to account current. The latter remitted fully and received

title thereto was not defeated by application of the money  
ignor to an old account, and the carrier was not liable for  
the goods to him without the bills of lading. *Herbst v. The*  
*nce*, 97 Fed. Rep. 343.

at West Wego under a shipment to New Orleans for trans-  
to Europe was proper as that was the port at which steamers  
Orleans for Europe loaded. *Reiss v. Texas &c. R. Co.*, 98  
33; s. c. aff'd, 99 id. 1006.

by owner to receive goods, billed to him, at destination con-  
stituted an estoppel in an action for their non-delivery.  
*cey*, 22 Wash. 94.

as liable for delivering shipment to consignee without bills of  
it had issued bills of lading which were negotiable by statute.  
*nal Bank v. Northern P. R. Co.*, (Wash.) 68 Pac. Rep. 965.

#### NOTICE OF ARRIVAL.

ding provided for "tender to the consignee," also that car-  
l be complete a reasonable time after arrival without notice.  
carriage was complete without notice, notwithstanding the  
ever made application by reason thereof, that did not dis-  
the tender required. *Diamant v. Long Island R. Co.*, 30 Misc.

d company was held to a common carrier's liability for loss  
fire, where it failed to give notice to consignee personally or  
within 24 hours of arrival as required by statute. *Louisville*  
*Cowherd*, 120 Ala. 51.

carrier should notify consignee of arrival of goods, under  
2120, and failure of consignee to remove goods for three  
or their arrival is not of itself an unreasonable delay. *Wilson*  
*a Cent. R. Co.*, 94 Cal. 166.

on to one fraudulently representing himself to be the con-  
not terminate liability as common carrier. *Cavallaro v. Texas*  
110 Cal. 348.

carrier to notify consignee of arrival of goods, which delay  
tion of custom, renders him guilty of negligence and subse-  
py freshet is chargeable to him. *Richmond &c. R. Co. v.*  
*a*. 805.

of common carrier by rail ceases as common carrier on un-  
ds without notice to consignee. *Gregg v. Illinois &c. R. Co.*,  
; *Illinois &c. R. Co. v. Carter*, 165 id. 570.

of a carrier by water to notify the consignee of the arrival

of his goods may be waived by a usual course of business in the previous course of dealing between the parties. *Illinois C. R. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. A.

No recovery was allowed the owner of poultry transported by from C. to H. for failure to notify him of its inability to find co *Merrill v. American Exp. Co.*, 62 N. H. 514.

Carrier's duty to give notice of arrival was allowed to be modified by stipulation as to small towns where no station house had been built and no freight agent located. *Allam v. Pennsylvania R. Co.*, 183 Pa. 39 L. R. A. 535.

A carrier in giving notice of arrival, having given the number of cars goods were in, was not liable for failing to state what cars the goods originally shipped in or transferred from during transit. *Galves R. Co. v. Hunt*, (Tex. Civ. App.) 32 S. W. Rep. 549.

## XVII. When Liable as a Warehouseman.

When the carrier has discharged his whole duty in transporting goods and is unable to deliver them in the manner required of him as a carrier, he may select a suitable warehouseman, and by depositing the goods with him be relieved from further responsibility; or if he transfers possession of them, he will be only required to exercise the ordinary care exacted of a warehouseman, either in his custody of the goods or in the delivery thereof.

See complete discussion in *McMillan v. R. Co.*, *post*, p. 331.

A carrier transferred goods to a float from which trans-shipment was to be made to the next carrier. A reasonable time not having elapsed for the next carrier to take them, the first carrier still held them and was liable for fire.

The general rule is, that a common carrier is bound to deliver the goods which he has undertaken to carry, at the place to which it is directed by the consignee personally. *Gibson v. Culver*, 17 Wend. 305; *Der v. Brown*, 15 John 42; *Fisk v. Newton*, 1 Denio 46. Personal delivery, however, is sometimes dispensed with, in the case of goods transported by ships or boats. Notice given to the consignee of the arrival at the place of deposit, comes in lieu of personal delivery. 2 Kent's Co.

When goods are safely conveyed to the place of destination, and the consignee is dead, absent or refuses to receive, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility by placing the goods in store with a responsible third person in that business, at the place of delivery, and on account of the owner. When so delivered, the storehouse becomes the bailee and agent of the owner in respect to such goods. *Miller v. Steam Navigation Co.*, 10 N. Y. 431.

was committed to the defendants as carriers, directed to Annis, Port Gibson, care of Dawley, Express Agent, Vienna, express line ran to Vienna, but Port Gibson was off the Vienna agent was accustomed to hold express matter for or deliver it. Held, that he received this package not immediate consignee of the plaintiff, but as defendant's agent. *Livingston*, 16 N. Y. 515.

The second carrier refuses unreasonably to receive goods, carrier remains liable as insurer. To relieve itself the carrier goods in a warehouse or otherwise indicate a renunciation. So held, where a carrier on the Hudson river at Albany to be delivered to a carrier on the Erie canal to the owner, removed the goods to a floating barge as a place of temporary storage and to facilitate shipment. The canal carrier unreasonably delayed to receive them requested and promising so to do, and they were consumed. *Old v. Chapin*, 20 N. Y. 258; *Miller v. Steam Navigation* 431.

Warehouseman at Buffalo was also a carrier on the Erie canal. He shipped at Detroit addressed to his care to go from Buffalo to Albany, at 30 cents per 100 pounds. He received them as warehouseman and was liable for loss by fire in his warehouse, without his fault. Where a person is both carrier and warehouseman, it is well settled that the deposit of the goods in the warehouse is a mere accessory to the carriage and not subject to any particular order of the owner, or if deposited for the purpose of being carried further, the responsibility having them in charge is that of a carrier. *Ang. Blossom v. Griffin*, 3 Kern. 569, 572. But when goods are deposited in a warehouse subject to the further order of the owner, the carrier is otherwise. In such case, as Judge Buller said, in *Garside v. Owners of the Trent and Mersey Navigation Company* (4 Term) "The keeping of the goods in the warehouse is not for the convenience of the carrier, but the owner of the goods. In such case, the duties and responsibilities of warehousemen would attach to the goods having the goods in store." But this rule cannot apply to a carrier having the charge or custody of the goods while they are in his warehouse. When a carrier deposits property in his own warehouse at an intermediate place in the course of his own route, or at the end of his route where it is his duty to deliver it to the owner, his duty as carrier is not completed, and he will remain liable as carrier for any loss. Such common carriers are ordinarily responsible. *Story on Carriers*, sec. 447, 536; *Forward v. Pittard*, 1 Term. 27; *Hyde v.*

Trent Navigation Company, 5 id. 380. *Ladue v. Griffith*, 25 N. Y. 364.

A carrier agreed to deliver flour at New York and to let it remain about ninety days after its arrival. The consignee refused to receive it thereafter. The defendant was bailee of the owner and was not liable for injury to it without his fault. *Hathorn v. Ely*, 28 N. Y. 78.

See *McDonald v. W. R. R. Co.*, 34 N. Y. 497.

Where it has been a long custom for the consignees to receive goods upon their arrival each day, at the carrier's wharf and remove them, no specific notice of their arrival is not necessary as the carrier's duty is ended when the goods are landed at the accustomed place, and the consignees have a reasonable time to remove them; but if the arrival is on a holiday and it has not been the custom to receive goods upon that day, reasonable time after such day should be given to remove them.

Goods were destroyed by fire in the night time upon the vessel. There was no means of extinguishing the fire, and although the watchman was left with some colored men, none of them were produced as witnesses, nor did it appear that the watchman was at his post. The case was one for the jury. Nonsuit reversed. *The J. Russell Mfg. Co. v. N. H. S. Co.*, 50 N. Y. 121; distinguishing *Lamb v. The C. & C. R. Co.*, 46 N. Y. 271.

Plaintiffs contracted in New York with a carrier for the transportation of certain goods to Boston, and the delivery thereof to plaintiffs who were the consignees. The goods were received by defendants as connecting carriers over the latter part of the route, and were delivered to defendants of Massachusetts. Upon arrival of the goods at Boston they called for, but a delivery refused until the next day as it was not convenient to deliver at the time. They were unloaded the same afternoon and placed in defendant's warehouse, but too late for delivery. During the night the warehouse with the goods was destroyed by fire. In an action to recover the loss, held, that defendants were liable for the loss, this, although under the decisions of the court of Massachusetts that operators of the road, as matter of law, cease to become common carriers and become warehousemen, when the duty of transportation is completed and goods are deposited in a warehouse awaiting the order of the owner or consignee. *Faulkner v. Hart*, 82 N. Y. 413; 12 J. 471.

**From opinion.**—"The rule as to the liability of carriers under the law stated is well established by the law merchant, and the authorities are numerous which sustain the position that the carrier is bound to pay for the loss of goods destroyed. It is his duty not only to transport the goods, but to perform his entire contract as a common carrier until he has delivered them to the consignee."

offered to deliver them to the consignee, or has done what is giving to the consignee, if he can be found, due notice after their furnishing him a reasonable time thereafter to take charge of, the same." *Gatliffe v. Bourne*, 4 Bing. (N. C.) 314; s. c., 11 Clark & Powell, 3 Comst. 322; *Zinn v. N. J. St. Co.*, 49 N. Y. 442; *Edson River R. R. Co.*, 64 id. 254; *The "Sultana" v. Chapman*, 5 La. Ann. 453; *Graves v. H. & N. Y. St. Co.*, 38 R. I. R. R. Co. v. Warren, 16 Ill. 502; *Moses v. B. & M. R. R.*, The Tangier, 1 Clifford 396.

Companies of Massachusetts establish that the proprietors of a railroad, who receive goods for hire and deposit them in a warehouse until the owner has had a reasonable time to take them away, are not liable as common carriers for their loss by fire, without negligence or default on their part; that the corporation ceases to be a common carrier; and becomes a warehouseman as a matter of law, when it has completed the duty of transportation and assumed the position as a warehouseman, as a matter of fact, and in view of the usages and necessities of the business in which it is engaged. *Co. v. B. & M. R. R. Co.*, 1 Gray 263; *Rice v. Hart*, 118 Mass.

It has been a positive statute of the state of Massachusetts providing that the carrier's liability should cease when the goods had been deposited at a warehouse on their route in a suitable warehouse, a different question would arise, and it will well be contended that, as the question arose under the statute of Massachusetts, the question of liability would depend upon the construction placed upon the statute by the court in Massachusetts, in accordance with the decisions of the courts of this state and the Supreme Court of the United States. *McGee*, 80 N. Y. 441; *Mills v. M. C. R. R. Co.*, 45 id. 626; *Whitcomb v. R. R. Co.*, 23 id. 465; *Elmendorf v. Taylor*, 10 Wheat. 152; *11 id.* 367; *Town of Ottawa v. Perkins*, 94 U. S. 260; *Fairfield v. Mallatin*, MS. Opp. U. S. Sup. Ct."

The liability of a railroad company for negligence for freight destroyed by fire from the burning of the freight house, after its arrival at the wharf on the freight car, and before delivery, was a question

There were two questions for the jury: First. Whether the fire which burned the freight house and the car containing the goods standing on the adjoining track, was caused by sparks from a defective engine; and, second, Assuming that the engine which communicated the fire was in good order, whether the railroad was negligent in leaving the plaintiff's goods in the car in the danger of fire from the burning of the freight house. *Y. C. & H. R. R. R. Co.*, 108 N. Y. 623.

The goods were shipped in defendant's steamship, under a bill of lading, which provided that it should be transported via London to New York. The ship, having it on board arrived at her wharf in New York on Saturday, and notice was on the same day given to the consignee that the goods were on Monday deposited on the proper wharf. The consignees had had three full days to remove the tin, it was

discovered that part of it had been removed from the wharf by one without authority from the consignees. Held, that as such removal occurred after the lapse of a reasonable time for the removal of the tin by the consignees after notice, defendant was not liable as a common carrier.

The wharf was closed by a gate through which the missing tin could not have been taken; the delivery to consignees of cargo landed at defendant's wharf was under the direction of a delivery clerk, who had been instructed not to deliver goods to be taken from the wharf without receiving a receipt, and it was the practice of the carman, when goods were being removed by a cartman, to count the load and take the carman's receipt in a book provided for that purpose. The delivery clerk testified that when he knew the cartmen, he sometimes permitted them to take goods without receipting for them. There were no receipts for the tin in question. The servants of defendant were negligent in omitting to take ordinary care in the custody of the tin in question, and in permitting it to be removed without taking receipts; the defendant is therefore chargeable with such negligence.

Although the complaint was based solely on the contract of affreightment, as the case was tried upon both theories of liability with respect to the tin, the objection, it was too late to take the objection here. *Tarbell v. The Exchange Shipping Co.*, 110 N. Y. 170, rev'g 21 J. & S. 190, and 100 Cal. 400, 34 P. 1000, 1001.

**From opinion.**—"The general principle that the duty and obligation of a common carrier by water, does not, *ipso facto*, cease on the unloading of goods from the ship and their deposit upon a wharf, and especially where the place of deposit is also the terminus of the particular voyage, is the settled doctrine of this court and the generally accepted doctrine of the maritime law. The obligation of the ship owner is not only to carry the goods to the port of destination, but to deliver them there to the consignee. But a delivery which will do so, may be constructive and not actual. To constitute a constructive delivery the carrier must, if practicable, give notice to the consignee of the arrival, and when this has been done and the goods are discharged in the proper and proper place, and reasonable opportunity afforded to the consignee to receive them, the liability of the carrier, as such, terminates. The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be converted at the option, or to suit the convenience of the consignee. The carrier is bound to act promptly in taking the goods, and if he fails to do so, whether any other duty may rest upon the carrier in respect to the goods, his liability as carrier is by such failure terminated. *Redmond v. Liverpool Co.*, 46 N. H. 100. *Hedges v. Hudson R. R. Co.*, 49 id. 223. \* \* \*

The consignees had three full days thereafter in which they could have removed the tin, before the first of December, the day when the loss was discovered. They were not prevented from removing it from the wharf during the



of the defendant, or by any vis major, and it is very clear that its  
ing that time was practicable in the exercise of due diligence by  
es. *Richardson v. Goddard*, 23 How. (U. S.) 28. Under these cir-  
the defendant, under the authorities, must be held to have made  
the tin under its contract as carrier, and to have discharged itself  
tody as such; and as the loss, upon the evidence and findings, must  
ave occurred after notice to the consignees of arrival, and the lapse  
ble time for the removal of the tin from the wharf, the general term  
erruled the first ground of liability asserted by the plaintiff. The  
r of a carrier to deliver, and of a consignee to receive, as defined  
rities to which we have referred, is not, we think, essentially changed  
e in the bill of lading that the goods are to be delivered 'from the  
when the shipper's responsibility shall cease,' or by the clause that  
e to be received by the consignee 'immediately the vessel is ready  
' *Collins v. Burns*, 63 N. Y. 1; *Gleadell v. Thomson*, 56 id. 194.  
nt, in our view, is not liable as carrier for the reason that it made  
such, according to the general rule governing the liability of carriers

conclusion does not meet the other ground of liability asserted, and  
e trial court, viz., that the defendant neglected to exercise due and  
of the tin and negligently permitted it to be taken from its wharf  
s, which is the substance of the findings on this branch of the

be no doubt, we suppose, that in many cases a carrier's whole duty  
o goods carried by him is not discharged by a constructive delivery  
his strict responsibility as carrier.

a consignee may neglect to accept or receive the goods, the carrier  
by justified in abandoning them, or in negligently exposing them to  
e law enables him to wholly exempt himself from responsibility in  
ngency by giving him the right to warehouse the goods. When this  
s no longer liable in any respect, and if they are subsequently lost  
ngence of the warehouseman, the carrier is not liable. *Redmond v.*  
s., 46 N. Y. 578, and cases cited. But so long as he has the custody  
s, although there has been a constructive delivery which exempts  
liability as carrier, there supervenes upon the original contract of  
implication of law, a duty as bailee or warehouseman to take  
re of the property. This duty of ordinary care rested upon the  
this case."

receiving goods addressed to points on line of connecting car-  
also price for the same, undertakes to carry through for the

If first carrier has not authority to contract for second car-  
tracts itself for the whole line. Where contract required rail  
first carrier is liable for loss if it employs water transporta-  
*dict v. G. T. R. Co.*, 4 Lansing, 106; s. c. aff'd, 54 N. Y. 500.  
a carriers had at terminus an elevator through which they re-  
chandise for transportation, and also used as storehouse.  
ceived there grain from a connecting carrier, consigned to a  
nd the other terminus of his line, without agreement or di-

rections for storage, they were held liable as carriers and not as housemen. *Rogers v. Wheeler*, 6 Lansing, 420; s. c. aff'd, 52 N. Y.

Defendant received box for West Virginia, C. O. D. \$40, accepted with exemption against negligence of connecting carriers stipulated to forward to nearest point reached by it; and, having this, the connecting carrier took and tendered the same to consignor who refused to accept it, and it was placed in the warehouse which was burned. Defendant held not liable save as warehouseman, which was not found. Words "C. O. D." did not affect character of shipment. *Gibson v. American Mer. Ex. Co.*, 1 Hun, 387.

A package sent by the defendant to be delivered C. O. D. Consignor notified of arrival but could not pay, promising to pay in a few days. Meanwhile defendant's express office was broken into and package stolen. Defendant then was warehouseman and not carrier and not negligent in not notifying consignee of the delay. *Grossman v. Fargo*, 63 N. Y. 310.

Plaintiff sent his trunk to Watertown by defendant's express office while yet at defendant's office the plaintiff paid the charges and received the trunk and was allowed thereupon to take from the trunk his articles, though he locked it and said that he intended to leave it until the next day. Before he called for it, the agent had delivered it to other parties, who claimed to have been sent for it. A nonsuit was improper, as it was a question for the jury whether the agent was acting within his apparent authority in making the arrangement, and whether the defendant was liable as a warehouseman.

Upon a new trial the question was properly submitted to the jury. Above, and whether the defendant retained the trunk as a warehouseman or bailee, it was held that a direction to the agent not to do so was not a defense unless it were made known to the plaintiff. A verdict for the plaintiff was sustained. *Oderkirk v. Fargo & Co. Ex. Co.*, 61 N. Y. 418.

A consignment of cotton having arrived at its destination, defendant began unloading and sent the consignee notice that 100 bales were ready for delivery, who, upon receipt thereof, removed a portion of the cotton. Failure to remove the rest for three full days was an unreasonable delay and the carrier's relation to the goods was changed to that of warehouseman. *Wynantskill Knitting Co. v. Murray*, 90 Hun. 554.

Diamonds, misdirected, were received at the place designated on Saturday at 4 p. m., where they remained until 7.30 p. m. on Monday, defendant having immediately mailed a notice of arrival to the consignee directed to the address given. A reasonable time having elapsed for delivery and there having been no negligence as to its custody

an, defendant was not liable. *Laporte v. Wells &c. Co.*, 23  
67.

shipped certain bales of hops by the defendant's line, which,  
in New York, were lightered to a dock, and the consignee  
of their arrival. He replied that they would be removed  
that day, but only one load was taken, and late in the afternoon  
that no more would be taken that day. The captain of  
the vessel covered the bales with tarpaulins to protect them, but,  
on account of a heavy storm during the night, the hops were damaged.  
The consignee refused to receive the balance. Held, that the  
day afforded a reasonable time for the removal of the bales,  
and there was a constructive delivery sufficient to relieve defendant  
as carrier; that under the circumstances it was not required  
that the warehouseman should have used the usual means of protection,  
and having used the usual means of protection, was  
not liable. *Brand v. The New Jersey Steamboat Co.*,  
36 Misc. 666. (New York Common Pleas.)

When property not removed within 24 hours would be  
at the sole risk of the owner, referred to the termination of the  
bailment and did not relieve it of the liability of a warehouse-  
man. *Aaronson v. Penn-  
Co.*, 23 Misc. 666.

When assignor gives notice to carrier to hold goods consignee has  
accepted, till called for, carrier becomes liable thereafter only  
as warehouseman. *Byrne v. Fargo*, 36 Misc. 543.

In the absence of husband, wife directed carrier to leave the  
goods at the dock, as her husband was not ready for them, carrier after  
that time became liable only as warehouseman. *King v. New  
Jersey Steamboat Co.*, 36 Misc. 555.

After termination of defendant's character as common  
carrier he can be recovered for only as for bailment to warehouseman.  
*Co. v. Grabfelder*, 83 Ala. 200.

The time for consignee to remove goods must elapse before a  
liability for them, as carrier ceases. Three days was a rea-  
sonable time for the removal of a piano. *Columbus &c. R. Co. v. Lud-  
low*, 612.

May determine the fact of delivery; if cars containing goods  
were tracked until a way bill was furnished, liability of carrier  
would be that of a warehouseman until such way bill was  
furnished. *Mount Vernon Co. v. Alabama &c. R. Co.*, 92 Ala. 296.

When reasonable time has elapsed for the consignee of goods to call  
for them, the liability of the carrier as such ceases and he becomes liable  
as warehouseman. *Anniston &c. R. Co. v. Ledbetter*, 92 Ala. 326.

An express company, making no delivery beyond its office, notified consignee of the arrival of his goods, and received in reply a request to remove them at the office until the next day. The liability as carrier terminated on arrival and liability as warehouseman began with the notification of arrival. *Southern Ex. Co. v. Holland*, 109 Ala. 362.

Stipulation that liability as common carrier should cease immediately on arrival construed to mean, after a reasonable time for removal.

Six days was held to be unreasonable time for the removal of 43 bales of cotton, though the consignee had to haul it six miles to its farm, and the carrier was not liable as insurer for loss by fire. *Tallasser v. Man. Co. v. Western R.*, 128 Ala. 167.

Where goods remained in carrier's possession by reason of consignee's refusal to accept, on ground that they were damaged, at the time of subsequent fire, the liability was that of a warehouseman and not of a carrier. *Frederick v. Louisville &c. R. Co.*, (Ala.) 31 South Rep. 96.

Failure of railroad company to remove cotton from consignee's warehouse is not the cause of the burning of the same, and damages therefor cannot be awarded against it. *Martin v. Railway Co.*, Ark. 510.

Defendant had been in the habit of giving notifications of arrival of goods stating that unless removed within a given time they would be stored at the owner's risk and storage therefor would be charged. This was insufficient to show a custom continuing liability as common carrier, varying the general rule that such liability ceases on arrival of goods at destination and deposit in place of safety. *Georgia &c. R. Co. v. Atlanta*, 111 Ga. 6.

Cars containing consigned goods were side tracked on tracks of consignee for unloading and were burned. Defendant's liability as carrier had ceased when on consignee's order it had side tracked the cars. *Peoria &c. Co. v. U. S. Rolling Stock Co.*, 136 Ill. 643.

A carrier is liable only as warehouseman for corn destroyed by fire after it had reached its destination, and before delivery to the consignee, it being the custom for consignee to receive such a shipment directly from the track if he fails to designate a place of delivery. *Gregg v. Illinois R. Co.*, 147 Ill. 550.

Liability as carrier terminated upon the arrival within the usual time for transit and deposit in a safe deposit or warehouse ready for delivery, though the consignee was not notified thereof. *Illinois C. R. Co. v. Carter*, 165 Ill. 570; s. c., 36 L. R. A. 527; rev'd s. c., 62 Ill. App. 600. *Chicago &c. R. Co. v. Kendall*, 72 Ill. App. 105.

Stipulations limiting liability not available where goods billed to consignee, not the consignee. *Chicago &c. R. Co. v. Fifth Nat. Bank*, 26 Ind. 600.

ty of a company for goods in depot not called for, for eight  
that of warehouseman. Loss of goods by fire after that period  
able to company, if demand had been made for them and owner  
that they had not arrived. *Union &c. R. Co. v. Moyer*, 40 Kas.

were delivered to carrier, but not for shipment, until others ar-  
next morning. Liability before shipment was that of a ware-  
a. *Missouri P. R. Co. v. Riggs*, 10 Kan. App. 578.

e continuance of liability as common carrier after goods have  
their destination and await delivery to consignee, who has not  
fied of their arrival the court was divided. *McMillan v. M. S.*  
*P. R. Co.*, 16 Mich. 79.

pinion, Cooley, J.—“What that liability is when they have transported  
over their road and deposited it in their warehouse to await delivery  
signee is the next question demanding consideration.

point three distinct views have been taken by different jurists, neither  
can be said to have been so far generally accepted as to have be-  
prevailing rule of the courts.

that when the transit is ended, and the carrier has placed the goods  
warehouse to await delivery to the consignee, his liability as carrier is  
o, and he is responsible as warehouseman only. This is the rule  
achusetts cases. *Thomas v. Boston & Providence R. R. Co.*, 10 Met.  
Norway Plains Co. v. Boston & Maine R. R. Co., 1 Gray, 263, and those  
ow them.

That merely placing the goods in the warehouse does not discharge  
er, but that he remains liable as such until the consignee has had  
e time after their arrival to inspect and take them away, in the com-  
se of business. *Morris & Essex R. R. Co. v. Ayres*, 5 Dutch. 393;  
al v. Brainerd, 38 Vt. 413; *Moses v. Boston & Maine R. R.*, 32 N. H.  
d v. Crocker, 18 Wis. 345; Redf. on Railw. sec. 157.

That the liability of the carrier continues until the consignee has been  
f the receipt of the goods, and has had reasonable time, in the common  
business, to take them away after such notification. *McDonald v.*  
*Corp.*, 34 N. Y. 497, and cases cited; 2 Pars. on Cont. 5th ed., 189;  
Carriers, sec. 313; Chitty on Carriers, 90.

le as secondly above stated proceeds upon the idea that the consignee  
formed by the consignor of any shipment of freight, and that it then  
he duty of the former to take notice of the general course of business  
rrier, the time of departure and arrival of trains, and when, there-  
receipt of the freight may be expected, and to be on hand ready to take  
when received. It is assumed to be simply a question of reasonable  
with the consignee whether he ascertains the receipt of his consign-  
not; the regularity of the trains being such as to leave him without  
e excuse if he fails to inform himself.

may be railroad lines in the country where the application of this  
d do injustice to no one.

business is not so great but that freight trains can be run with the  
ularity as those for passengers, and the freight can always be sent

forward immediately on being received for the purpose, a notice from the signor will usually apprise the consignee with sufficient certainty when goods may be expected. But on the long through lines such regularity is impracticable. Freight must be sent forward from the carrier's warehouse with a promptness depending upon the pressure of business; or, in other words, it may suit his convenience and his interest to forward it. This may be for days, or even weeks, after its receipt, or it may be immediately. It is always in the power of the carrier to give reliable information upon the subject, and unavoidable delays will frequently intervene after the transit has commenced. To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to be imposing a burden upon him without in the least relieving the carrier. It can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books which would otherwise be necessary, especially at the important points.

The rule that the liability of the carrier shall continue until the consignee has had reasonable time after notification to take away his goods, is traceable to certain English decisions having reference to carriers by water, whose mode of doing business resembles that of railroad companies in the inability to bring their vehicles to every man's door, and there deliver his goods. It is a modification in favor of the carrier by land of the obligation formerly resting upon him, and which required, in the absence of special contract, an actual delivery to the consignee of the goods carried. The modern modes of transportation render this impracticable, unless the carrier shall add to his business that of drayman also, which is generally a distinct employment. In lieu of delivery, therefore, the carrier is allowed to discharge himself of his extraordinary liability by notifying the consignee of the receipt of the goods, who is then expected to remove them in accordance with what is an almost universal custom, to remove them himself. It is insisted, however, that this rule, so far as it can be considered established by authority, is applicable only to carriers who have no warehouses of their own, but make the wharf or platform their place of delivery, and who, therefore, never become warehousemen, and are held to a continued liability as carriers, as the only mode of insuring watch and protection over the goods is that the owner can have opportunity to receive them. This distinction would not be entirely without force, and would seem to be acted upon in one state at least. Compare *Scholes v. Ackerland*, 13 Ill. 574, and *Crawford v. Clark*, 15 id. 407, with *Eichards v. M. S. & N. I. R. R. Co.*, 20 id. 404, and *Porter v. Same*, 21 id. 407. See, also, *Chicago & R. I. R. R. Co. v. Warren*, 16 id. 502, where a railroad company was held to the same measure of responsibility as a carrier by water, where the property carried, instead of being placed in their warehouse, was carried outside.

But it may well be doubted whether the distinction rests upon sufficient reasons. The man who sends his goods by railroad, and who desires to receive them as soon as they reach their destination, has commonly no design to enter into any relation with the railroad company in any other capacity than that of carrier. If any relation than that is formed between them, it is one that the law forms without consideration springing from the usages of business, and having reference to the due protection of the interests of both. The owner wants storage only so long as he can have time to remove the goods; and the warehousing is only incidental to the carrying. Payment for the transportation is payment also for the

cidental storage. The owner has been willing to trust the company as carriers because the law makes them insurers; but he might not be willing to trust them as warehousemen under a liability so greatly qualified, and in a trust which implies generally a considerable degree of personal confidence. As what he desires is, not to have the goods remain in store, but to receive them personally as soon as they can be carried, and as the railroad company, if they had no warehouse, would continue to be liable as carriers until the lapse of a reasonable time after notification, it would seem that if the company can elaim any exemption from their liability as insurers, it must be upon the ground that the erection of warehouses is for the benefit, not of the company, but of the public doing business with them, and to facilitate delivery. But this, as appears to me, would be taking a very partial and one-sided view of the purpose of these structures.

If the road has no warehouse, the cars must remain standing on the track until the owner can come and receive his goods, or, if they are unloaded, the company must not only establish a watch to prevent thefts, but at their peril must protect against injuries by the elements. Landing the goods on the platform, it is agreed on all hands, does not alone discharge the carrier. And it seems to me that a consideration of the immense carrying trade of the country will force one to the conclusion that it cannot possibly be either properly, expeditiously or profitably done except with the conveniences afforded by the railroad warehouses, which afford the easiest, cheapest and most effective means by which carriers are enabled to protect themselves against losses in that capacity.

At the great centers of commerce, it would be impossible to transact the amount of business now done, if the cars must stand upon the track until the goods carried can be delivered from thence to the consignees. Unloading them in immense quantities upon open platforms would expose them to destruction. At the less important points the same thing is true, but in less degree. It would seem, therefore, looking only to the interest of the carriers, that the reasons which require the construction of warehouses are imperative. Only by means of them can they keep their tracks clear for trains, or protect against the destruction of goods of which they are insurers. And wherever the business is large, warehouses are required also, to enable the companies to carry out a system of separation and classification of goods received, without which it would be quite impossible to conduct the business with facility or profit. The warehouses are also absolutely essential in connection with the receipt and dispatch of goods to be sent from each point, and in respect to which the railroad company are unquestionably liable as carriers from the time of their receipt. In every view, therefore, they seem indispensable to the business of the carrier; and being constructed with reference to it, they are properly nothing more than an extension of the platforms upon which the companies receive and deliver goods, with walls and roofs added to facilitate, guard and to protect against injuries by the elements.

The interest, on the other hand, which the consignee has in the warehouse, is much less direct and important. It may facilitate the delivery of goods, but the carrier is liable if he fail to deliver in reasonable time. The risk of loss and injury will be less, but against these the carrier insures. In no proper sense can the warehouse be said to be for his accommodation; and if the obligations of the carrier to him are to be diminished by its erection, he might well prefer that it should not be built. The rule which changes the carrier into a ware-

houseman against the will of the owner of the property, on the ground that he has erected convenient structures for the storage, but which structures are absolutely essential to his business as carrier, seems to me to be a departure from the rule of the common law upon reasons which do not warrant it. A rule which allows the insurer to absolve himself from obligations to the insured by supplying himself with the conveniences for the transaction of his business and with the means of protection against loss or damage.

A critical examination of the cases on this subject would scarcely be profitable. As they cannot be reconciled, the court must follow its own reasons. I am not to discover any ground which to me is satisfactory, on which a common carrier of goods can excuse himself from personal delivery to the consignee, except the fact that which usage has made a substitute. To require him to give notice when the goods are received, so that the consignee may know when to call for them, is not upon him no unreasonable burden. If, by understanding with the consignee that the goods were to remain in store for a definite period, or until he should receive further directions concerning them, the rule would be different, because the relationship of warehouseman would then be established by consent. In the absence of such understanding sound policy, I think, requires the carrier to be held liable until he has notified the consignee that the goods are received. If the nature of the bailment then becomes changed through the neglect of the carrier to remove the goods, it will be by his implied assent. Such a rule is just to both parties and burdensome to neither, and it will tend to protect the public on the part of carriers in giving the notices, which, whether compulsory or not, are generally expected from them."

A carrier who has in accordance with statutory requirement delivered grain to the public warehouseman "for and in behalf of the consignor," who had been notified of the same, is not liable for its loss. *Arthur v. St. Paul & C. R. Co.*, 38 Minn. 95.

Liability of a carrier as such terminated by tender to a consignee, and a refusal to receive by the latter, and, being liable to the consignee as warehouseman only, the original carrier was not negligent, where the loss of stock in pens through an infectious disease was one which the carrier had no reasonable cause to anticipate. *Larimore v. Chicago & C. R. Co.*, 100 Mo. App. 167.

Where the carrier was not to be liable unless the goods were removed on arrival, it was relieved, where they were not removed within a reasonable time after notification though that was not made on the day of arrival. *Herf & C. Chemical Co. v. Lackawanna Line*, 70 Mo. App. 100.

Freight received and stored in a freight house remained the property of the carrier for several days, though a part was taken away on arrival. It was held that a reasonable time for removal had expired and that the carrier's liability terminated thereafter that of warehouseman only. *Welch v. Concord R. Co.*, 100 N. H. 206.

As the warehouse of defendant company in which were goods of plaintiff was burning up, plaintiff requested that he might be allowed to remove them to save his property, but company refused on the ground that the



warehouse could be stolen if the doors were opened. Held, liable for destruction of plaintiff's property. *Turrentine v. &c. R. Co.*, 100 N. C. 375.

delivered, to be held for shipment until crated. The that of a warehouseman only. *Fisher v. Lake Shore &c. R. Co.*, 100 N. C. 491.

delivered to defendant steamboat company to be sold and returned. While it was carrying the flour it was a carrier; when the flour it became a factor; when the flour was sold and proceeds of the sale were received by it, it became a carrier for the loss of such money by fire on the return trip it was *Harrington v. McShane*, 2 Watts. (Pa.) 443.

not liable for damage by storm to goods unloaded on an platform at a way station with no station house, or agent, regulation provided that goods should be at owner's risk when *Illam v. Pennsylvania R. Co.*, 183 Pa. St. 174; rev'g s. c., 3 Pa. St. 335.

was not liable, even as warehouseman, where the shipper and when the defendant's freight house had been closed for entry to it and put goods inside from an upper window. *Pennsylvania R. Co.*, 11 Pa. Super. Ct. 97.

company was not required to provide storage in a warehouse at least a depository and as such bound to use such reason-able protection of goods as the conditions permitted. *Springs and R. Co.*, 46 S. C. 104.

sufficient to constitute one a warehouseman is only made by the goods in a safe warehouse and the liability of a carrier as long as the goods remained in a car, which could not be a warehouse. *Hipp v. Southern R. Co.*, 50 S. C. 129.

did not constitute itself a warehouseman, by placing goods on and notifying the consignee, a connecting carrier, to receive them soon as possible. *Texas &c. R. Co. v. Clayton*, 173 U. S. 100, 84 Fed. Rep. 305.

was at least a warehouseman, where its cars still containing goods, were placed in the yards of an association furnishing terminal facilities but not having control or possession of the goods. *Hunting Elevator Co. v. Bosworth*, 179 U. S. 415; *Ill v. Chicago &c. R. Co.*, 87 Fed. Rep. 72.

is relieved from liability as such for damage to fruit, under the bill of lading providing that consignee must be on receipt of the goods, otherwise carrier will deposit them in warehouse with notice. *The Boskenna Bay*, 40 Fed. Rep. 91.

Carrier was liable where the goods were misplaced upon arrival, the consignee informed that they had not arrived. Consignee discovered them, but too late for removal before their destruction by fire. *Central Trust Co. v. East Tennessee R. Co.*, 70 Fed. Rep. 764.

Citing *Railway Co. v Kelley*, 91 Tenn., 699.

Carrier was liable as warehouseman for negligence, where it had a few employes that it was unable to discover a leaky carboy of oil placed in the building by a drayman. *Farmer's Loan &c. Co. v. O'Connell &c. Co.*, 73 Fed. Rep. 1003.

A carrier depositing goods in its warehouse was held to be a warehouseman for hire and not a naked depositary and was liable for negligence, where it permitted a car marked "powder" to be so close to the warehouse as to deter firemen in their efforts to extinguish a fire in the warehouse. *Hardman v. Montana &c. R. Co.*, 83 Fed. Rep. 88; s. c., 39 L. R. A. 100.

Carrier received cotton for transportation to New Orleans to be transhipped in steamers. It was destroyed after unloading upon a wharf but before the customary notification and checking off by the steamship companies. It was held that there was no "delivery" within the stipulation against liability after delivery to a connecting carrier. *Texas &c. R. Co. v. Reiss*, 98 Fed. Rep. 533; s. c. aff'd, 99 Fed. Rep. 1006.

It was for the jury to say whether defendant's piling cotton around its fire apparatus contributed to a loss by fire and whether it was negligent to store it in open sheds in close proximity to railroad track, and in not having a larger force of watchmen. *Marande v. &c. R. Co.*, 184 U. S. 173; rev'g s. c., 102 Fed. Rep. 246.

Goods consigned to plaintiff at St. A. arrived safely; plaintiff failed to inquire about the same in the evening of the day they arrived, but left them with a view of getting them the next morning and they were burned that night. Court held, that defendant's liability to be that of a warehouseman, unless it were shown that plaintiff would not reasonably be required to accept delivery of it until the following morning. *Menthal v. Brainerd*, 38 Vt. 402.

Liability as common carrier continues for a reasonable time after arrival to allow for removal, after which liability is reduced to that of a warehouseman. *Berry v. West Va. &c. R. Co.*, 44 W. Va. 538.

The facilities of the consignee for removal do not affect a determination of what constitutes reasonable time therefor before termination of the carrier's liability as such. Three days was held to be reasonable in the matter of law. *Backhaus v. Chicago &c. R. Co.*, 92 Wis. 393.

## XVIII. Connecting Carriers.

A common carrier may by contract or by holding itself out as undertaking such carriage, become obligated to carry to a point beyond the terminus of the line operated by it, in which case it is liable for failure to safely carry and deliver by whosoever's default; each carrier, in such case, is also liable for his own default. If there be no contract to carry beyond its own line, the liability of each carrier will begin with the receipt and due dispatch of the goods or passenger, and end with due delivery at the end of its line. The owners of several lines are liable also when they operate their lines as one, or hold them out to be one, or use a common ticket, or indifferently receive each other's ticket, or are partners. But the mere fact that a carrier checks baggage through, receives goods marked through, receives a through price, or sells a ticket for its own line with the coupon ticket for the subsequent line, does not generally create a contract to carry through; but, the rule in several states, as well as in England, is that the receipt for shipment of goods marked to a particular point creates presumptively a contract to deliver at such point, and even the receipt of the price through has been considered important as evidence of a through contract. If the first carrier is authorized to impose its obligation on a subsequent carrier it may also confer the immunities possessed by itself; hence, exemption secured to the first carrier extends to auxiliary carriers, or if the first carrier has power to make an independent contract for shipment beyond its line, it may, in behalf of the shipper, stipulate for succeeding lines the same exemptions that it has secured for itself from the shipper.

The following rules generally prevail:

## (a). THROUGH CONTRACTS.

A carrier may contract to carry beyond the terminus of its own line over other roads, even into other states. *Wibert v. R. Co.*, 12 N. Y. 245; *Quimby v. Vanderbilt*, 17 id. 306; the agent in this case posted an advertisement headed "Vanderbilt's Line between New York and San Francisco," describing the route by steamships on both oceans and across the isthmus, and sold the plaintiff for a gross sum three tickets, which severally purported that he was to be carried to and across the isthmus and thence upon a particular vessel on her next voyage to San Francisco. \**Burtis v. Buffalo & State Line R. Co.*, 24 N. Y. 269; *Maghee v. Camden & Amboy R. Co.*, 45 id. 514; *Root v. Great West. R. Co.*, 45 id. 524; *Swift v. Pacific Mail S. Co.*, 106 id. 206; *Jennings v. Grand Trunk R. Co.*, 127 id. 438; *Angle v. R. Co.*, 9 Iowa 487; *Bank of K. v. Adams Ex. Co.*, 93 U. S. 174; *Bennett v. Filyaw*, 1 Fla. 403; *Cutts v. Brainard*, 42 Vt. 566—receipt contained promise

\* NOTE.—Although this case was decided under chap. 270, sec. 9, L. 1847, the opinion seems to make the liability of the defendant dependent upon the consent or contract of the carrier, not upon any compulsion of the statute, but regards the statute as an enabling act. This was held in *Root v. Great West. R. Co.*, 45 N. Y. 525. The statute was repealed by chap. 575, Laws of 1890.

to carry to destination. *Hart v. Rensselaer &c. R. Co.*, 8 N. Ill. Cent. R. Co. v. *Johnson*, 34 Ill. 389; *Louisville &c. R. Co. v. Campbell*, 7 Heisk. 253; *Meyer v. Rutland &c. R. Co.*, 26 Vt. 339; *Nashua Lock Co. v. Worcester &c. R. Co.*, 48 N. H. 339; *Chicago & N. W. R. Co.*, 19 Wis. 131, "contract from N. to N. \$2.25 per barrel, J. H. S., agent," was through contract. *Penn. v. Berry*, 68 Penn. St. 272; *Perkins v. Portland*, 47 Maine 57; *field on Railways*, 284; *Schroeder v. Hudson R. Co.*, 5 Duer 55; *&c. R. Co. v. Merriam*, 52 Ill. 123; in this case the carrier attempted to limit its liability to its own line, but the general contract and bill of lading prevailed. *Weed v. Saratoga &c. R. Co.*, 19 Wend. 534.

The defendant hired "D." to run a stage from its station to a boring village, and to sell tickets from the station to points on the line. The plaintiff was injured on the stage, while going to take a trip which he held no ticket. He had become a passenger, and the defendant was liable. It was no defense that the contract with "D." was *ultra vires*. *Buffett v. Troy & Boston R. Co.*, 40 N. Y. 169; aff'd *judgment*.

Passenger from New York to Germany delivered his trunks to the defendant to be shipped to an address in England, taking a receipt "for transfer by slow freight" to the address given. It was held that the contract to forward and not to carry and defendant was not liable by fire during detention in custom house. *Parker v. North Lloyd S. Co.*, 76 N. Y. Supp. 806.

A bill of lading which agrees to transport goods to a given place, the entire sum paid at delivery with no reference to connecting carrier, is more than that they shall be entitled to the benefit of a stipulation limiting its liability where valuation is not specified, construed as a through contract entitling connecting carrier to the benefit of the exemptions. *W. & A. Weir*, 33 App. Div. 145.

Where company's charter provided for the running of trains to a certain place and the company contracted to carry a passenger beyond that place, it was held that the doctrine of *ultra vires* would apply to an action for injuries received beyond the termination of the road, and that passenger could not recover for the same. *Hood v. N. Y. &c. R. Co.*, 22 Conn. 441; *Pierce v. Madison &c. R. Co.*, 21 How. (U. S.) 441. The Connecticut courts still adhere to this. *Converse v. Norwich &c. R. Co.*, 33 Conn. 16; *Turner v. R. Co.*, 20 Mo. App. 632; *Irwin v. R. Co.*, 59 N. Y. 653.

Though the carriage as contracted is necessarily over connecting carrier, it is not against public policy nor a statute, prohibiting limitation of liability, to limit liability to a carrier's own line. *Hartley v. St. Louis & N. W. R. Co.*, (Iowa) 89 N. W. Rep. 88.

an agent did this in one single instance without authority, it was only liable to the end of its own line. *Burroughs v. R. Co.*, 100 Mass. 26. See *Elkins v. R. Co.*, 3 Foster, 275. cannot limit liability to its own line where it agrees to carry over connecting lines. *Jones v. St. Louis &c. R. Co.*, 89 Mo.

presence of express provisions the receipt of goods billed through and on through freight shows a through contract; but an exception in a bill of lading governs. *Stevens v. Lake Shore &c. R. Co.*, 111 U. S. 41.

A connecting carrier agrees to act as the agent of the connecting carrier, the freight charges for such being separate it is not a single contract. *Hughes v. Pennsylvania R. Co.*, (Pa. St.) 51 Atl.

Receipt of a through car and collecting through freight are evidence of a contract for the journey. *Page v. Chicago &c. R. Co.*, 7 S. D.

Receipt of freight for the entire distance held insufficient to warrant a through contract. *Sutton v. Chicago &c. R. Co.*, (S. D.) 100 U. S. 396.

A carrier must receive a connecting carrier's freight under Tex. art. 4535, it may require them to be carried on a separate car, its own, and, if it receives them upon a through contract it is liable under art. 331a for the acts of the connecting carrier. *Texas &c. R. Co. v. Randle*, 18 Tex. Civ. App. 348.

Where, it makes a separate contract, the fact that it receives the freight from the first carrier does not bring it within the latter contract. *Ill. &c. R. Co. v. Short*, (Tex. Civ. App.) 51 S. W. Rep. 261. testified that he arranged for transportation to a given point on defendant's line with the privilege of changing destination. Defendant liable for its connecting carrier's negligence. *Texas Mexican &c. R. Co. v. Gallagher*, (Tex. Civ. App.) 64 S. W. Rep. 809.

A bill of lading from "W." to "O." signed regularly by defendant, bound defendant although its line ran only to "M." Cars were destroyed en route from "M." to "O." *Hansen v. Chicago &c. R. Co.*, 73 Wis. 346; *Perkins v. Portland &c. R. Co.*, 47 Me. 200; *Con v. N. Y. Cent. &c. R. Co.*, 94 N. Y. 278.

A carrier was not allowed to set up that a contract, made by it to carry freight to points beyond its own line, was *ultra vires*. *Bigelow v. Chicago &c. R. Co.*, 104 Wis. 109.

## (b). INITIAL CARRIER'S LIABILITY THEREON.

The carrier thus contracting to carry through is liable for injury or loss happening on any of the roads which it employs in discharging its contract to carry the goods to their destination; and, so, any carrier would be liable for the default of other carriers acting as its agents. *Hart v. Rensselaer & Saratoga R. Co.*, 8 N. Y. 37; *Quimby v. Vanderbilt*, 17 id. 306; *Bissell v. Michigan Southern & Northern Indiana R. Cos.*, 22 id. 258; *Root v. Great Western R. Co.*, 45 id. 524; *Jennings v. Grand Trunk R. Co.*, 127 id. 438; *Hansen v. Flint &c. R. Co.*, 73 Wis. 346; *Wharton on Neg. sec. 578* (note 2).

This would be so although there were a notice on the ticket or in the shipping contract that the first carrier acts as agent, or that it is not liable beyond its own line. *Condict v. Grand Trunk R. Co.*, 50 N. Y. 500; *Bussman v. Western Transit Co.*, 9 Misc. 410.

An agreement to forward fresh fruit, billed to New York, "care C. & N. W. via Erie Dispatch, New York passenger train service," and providing for through freight, was a special contract for through transit and rendered the contracting company liable for delay on connecting line in spite of a stipulation restricting its common law liability to its own line. *Colfax &c. Fruit Co. v. Southern P. R. Co.*, 118 Cal. 648; s. c., 40 L. R. A. 78.

A statute, making the initial carrier liable for failure to trace the goods and show delivery upon notice of non-delivery, held not to apply, where the goods were actually delivered, though damaged, before notice was given. *Savannah &c. R. Co. v. Austin*, 101 Ga. 629.

Initial carrier held not liable under such statute for goods, in warehouse of final carrier subject to consignee's orders, as "lost." *McElveen v. Southern R. Co.*, 109 Ga. 249.

On contract of through carriage, initial carrier is liable for negligence of connecting carrier. *St. Louis &c. R. Co. v. Elgin &c. Milk Co.*, 175 Ill. 557; aff'g s. c., 74 Ill. App. 619.

Where a carrier agrees to transport beyond its own line, it is liable for injuries on other lines in the absence of an agreement to the contrary. *Elgin &c. R. Co. v. Bates Mach. Co.*, 98 Ill. App. 311.

Where a carrier undertakes by a through contract to transport for the whole distance, it cannot exempt itself from liability for the acts of connecting carriers. *Ireland v. Mobile &c. R. Co.*, 105 Ky. 400.

Where a carrier agrees to transport beyond its own line it is liable for injuries on other lines and it cannot limit it by agreement to its own. *Chicago &c. R. Co. v. Western Hay &c. Co.*, (Neb.) 90 N. W. Rep. 205.

A carrier with privilege of selecting route is liable for sending by insolvent carriers. *Post v. Southern P. R. Co.*, 103 Tenn. 184.

Where defendant's contract was to carry to a certain point it was not affected by the shipping report signed by plaintiff and agent of connecting carrier at the point of connection. *San Antonio &c. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

Agreement to carry beyond its own line renders carrier liable for injury on connecting lines. *Gulf &c. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. Rep. 119.

Carrier by agreeing to ship over a connecting line assumes liability for damage on such line. *Texas &c. R. Co. v. McCarty*, (Tex. Civ. App.) 69 S. W. Rep. 229.

A railroad who has agreed to carry to a given point cannot relieve itself from responsibility for injuries by placing the passenger in charge of another road. *Barkman v. Pennsylvania R. Co.*, 89 Fed. Rep. 453.

#### (c). CONNECTING CARRIER'S LIABILITY THEREON.

In case of a contract by a preceding carrier to carry through, a subsequent connecting carrier is only liable for loss or injury happening on its own line. *Campbell v. Perkins*, 8 N. Y. 430; *Burtis v. Buffalo & State Line R. Co.*, 24 id. 269, 272; *Root v. Great Western R. Co.*, 45 id. 525, 530; s. c., 55 id. 636; *Kessler v. N. Y. Cent. R. Co.*, 61 id. 538, aff'g 7 Lansing 62, and rev'g judg't for pl'ff; *Barter v. Wheeler*, 49 N. H. 9; *N. J. Steam &c. Co. v. Merchants' Bank*, 6 How. (U. S. R.) 344; *Smith v. N. Y. Cent. R. Co.*, 42 Barb. 225; *Van Santvoord v. St. John*, 6 Hill R. 157; *Wharton on Neg.*, sec. 579.

Each connecting carrier in a through bill of lading is an agent of the others to transport and deliver the goods. The receiving carrier will be liable to owner for negligence anywhere along the line, but as between themselves each is liable only for its own negligence. *Missouri P. R. Co. v. Twiss*, 35 Neb. 267.

The English rule is different, and by it the contracting carrier is alone liable. *Root v. Great Western R. Co.*, 45 N. Y. 524, and cases cited; *Bristol &c. R. Co. v. Collins*, 7 H. L. Cas. 794.

And so it has been held in some states. *Cincinnati &c. R. Co. v. Pontius*, 19 Ohio St. (N. S.) 22; *Coates v. U. S. Express Co.*, 45 Mo. 238; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88; *Southern Express Co. v. Shea*, 38 Ga. 519; *Toledo &c. R. Co. v. Merriam*, 52 Ill. 123.

A shipper may recover on a through contract of any connecting carrier on whose line his goods were lost. *Cavallaro v. Texas &c. R. Co.*, 110 Cal. 348.

In the absence of any special relationship or understanding or agreement with the shipper, a connecting carrier is not liable for damage

occurring in the hands of the first carrier. *Trumball v. Couls*  
Colo. App. 102.

Shipper may recover of a connecting carrier for loss due to its  
gence. *United States Mail Line Co. v. Carrollton &c. Man. Co.*  
Ky. 658.

A connecting carrier, accepting goods requiring rapid carriage  
contract for through transportation, was liable for failure to com-  
cate for 18 days the refusal of the ultimate carrier with whom  
needed, to carry without prepayment of freight charges. *Bird v. So.*  
*R. Co.*, 99 Tenn. 719.

Connecting carrier held liable for holding goods for excessive cl  
*Texas &c. R. Co. v. Hassell*, (Tex. Civ. App.) 58 S. W. Rep. 54

Where the company agreeing to carry beyond its own line is  
jected to liability for loss on a connecting line, it may recover  
latter. *Texas &c. R. Co. v. McCarty*, (Tex. Civ. App.) 69 S. W.  
229.

#### (d). EFFECT OF SELLING COUPON TICKETS AND CHECKING B. THROUGH.

The mere fact that a carrier sells tickets over its own line, and a  
a coupon ticket for subsequent lines, or receives through charges,  
ing a connecting line, without agreement to deliver at destination,  
not make it liable for the default of the connecting line, even tho  
check the baggage through. In such case the rights and liability  
the same as if the purchase had been made at actual office of the  
tive lines. *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 191; *W.*  
*Northern R. Co.*, 53 id. 156; *Milnor v. N. Y. & N. H. R. Co.*,  
363; *Kessler v. N. Y. Cent. & H. R. Co.*, 61 id. 538; *Isaacson v.*  
*Cent. & H. R. Co.*, 94 id. 278; *Poole v. D. L. & W. R. Co.*, 35 H.

See, *Quimby v. Vanderbilt*, 17 N. Y. 306; *Brintnall v. R. C.*  
*Vt.* 665; *Brooke v. Grand Trunk R. Co.*, 15 Mich. 332; *Burro*  
*R. Co.*, 100 Mass. 26; *Ellsworth v. Tarrt*, 26 Ala. 733; *Gass v.*  
99 Mass. 220; *Hartan v. Eastern R. Co.*, 114 id. 44, dist'ing *Hil*  
*Co. v. Boston, &c. R. Co.*, 104 id. 122; *Hood v. N. Y. &c. R. C.*  
*Conn.* 1; *Knight v. Portland &c. R. Co.*, 56 Maine, 234; *Kerr*  
*Southern Pac. R. Co.*, 81 Cal. 248; *Myrick v. Michigan R. Co.*,  
S. 102; 104 Mass. 122; 96 U. S. 258; 104 id. 146; *Nashville*  
*Co. v. Sprayberry*, 8 Bax. (Tenn.) 341; *Naugatuck R. Co. v. Wat*  
24 Conn. 468; *Penn. R. Co. v. Schwartzenberger*, 45 Penn. St.  
*Penn. R. Co. v. Cornell*, 18 Am. & Eng. R. Cas. 339; *Peterson*  
*cago &c. R. Co.*, 80 Iowa, 92; *Sprague v. Smith*, 29 Vt. 421; *Sch*



c. R. Co., 9 Cush. 24; Railway Co. v. Roach, 35 Kan. 740; R. Co. v. Dumser, 161 Ill. 190; aff'g s. c., 60 Ill. App. 93; Kansas City &c. R. Co., 77 Miss. 789; Lessard v. Boston 39 N. H. 648.

ra, Wolff v. Railway Co., 68 Ga. 653; Railway Co. v. Fort m. & Eng. R. Cas. 392; id. 395; Harp v. The Grand Era, 1

contract for through shipment made by intermediate car-  
t fix liability for damage occurring on another road. *Fort*  
*R. Co. v. Williams*, 77 Tex. 121.

ttiff bought of the defendant's agent a ticket for New York  
ndant's line to Utica and thence by the N. Y. C. R. Co. to  
the coupon from Utica to New York contained no terminal  
l the plaintiff, upon arrival over the defendant's road at  
refused admission to the Central station and was obliged to  
ticket. Held, that the ticket agent on the defendant's line  
ntal company's agent, but the agent of the defendant, and  
endant was liable; *especially* as failure to insert "terminal  
as the fault of the agent. Whether the plaintiff could re-  
than the price of the fare to New York, *quære*. *Griffin v.*  
*ck River R. Co.*, 41 Hun, 448, reversing nonsuit.

t sold tickets from "O." to "F.," stations on its road, and  
coupon for the stage line from "F." station to "F." by  
nibus. Hatch sold tickets on separate cards, one for his  
nd one for the railway to "O." Defendant was not liable  
n stage line by Hatch's negligence. *Poole v. D., L. & W. R.*  
*u*, 29, reversing judgment for plaintiff.

ision.—"The separate tickets, whether regarded as contracts or  
nsufficient evidence to justify the conclusion as a matter of law,  
hat the defendant contracted to carry the plaintiff beyond Fulton  
ner v. N. Y. & N. H. R. R. Co., 53 N. Y. 363. In this case the  
ued coupon tickets and checked the plaintiff's baggage over a con-  
\* \* \* It was held that the tickets and check were insufficient  
authorize the conclusion that defendant, contracted to carry over  
g road.

v. New York Central and Hudson River Railroad Company (61  
the plaintiff purchased a coupon ticket from the Baltimore and Ohio  
Washington, for Buffalo, over the defendant's road, and checked her  
ugh, which was never delivered. The plaintiff failed to show that  
came into the possession of the defendants, and it was held that  
nd checks were insufficient evidence to justify the conclusion that  
g roads were liable as joint contractors.

n v. New York Central and Hudson River Railroad Company (94  
t was held that a check upon baggage through to New Orleans was

evidence of a contract to safely deliver to a connecting road, but not a contract to deliver at New Orleans. The same principle is decided in *v. Portland Railroad Company*, 56 Maine 234; *Myrick v. Michigan Central Railroad Company*, 107 U. S. 102; *Gass v. New York, Providence and Boston Railroad Company*, 99 Mass. 220; *Burroughs v. The Norwich and Worcester Railroad Company*, 100 id. 26; see, also, *Wharton on Negligence*, secs. 109, 110; *Rorer on Railroads*, 975; \* \* \* see, also, *Buxton v. Northeastern Railroad Company*, Law Rep. 3 Q. B. 549; *Bristol and Exeter Railway v. Collyer*, 13 Q. B. 194.

The rule in England differs from the rule generally laid down in the United States. (For a discussion of the English and American rule, see 3 *Am. Law Rev.* 485; 2 *Am. Law Rev.* 426.)"

The Wabash Railroad Company, the Grand Trunk Railroad Company and the West Shore Railroad Company formed a through route from Detroit to Chicago and to New York. Coupon tickets were issued, each coupon of each company being for transportation over its own road. Baggage checked under this ticket, sold by the first company on the road of the second company. *Talcott v. Wabash R. Co.*, 187 U. S. 456; reversing judgment for plaintiff on account of errors in the lower court.

There was some absence of unity in interpreting this contract.

Van Brunt, P. J.—The first company, and not the connecting company, was concerned in the contract as respects the plaintiff, and the action was brought against the first company. *Burnell v. N. Y. C. R. Co.*, 45 N. Y. 18; *Cleveland & Toledo R. Co.*, 29 Barb. 35; *Burtis v. Buffalo & State R. Co.*, 24 N. Y. 275; *Condict v. G. T. R. Co.*, 54 id. 505; *Sloman v. G. W. R. Co.*, 21 id. 211; *Isaacson v. N. Y. C. R. Co.*, 94 id. 278.

O'Brien, J.—The first company was not liable as a matter of course, as the coupon ticket specified that the first company was the agent of the second, and limited its liability for damages occurring on its own route. *Auerbach v. C. R. Co.*, 89 N. Y. 281.

Barrett, J.—There was no evidence of a coupon ticket, and the first company's liability resulted from the sale of a through ticket.

Where a carrier sells tickets over another line connecting with its own, and assumes to secure accommodations over that line, it is liable for damages on that line, of such other line to furnish proper accommodations, notwithstanding it has printed a notice on the ticket that it acts as agent and is not liable beyond its own line.

Such a notice printed on the ticket is not a contract which binds the passenger, the ticket is only a voucher that the party holding it is entitled to his fare.

Defendant advertised to carry passengers to the World's Fair at Chicago for a special rate, which was to include meals and berth in the day room, defendant's steamers connecting with those of the Lake Superior and Lake Superior Transportation Company, at Sault Ste. Marie. In pursuance of this advertisement plaintiff bought tickets for himself and family.

ndant endeavored to secure berths for its passengers from the any, which replied that it had reserved a number which would sufficient, but failed to furnish any to plaintiff or his wife. n for such failure, a nonsuit was improper. *Bussman v. The ansit Co.*, 9 Misc. 410. (Superior Court of Buffalo.)

carrier may contract to carry beyond its own line, in the ab- such a contract, by selling a through ticket over other lines, ely as agent of such lines and is bound only to carry to the own line and deliver to the connecting carrier. *Talcott v. Co.*, 89 Hun, 492; s. c. rev'd, on another point, 159 N. Y.

ging for an excursion for a society. its vice-president desired to make an arrangement with another road on whose line was be visited. The defendant did so and the tickets mentioned Defendant had not agreed to transport over another line for n of the route and was not liable for injuries received thereon. *New York &c. R. Co.*, 39 App. Div. 457.

#### EFFECT OF RECEIVING GOODS BILLED THROUGH.

r will not usually be deemed to have contracted to carry be- yrn line from the mere fact that goods are marked through, or nation beyond its line; and in such case is only bound to r to the connecting carrier. *Root v. Grand Western R. Co.*, 24; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 491; *Angle v. R. Co.*, 9 Iowa, 487; *Ackley v. Kellogg*, 8 Cow. 223; *Bur- Norwich &c. R. Co.*, 100 Mass. 26; *Brintnall v. Saratoga &c. Vt.* 665; *Briggs v. Boston &c. R. Co.*, 6 Allen, 246; *Bank v. Co.*, 18 Vt. 140; 23 id. 209; *Converse v. Norwich &c. R. Co.*, 66; *F. & M. Bank v. Champlain T. Co.*, 23 Vt. 209; *Jame- A. R. Co.*, 2 Am. L. Reg. 234 (note); *McKay v. N. Y. C. R. un*, 562; *McMillan v. Michigan &c. R. Co.*, 16 Mich. 119; *Conn. R. Co.*, 1 Gray, 502; *Penn. R. Co. v. Berry*, 68 Penn. *Peet v. Chicago &c. R. Co.*, 19 Wis. 136; *Perkins v. Portland 47 Maine*, 573; *Rome R. Co. v. Sullivan*, 25 Ga. 228; *Van v. St. John*, 6 Hill, 157; *Zeuner v. C. & A. R. Co.*, 27 Penn. *Klein v. Dunlap*, 16 Misc. (N. Y.) 34; *Osterhoudt v. Southern 47 App. Div. (N. Y.)* 146; *Howard v. Chesapeake &c. R. pp. D. C.* 300; *Hartley v. St. Louis &c. R. Co.*, (Iowa) 89 *p.* 88; *Hoffman v. Union P. R. Co.*, 8 Kan. App. 379; *Mis- R. Co. v. Houston*, 10 id. 356; *Louisville &c. R. Co. v. Cooper. S. W. Rep.* 1134; *Richmond &c. R. Co. v. Richardson*. (Ky.)

43 S. W. Rep. 465; *Seasongood v. Tennessee &c. T. Co.*, (Ky.) 54 Rep. 193; *Taylor v. Maine C. R. Co.*, 87 Me. 299; *Hoffman v. Berland Valley R. Co.*, 85 Md. 391; *Fremont &c. R. Co. v. Waterbury*, 592; *Wolfe v. Lehigh Valley R. Co.*, 9 Kulp, (Pa.) 401; *cinnati &c. R. Co. v. Fairbanks &c. Co.*, 90 Fed. Rep. 467.

See Am. note to 11 Exch. 497.

Where a carrier stipulates for the carriage of property *through* liable for a default of a connecting line; but, although goods be n "through," yet, in the absence of a contract to carry through, partnership between the carriers, the receiving company is bound for the due delivery of the goods to the next carrier. *Van Sant v. St. John*, 6 Hill, 158, 161, 162; *Jameson v. C. & A. R. W. Di Phila.* 4 Am. L. Reg. 234, note. Chapter 270, Laws 1847, has no cation. *Burtis v. The Buffalo & State Line R. R. Co.*, 24 N. Y. *Root v. Great Western R. R. Co.*, 46 N. Y. 524, rev'g 2 Lans. 19

See *McKay v. N. Y. Cent. R. R. Co.*, 50 Hun, 562.

From opinion.—"The English authorities hold that in such a case the pany first receiving the goods marked for a particular place, without ex limiting its responsibility, undertakes *prima facie* to carry them to their c tion, even though beyond the limits of the company's route, and is to garded as a carrier throughout the entire route; and that this rule applie the goods are directed to points even beyond the limits of England; a English cases have carried the rule so far as to hold the contract is crec with the first company, and that there is no right of action in favor owner against any of the subsequent companies on the route. *Musch Lancaster & P. R. W.*, 8 M. & W. 421; *Watson v. Ambergate R. W. 3 L. & E.* 497; *Scothorn v. S. Staffordshire R. W.* 8 Exch. 341; s. c., 18 En E. 553; *Wilson v. York R. W.* id. 557; *Crouch v. London & N. W. R. W. 287*; *Bristol & Ex. v. Collins*, 7 Ho. Ld. Cas. 194.

The fact that the contract *fixes the price for the entire carriage* not enable the connecting carrier to avail himself of limitations e to the initial company, and the first company is not the agent shipper to make such limitations with the connecting company.

Where a carrier undertakes for a specified compensation to tra over his own route, and to deliver at the terminus thereof goods n to a consignee beyond such terminus, a through contract will not plied from the fact that in the description of the goods in the c *the marks showing the ultimate destination are given.* Nor is contract extended or affected by the fact that in making it a p blank is used adapted to a through contract extending over oth connecting lines, and making the contract to read *ostensibly for behalf of all the carriers over whose lines the goods may pass.* Th ten portions of the contract will control, and only so much of the p matter in the blank form used as is consistent therewith is of any

mechanics' Ins. Co., 4 Seld. 351; Harper v. Albany Mutual N. Y. 194; all that is compatible with or inappropriate to of the parties as indicated by the written portion is to be re- *cock v. L. S. & M. S. R. Co.*, 49 N. Y. 491.

*gs v. Grand Trunk R. Co.*, 52 Hun, 227.

tion.—“The Camden and Amboy R. and T. Company were held mon carriers under a contract somewhat like this made with the Railroad Company, under which the goods were transported by mpany to Philadelphia, and there delivered to the former company. T. Co. v. Forsythe, 61 Penn. R. 81.”

y company sold two tickets, connected, one being for its own e for the connecting road, and checked the baggage for the with the letters of the second road on the check, whereon e was lost. The facts imported an agency, on the part of and not a contract by it as principal, for transportation over ing line, and defendant was not liable. *Milnor v. N. Y. & Co.*, 53 N. Y. 363, aff'g judg't for def't.

ing Quimby v. Vanderbilt, 17 N. Y. 306; Hart v. R. & S. R. R., 8 id. S. and S. R. R., 19 Wend. 534, and Burnell v. N. Y. C. R. R., 45

tion.—“It is well settled in this state that a railroad corporation elf, by contract, beyond its line (45 N. Y. 514; 22 id. 269; 4 Seld. . 306). \* \* \* Each case must depend upon its own facts, but unable to find any authority in this country which holds that the case constitute in law a contract on the part of the company sell- or the entire route. The decided tendency of the authorities is the Knight v. Portland, S. & P. R. R. Co., 56 Me. 234; Brooke v. R. Co., 15 Mich. 332; 2 E. D. Smith, 184; Root v. Great Western Y. 524.”

purchased at the office of the B. & O. R. R. Co., at “W.,” a et from “W.” to “B.” over several connecting railroads, the h was that of defendant. She received a check for her bag- the names of all the roads stamped upon it. On arriving at anded her baggage, but it could not be found, and no trace of it after it was checked. In an action to recover for the hat in the absence of proof that the baggage came into de- ossession, it was not liable; that the ticket and check fur- vidence that the connecting roads were jointly engaged in the carrying passengers; but the facts were consistent with two her that the B. & O. R. R. Co. made an entire through con- ploying the other companies, or what was more probable, that ny was the agent of the others to sell tickets and check bag- e others; and, in either view, defendant would not be respon-

sible without proof that the baggage came into its possession. *K. v. N. Y. Cent. R. Co.*, 61 N. Y. 538.

So, although a carrier check baggage to a destination beyond its line, its duty is merely to duly carry and deliver to the connecting carrier. *Milnor v. N. Y. & N. H. R. Co.*, 53 N. Y. 363; *Steinson Co.*, 98 Mass. 82; *McMillan v. R. R. Co.*, 16 Mich. 120; *Penn. & Co. v. Sullivan*, 25 Ga. 228; *Chicago & C. R. Co. v. Mountford*, 6 173; *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 78.

**From opinion.**—"There are a number of English cases in which it has been held, where carriers received goods and gave receipt therefor which specified they were received to be sent to a point beyond their line, and there delivered to the consignee, that the contract was one for transportation the whole distance upon which the first carrier might be sued for a loss occurring after the goods had passed out of his hands. *Musechamp v. Lancaster R. R. Co.*, 8 M. & W. 100; *Collins v. Bristol & Exeter R. R. Co.*, 11 Exch. 790; same case in *House of Lords*, 5 H. & N. 969. The same ruling has been made in this country where the carrier had expressly agreed to carry to a point beyond his line for a compensation specified. *Wilcox v. Parmalee*, 3 Sandf. 610; *Mallory v. Burrett*, 1 E. D. Smith, 234; *Noyes v. R. & B. R. R. Co.*, 27 Vt. 110. The doctrine generally accepted by the American courts is, *that where a carrier receives goods marked for a particular destination beyond his line, and does not expressly undertake to deliver them at the point designated, the contract is only to transport over his own line and forward from its terminus.* *Ackley v. Kellogg*, 8 Cow. 223; *Van Santvoord v. St. John*, 6 Hill, 157; *H. v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *F. & M. Bank v. Champlain Trans. Co.*, 23 Vt. 209; *Brintnall v. Saratoga R. R. Co.*, 32 id. 665; *Nutting v. Connecticut River R. R. Co.*, 1 Gray, 111; *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246; *Perkins v. Portland & Maine R. R. Co.*, 47 Maine, 573; *American note* to 11 Exch. 797. And see *Am. Miss. & Mo. R. R. Co.*, 9 Iowa, 478. In the case in 1 Gray, the defendant received the goods at a station on their line 'for transportation to New York, a point beyond their line. No connection in business was shown between the defendant and any other railroad company. The defendants were accustomed to receive goods and pay only over their own road. The goods in question were delivered to the defendant's connecting line, but only a portion of them reached New York. The defendants were held not liable, on the ground that their undertaking was to carry the goods over their own road only. Whether the receipt of freight by them for the whole distance would have affected their liability may perhaps be an open question for the authorities. That circumstance has evidently been regarded as important in some cases. See *Weed v. S. & S. R. R. Co.*, 19 Wend. 537, and *Redf. on R. R.*, 286 and note; but in *Hood v. N. Y. & N. H. R. R. Co.*, 22 Conn. 1, the court held the carriers, who received payment for transportation over the connecting line, to be regarded as having received it as agents only, and not as compensation for their undertaking by themselves to transport over such line."

A contrary rule is held in some states, viz.: that the receipt of goods marked to a point beyond the carrier's line presumptively creates a contract to carry to such point, yet the terms of the contract between the shi-

may limit the carrier's duty to due carriage and delivery connecting carrier. Ill. Cent. R. Co. v. Frankenberg, 54 Ill. Merriam, 52 id. 123; C. & Mo. R. Co. v. People, 56 id. W. R. Co. v. Mountford, 60 id. 176; U. S. Express v. 137; Erie R. Co. v. Wilcox, 84 id. 239; Illinois C. R. Co. Ill. 570; s. c., 36 L. R. A. 527; rev'g s. c., 62 Ill. App. Shua Lock Co. v. Worcester &c. R. Co., 48 N. H. 339, and ew of decisions and enforcement of the English rule. This a rule: Muschamp v. Lancaster R. Co., 8 M. & W., 421; stol &c. R. Co., 11 Ech. 790; 5 H. & N. 969. effect, Wilcox v. Marmelee, 3 Sandf. 610; Mallory v. Burrett, 1 4; Noyes v. R. R. Co., 27 Vt. 110.

it is considered that the collection, by such contracting e in advance for the entire journey, without an agreement nders it liable on receipt of the traveler's baggage to trans- to the end of the route, and there deliver it on demand to Railroad Co. v. Campbell, 36 Ohio St. 658, citing Schouler 336; Thompson on Carriers, 431; Lawson on Carriers, tchinson on Carriers, sec. 145.

may lawfully agree with the passenger that it shall not pt for loss or damage on its own line. It has been con- through bill of lading constitutes a contract for the entire c. R. Co. v. Twiss, 35 Neb. 367; Hansen v. Flint &c. R. 46.

y of one road for injuries received by a passenger on a ad, depends, not upon the contract between them, but upon t road invited the passenger to believe. *Dye v. Virginia R. Co.*, 9 Mackey, (D. C.) 63.

opped by several lines was damaged while in possession of In a suit against another line it was held that acceptance ament, marked for carriage beyond the terminus of its own es *prima facie* a contract for the transportation of the but- nation. *Beard &c. v. St. Louis &c. R. Co.*, 79 Iowa, 527. runk R. Co. v. McMillan, 16 Can. Sup. Ct. R., 543.

of fare for the whole journey without agreement as to risks rrier liable for the entire journey. So held in the case of timore &c. R. Co. v. Campbell, 36 Oh. St. 647.

as regarded as an important consideration in *Weed v. S. & Wend.* 537, and see Redf. on Railroads, 286, and note. ner duty to carry through or otherwise may not be inferred

See *Gray v. Jackson*, 51 N. H. 9; *Hempstead v. R. Co.*, 28 Barb. 485; *v. C. & N. W. R. Co.*, 27 Wis. 81; *Wood v. M. & H. P. R. Co.*, id. 541.

In the absence of special agreement liability on goods billed terminates with delivery to connecting carrier. But when through bill of lading is made, liability cannot be limited to initial carrier's own bill. *Miller Grain &c. Co. v. Union P. R. Co.*, 138 Mo. 658; *State Nat. Bank v. Chicago &c. R. Co.*, 72 Mo. App. 82; *Marshall v. Kansas C. & N. W. R. Co.*, 74 id. 81; *Popham v. Barnard*, 77 id. 619; *Eckles v. M. & H. P. R. Co.*, 72 id. 296.

Where there is no through contract, liability on goods billed to connecting carrier is that of warehouseman only, when connecting carrier refuses to receive them. *Larimore v. Chicago &c. R. Co.*, 65 Mo. App. 167.

Injury received through the delay of one carrier was not excuse for the delay of another. *Ft. Worth &c. R. Co. v. Byers*, (Tex. Civ. App.) 35 S. W. Rep. 1082.

An initial carrier was liable for negligently loading a log onto a cattle car by which a horse is injured though the injury happens on connecting line. *Galveston &c. R. Co. v. Herring*, (Tex. Civ. App.) 35 S. W. Rep. 129.

Initial carrier held liable for loss of goods refused by connecting carrier for failure to give indemnity to cover their damaged condition. To separate the damaged from the undamaged. That excessive indemnity was demanded, was held no excuse, when none at all was tendered. *Galveston &c. R. Co. v. Frank*, (Tex. Civ. App.) 48 S. W. Rep. 210.

That the consequences of a delay developed beyond its own liability was no defense. *San Antonio &c. R. Co. v. Thompson*, (Tex. Civ. App.) 48 S. W. Rep. 792.

Connecting carrier was not justified in refusing to accept cattle on connecting line as required by Tex. R. S. 1895, article 4535, on a through bill to a point within a quarantine line, where it would not have been to carry within such line, but to a point outside of it, especially where such line was void. *Ft. Worth &c. R. Co. v. Masterson*, (Tex.) 66 S. W. Rep. 833.

Initial carrier unloaded goods upon its dock and notified connecting carrier to remove them as soon as possible. Initial carrier was held liable as carrier for loss of the goods by fire before they had been received. *Texas &c. R. Co. v. Clayton*, 84 Fed. Rep. 305.

As to what constitutes a delivery to a connecting carrier see *Galveston &c. R. Co. v. Bosworth*, 179 U. S. 442; rev'g s. c., 87 Fed. Rep. 305.

See, also, "Delivery," ante p. 307.

A connecting carrier held entitled to refuse to carry without proper bill of lading.



charges. *Southern &c. Ex. Co. v. United States Ex. Co.*, 88 Fed.

*Shewalter v. Missouri &c. R. Co.*, 84 Mo. App. 589.

#### BURDEN OF PROOF WHEN THERE IS NO THROUGH CONTRACT.

When no contract is made by any one of several distinct carriers to transport goods on its own line, each line is liable only for default on its own line, and it must be shown that the injury or loss happened on its own line. *Wheeler v. New York Cent. R. Co.*, 61 N. Y. 58; *aff'd* 7 Lans. 62, 100 N. Y. 445; *judg't for pl'ff*; *Jennings v. Grand Trunk R. Co.*, 127 N. Y. 445; *aff'd* 100 N. Y. 445; *Booke v. Grand Trunk R. Co.*, 15 Mich. 332. (This case holds that a journey begun on one road need not be continuous over the others, but may be at any time unless limited). *Hartan v. Eastern R. Co.*, 114 Ill. 485; *Illinois Cent. R. Co. v. Kerr*, 68 Miss. 14; *Tolman v. Abbot*, 92 Ga. 251; *Coles v. Central R. Co.*, 86 Ga. 251; *Herrigan v. Southern R. Co.*, 81 Cal. 248; *Brintnall v. R. Co.*, 32 Vt. 635; *Converse v. R. Co.*, 33 Conn. 166; *Louisville R. Co. v. Campbell*, 7 Heisk. 253; *St. Louis v. R. Co.*, 100 Mass. 26; *Penn. R. Co. v. Schworzenberger*, 100 Pa. 208; *Reed v. R. Co.*, 60 Mo. 199; *Snider v. R. Co.*, 63 id. 199; *Snider v. Evans*, 25 Wis. 241; *Chicago &c. R. Co. v. Mount-pleasant R. Co.*, 175 Ill. 175; *Gray v. Jackson*, 51 N. H. 9; *Hempstead v. R. Co.*, 100 N. Y. 485.

In sec. 48, chap. 565, Laws of 1890, it was held, that although a carrier is not liable upon a check, as a contract (*Isaacson v. New York and Hudson River Railroad Company*, 94 N. Y. 278), yet as the carrier is checked to a point on a connecting line, it was bound to deliver the goods to the connecting line for further transportation and to publish the fact of such delivery. *Rawson v. Holland*, 59 N. Y. 445; *Jennings v. Grand Trunk R. Co.*, 127 id. 445; *Hyman v. Central R. Co.*, 66 Hun. 202; *aff'd judg't for pl'ff*.

The delivery of goods to arrive at their ultimate destination puts the initial carrier under a duty to deliver the same to the connecting carrier. *Hyman v. R. Co.*, 32 Vt. 665. The contrary was held in *Stinson v. R. Co.*, 98 Mass. 83.

The words "to forward" mean "to send" not "to carry;" and where goods are duly and safely delivered, at the end of its route, to a responsible carrier with proper instructions, their liability is exhausted. The contract expressly limited its liability as forwarders, and ended at the end of its route, and through charges were not paid. *Rocky Mount Express Co.*, 48 N. Y. 462.

When a receiving carrier makes contract for through transportation

no liability attaches to it for damage to vegetables occurring on connecting line. *Illinois Cent R. Co. v. Kerr*, 68 Miss. 14.

See, also, *Tolman v. Abbot*, 78 Wis. 192; *Coles v. Central R. Co.*, 86 G. See *Fordyce v. Johnson*, 56 Ark. 430.

The general duty of an intermediate carrier of property involves obligation on his part to deliver the property, at the end of his route to the succeeding carrier, within a reasonable time after its arrival. (*Rawson v. Holland*, 59 N. Y. 619.)

The plaintiff, shipper, must be deemed to have authorized the defendant, to deal with the property according to the custom, and in the direction of the dispatch company, in whose care it was consigned at New York. (See, *Van Santford v. St. John*, 6 Hill, 157; *Mosher v. The Michigan Central R. R. Co.*, 45 N. Y. 626.) *Whitworth v. Railway Co.*, 87 N. Y. 420.

See *McKinney v. Jewett*, 90 N. Y. 267.

The duty of transporting cattle from E. to N. O. over several connecting roads, does not rest with the receiving road. *Alabama &c. v. Thomas*, 83 Ala. 343.

See *Alabama &c. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173; *Mosher v. St. Louis &c. R. Co.*, 127 U. S. 390.

A contract limiting liability for goods shipped over several lines, damage occurring on defendant's line, is binding. *Central R. Co. v. Avant*, 80 Ga. 195.

*Pa. R. Co. v. Schwarzenberger*, 45 Pa. 208.

Actual notice need not be given to connecting carrier of the receipt of goods. Notice according to the custom of business is sufficient. The goods must be held a reasonable time for the connecting carrier to take away, and, on its neglect to do so, storage must be made or an act done to relieve the first carrier from liability as such. Held, the goods should be held by the first carrier until the arrival of a connecting line with which connection was usually made. *Mills v. Michigan Cent R. Co.*, 45 N. Y. 622.

When goods are delivered to a railroad company, by a connecting road company, to be transported to the owners, and the same are received by such company for that purpose, it becomes its duty to deliver them off, immediately; and it cannot justify the detention of the goods on the ground that, by its regulations, goods received from a connecting road are not to be forwarded until the receipt of a bill of lading and that no such bill accompanied the goods. *Michaels v. New York Central R. Co.*, 30 N. Y. 564.

Goods were billed to "Bryan & Sherman;" one line delivered

the defendant, as consigned to "Ryan Sherman" and the  
lled them to "Ryan & Sherman." The plaintiff called for  
t receiving them. Defendant was liable. This action was  
nst defendant as common carrier to recover damages for  
gence and delay in the delivery of thirteen bales of cotton,  
s error. *Sherman v. Hudson River R. Co.*, 64 N. Y. 254;  
Daly, 521.

of a boat load of wheat lost or converted a portion of it and  
ne residue into a barge, provided by the intermediate con-  
refused to pay the freight, charged to the first carrier for  
delivered without deduction for that which was lost. Held,  
mediate consignee was not liable for freight charges unless  
t were delivered and had authority to settle for the short-  
. *Pattison*, 24 N. Y. 317.

dant was an intermediate carrier of goods shipped from  
o Florida, which were discovered to be damaged while it  
g them to the next and last carrier. The presumption that  
delivered to it as they started applied to defendant and, for  
properly deliver in this case it was liable. *Savannah &c. R.*  
e, 26 Fla. 148.

transporting goods not chargeable to a connecting carrier  
lading was made out by receiving carrier not mentioning  
line, and the delay occurred on some other than the de-  
e. *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497.

ttaches to carrier for damage done to stock on its line, but  
ived by it from another line. *Wallingford v. Columbia &c.*  
C. 258.

of goods using the car of another company is liable for loss  
reason of defects in that car. *Railroad v. Dies*, 91 Tenn.

ing railway upon whose tracks a car containing plaintiff  
atched is liable for injuries to him, if it was its custom to  
rs, whether plaintiff had paid fare on connecting line or  
ooga &c. R. Co. v. *Huggins*, 89 Ga. 494.

route is made up of connecting lines no one of them is the  
le for the negligence of one of the others. *Sherman v. Hud-*  
e, 64 N. Y. 254.

f goods in a damaged condition held to raise no presumption  
first carrier. *Farmington Mercantile Co. v. Chicago &c. R.*  
s. 154.

ceiving goods at the point named in the bill of lading as  
tion for further carriage to the consignee's residence, was

held not a terminal connecting carrier within a statute making a carrier liable for damage and compelling the connecting carriers to settle the ultimate liability. *Kerr v. Georgia R. Co.*, 105 Ga. 371.

A statute making a connecting carrier liable for damage to freight and giving it a right of action over against the carrier causing the damage, construed not in violation of the 14th amendment to the Federal Constitution. *Texas &c. R. Co. v. Bigham*, (Tex. Civ. App.) 47 S. W. Rep. 814.

Shipment of goods between points on different lines and not for delivery to a connecting carrier is within the statute. *Houston &c. R. Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43.

Under a stipulation limiting a carrier's liability to its own line a terminal carrier was not liable for a damaged condition, due to rain, uncovered upon arrival, which could not have happened on its line in the absence of proof, presumption would be that damage occurred while in the connecting carrier's hands. *St. Louis &c. R. Co. v. Cohen*, (Tex. Civ. App.) 55 S. W. Rep. 1123; *Houston &c. R. Co. v. Ney*, 58 id. 43.

That the proportion of damages sustained on one of the connecting roads cannot be accurately ascertained, is no ground for giving judgment for such road, in view of a statute providing for apportionment of damages. *Texas &c. R. Co. v. Cushing*, (Tex. Civ. App.) 64 S. W. Rep. 795.

Delivery in good condition to an initial carrier and delivery in a damaged condition by a terminal carrier makes out a *prima facie* case against the latter, but where there are circumstances shown, which were sufficient to injure them while in former's possession and the car was not damaged till it reached the destination, the question of whose negligence caused the injury was for the jury. *Missouri &c. R. Co. v. Mazzie*, (Tex. Civ. App.) 68 S. W. 56.

#### (g). EFFECT OF PARTNERSHIP OR JOINT TRAFFIC ARRANGEMENTS

When the owners of two or more lines are, or hold themselves jointly interested in transportation, or as partners, or are agents for each other, any or all are liable for injury or loss on any one of the lines. *Hart v. The Rensselaer &c. R. Co.*, 8 N. Y. 37; *Bissell v. Morgan Southern R. Co. and the Northern Ind. R. Co.*, 22 id. 258; *McClellan v. N. R. Co. and the Erie R. Co.*, 53 id. 156; *Alleghany v. McClure*, 14 Pa. St. 83; *Barter v. Wheeler*, 49 N. H. 9; *Burroughs v. R. Co.*, 14 Mass. 26; *Bostwick v. Champion*, 11 Wend. 571; *Bradford v. S. R. Co.*, 7 Richardson (S. C.) 201; *Fairchild v. Slocum*, 19 Wend. 100; *Gass v. R. Co.*, 99 Mass. 220; *Nashua Lock Co. v. Worcester R. Co.*

Pratt v. R. Co., 102 Mass 557; Steam Navigation Co. v. rb. 378; Matthews v. Atchison &c. R. Co., 60 Kan. 11; ain Mills v. Wilmington &c. R. Co., 119 N. C. 693; Live- v. Chicago &c. R. Co., 87 Mo. App. 330.

Glass Co. v. Dewey, 16 Mass. 94.

ers, owning distinct portions of a continuous railroad, ran whole road with the same tickets, and received baggage of the whole. An action for the loss of baggage received nus to be carried over the whole road was maintainable f the companies. *Hart v. The Rensselaer & Saratoga R.* 37; aff'g judg't for pl'ff.

panies uniting to carry passengers over a third road beyond f either, are both liable for negligence in so doing, and no defense. *Bissell v. Michigan Southern and The North- R. Cos.*, 22 N. Y. 258; affirming judgment for plaintiff.

Company issued commutation tickets from Jersey City to et was headed "N. R. R.," and a part of the passage was way owned by the N. R. R. Co. There was no distinc- trains the commuters should take. Neither company e the contract showing the relation to each other, hence ce was against the defendant. The passenger was hurt preparing to alight. Both companies were liable. *Wylde and The Erie R. Co.*, 53 N. Y. 156; affirming judgment for

weight of authority is to the effect that two corporations, united in the business of transporting passengers, are for injuries from negligence of the employés of either. *ation Co. v. Weed*, 17 Barb. 378; *Silver Lake Bank v. ns.* Ch. 370; *Chester Glass Co. v. Dewey*, 16 Mass. 94; k, 3 Kern. (N. Y.) 304; *Parker v. Boston, &c. R. Co.*, 3 alleghany v. McClarkan, 14 Pa. St. 83; *Great Western R.* 7 Hurls. & Nor. (Exch.) 978.

ral carriers unite to complete a line of transportation, they e for damages subject to reclamation against the party by e damage occurred. *Richardson v. Chouteau*, 37 Fed. R. Grand Era, 1 Woods (U. S.) 184.

o companies acting as general agents of one another, can r to a contract for through transportation. *Southern Pao can*, 16 Ky. L. R. 119.

ral carriers act as partners, one of them cannot by issue of ll of lading vary the contract made by the other for con-

tinuous transportation over both lines. *Swift v. Pacific Mail S.* 106 N. Y. 206.

Limitation of liability to company's own line is not available if the connecting carrier is operated under an arrangement with it. *A. v. Chesapeake &c. R. Co.*, 11 App. D. C. 300.

A company receiving a fee for trackage but with no interest in the charges incurred no joint liability with the company carrying the freight. *Savannah &c. R. Co. v. Commercial Guano Co.*, 103 Ga. 590.

A through traffic arrangement between connecting carriers where each receives the income from, bears the expense of, and assumes responsibility for and pays rent for the cars of the other while on the track, imposes a joint liability for injury to a passenger. *Richmond &c. R. Co.*, (Minn.) 89 N. W. Rep. 52.

Agreement for *pro rata* distribution of gross receipts on through freight held not to create a joint liability or impair the force of a stipulation limiting the liability of each to its own line. *Galveston &c. R. Co. v. Johnson*, (Tex. Civ. App.) 37 S. W. Rep. 243.

That the existence of partnership relations would not affect the force of stipulations, see *Galveston &c. R. Co. v. Houston*, (Tex. Civ. App.) 37 S. W. Rep. 842.

#### (h). EFFECT OF AGENCY.

When the contract shows that the initial line acted only as agent for the connecting line, it is not liable for the default of the connecting line. *Milnor v. N. Y. & N. H. R. Co.*, 53 N. Y. 363; *Kessler v. Central R. Co.*, 61 id. 538; *Auerbach v. N. Y. C. R. Co.*, 89 id. 538; *Poole v. D., L. & W. R. Co.*, 35 Hun, 29; *Kerrigan v. Southern R. Co.*, 81 Cal. 248; *Peterson v. Chicago, &c. R. Co.*, 80 Iowa, 92.

A railway company must have contracted as principal for the distance to be answerable for injuries to a passenger on a connecting road. *Kerrigan v. Southern Pacific R. Co.*, 81 Cal. 248; *Peterson v. Chicago &c. R. Co.*, 80 Iowa, 92.

A carrier accepting goods for transit under a through bill of lading reciting the prepayment of freight, has notice that it must look to the initial carrier and not the owner for its own charges and those of the connecting carrier which it has paid. *Converse Bridge Co. v. Collieries*, Ala. 534.

A connecting carrier cannot deny the agency of an initial carrier where it accepts and recognizes the coupons on a through ticket drawn for its part of the route. *Spencer v. Lovejoy*, 96 Ga. 657.

A carrier, which voluntarily accepted goods for carriage, whose

en paid, under a through bill of lading stating that it had  
did not recover freight, earned by it, or paid by it to prior  
om an innocent purchaser of the bill of lading. *American*  
*Bank v. Georgia R. Co.*, 96 Ga. 665.

carrier was held liable for misdelivery pursuant to un-  
directions of connecting carrier. *Foy v. Chicago &c. R. Co.*,  
55.

carrier received fruit from a connecting carrier in an unsuitable  
excuse it from putting it in a proper conveyance. *Shea v.*  
*R. Co.*, 66 Minn. 102.

on of liability of an initial carrier to damage occurring on  
did not relieve a connecting carrier of liability for loss which  
sequently from its negligent piling of the boxes, which was  
nent. *Davis v. New York &c. R. Co.*, 70 Minn. 37.

carrier is not liable for an ejection by a connecting carrier  
it has arrangements for sale of tickets, where, though it gave  
the wrong ticket, the baggage was checked upon the right one  
ects were fully explained to the connecting carrier, and the  
eck and way bill shown. *Alabama &c. R. Co. v. Holmes*, 75

ing a through ticket the initial carrier makes the connecting  
agent so as to be liable for the latter's negligence. *Omaha*  
*v. Crow*, 54 Neb. 747.

y by one road to check baggage to points on the line of an-  
t authority to check merchandise as baggage so as to impute  
of one that apparent baggage is in fact merchandise as notice  
t. *Toledo &c. R. Co. v. Bowler*, 63 Oh. St. 274.

cting carrier was not responsible for the fulfillment of an  
for delivery at a specified date made by an agent of another  
representing it only. *St. Louis &c. R. Co. v. Cates*, 15 Tex.  
35.

ng carrier was liable for the negligence of its agent in mis-  
the final carrier that freight was unpaid, where he had been  
the initial road that freight for the whole distance had been  
*Missouri &c. R. Co. v. Dilworth*, (Tex. Civ. App.) 65 S. W.  
s. c. aff'd, 67 S. W. Rep. 88.

s which jointly agree with an association to carry an excur-  
gross sum, dividing the profits, are each jointly and severally  
the acts of the servants of the other. *Collins v. Texas &c. R.*  
*x. Civ. App.* 169.

ng a coupon ticket with limitation of liability to its own line,  
carrier acts as agent of connecting lines and does not make

itself liable for the latter's negligence. *Moore v. Missouri &c. R.* 18 Tex. Civ. App. 561.

Initial carrier held liable for failure to secure a state room on connecting line pursuant to terms of contract of carriage. *Bussm. Western Transit Co.*, 71 Fed. Rep. 654.

Two railroad companies, pursuant to agreement, had been selling other's tickets. Plaintiff recovered for ejection while attempting to on one of these tickets after a disagreement between the companies taken place and conductors were instructed not to accept them. *C. v. Winters*, 96 Fed. Rep. 929; aff'g s. c., 90 id. 99.

#### (i). STIPULATIONS FOR EXEMPTION.\*

If the initial company stipulate to carry through with a provision for exemption for loss or injury, the connecting companies will have the same benefit of such provision as is allowable to the contracting company. *Maghee v. C. & A. R. Co.*, 45 N. Y. 514; *Babcock v. L. S. & M. S. R. Co.*, 49 id. 491; *Lamb v. C. &c. R. & T. Co.*, 46 id. 343; *Manhattan Oil Co. v. R. Co.*, 54 id. 197. See *Hinckly v. R. Co.*, 2 N. Y. 429. *Faulkner v. Hart*, 82 N. Y. 422; *Green v. Clark*, 2 N. Y. 343, 350, &c.; *Levy v. Express Co.*, 4 So. Car. 234; *Merchants' B. N. J. S. Nav. Co.*, 6 How. U. S. 380; *Penn. &c. R. Co. v. Forsyth*, 1 Penn. 81; *Sanderson v. Lamberson*, 6 Binn. 129.

See *Western R. Co. v. Hamel*; *Wharton on Negligence*, 583, citing *Bristow v. R. Co. v. Collins*, 7 H. L. C., 794; *Hall v. R. R. L. R.*, 10 Q. B. 437.

Stipulations exempting carrier contracting through from liability, presumptively apply to its own connecting line. *Green v. Clark*, 2 Ker. 343; *Sanderson v. Lamberson*, 6 Binn. 129; 2 *Green Ev.*, sec. 1.

If the initial company stipulate to carry goods destined for a point beyond its line, and deliver to connecting carrier to be carried to ultimate destination, and also stipulate for lawful exemptions, the connecting carrier should be deemed empowered to make agreement for the same, but not greater or other exemptions. *Lamb v. Camden & Amboy R. Co.*, 46 N. Y. 271; *Green v. Clark*, 12 id. 343.

In *Babcock v. L. S. & M. S. R. Co.*, 49 N. Y. 491, this seems to have been held otherwise; but the opinion carefully states that there was no agreement or contemplation for the employment of subsequent carriers, and no reduction in rate as consideration for such agreement. If the public cartman who carries goods to the first carrier has power to stipulate for exemptions, why not the carrier, who does the same service, as regards the second carrier? The latter has a like authority at least to the extent conceded to himself by the shipper. *supra* 272).

\* NOTE.—As to validity and effect of such stipulations, see "Limitation of Liability," *ante*, p. 10.



If a receiving carrier contracts for exemption in transportation over its own line, a connecting carrier cannot avail itself of that exemption; but if receiving carrier contracts for through transportation, the connecting carrier may claim the exemption. *Western R. Co. v. Harwell*, 91 Ala. 340.

A New York bill of lading for goods shipped over several lines providing for exemption from liability for loss by fire protects the defendant in whose freight depot, in East St. Louis, the goods were burned. *Brown v. Louisville &c. R. Co.*, 36 Ill. App. 140.

A through receipt given by receiving carrier restricting liability on all the lines will not avail a connecting carrier, which gave the first carrier a receipt containing different provisions. *Browning v. Goodrich Transp. Co.*, 78 Wis. 391.

The Illinois Central R. R. Co. shipped at Cairo, Illinois, cotton consigned to S. W. & Co., New York, via Chicago, where its agent was named as consignee. The bill of lading exempted the Illinois Central from damage or loss by fire, and also from safety or safe carriage beyond its road, but stipulated a through rate. The Illinois Central contracted for the transportation from Chicago to New York with the U. T. Co., and the bill of lading had the same stipulation as to fire, and that damage should be limited to the value at the time of shipment.

The property was destroyed on the wharf of the defendant, a connecting road. Held, that the Illinois Central's agent could make the same but no greater terms of exemption with the connecting road as were made with it, and so far the carriers were exempt. Also, held, that loss by fire, happening by the negligence of the connecting line, was *not* within exemption, and that the burden of proof was on the plaintiff to show the defendant's negligence. *Lamb v. C. & A. R. & T. Co.*, 46 N. Y. 271; aff'd 2 Daly, 454.

On through contract successive connecting carriers are entitled to benefit of exemptions in original bill of lading; but not on a contract to deliver to a connecting carrier. *Robinson v. New York &c. Steamship Co.*, 63 App. Div. 211.

A provision in a through contract that the carrier's liability as such shall cease upon arrival and liability as warehouseman begin, held valid and inured to the benefit of a connecting carrier. *Kansas City &c. R. Co. v. Sharp*, 64 Ark. 115.

Where connecting carrier acts as agent of initial carrier in carrying out the contract, it is entitled to the benefit, of any limitation of liability in amount as to baggage therein. *Aiken v. Wabash R. Co.*, 80 Mo. App. 8.

## COMMON CARRIER OF PASSENGERS.

- I. WHO MAY BECOME AND REMAIN A PASSENGER.
- II. DISCRIMINATION AGAINST PASSENGERS.
- III. WHO IS A PASSENGER.
  - (a) Express messengers.
  - (b) Mail agents.
  - (c) Persons in charge of stock.
  - (d) Servant of carrier riding to or from his work.
  - (e) Riding on freight trains, engines &c. by invitation otherwise.
  - (f) Persons escorting friends to or from trains.
  - (g) When passenger ceases to be such.
- IV. DEGREE OF CARE REQUIRED IN THE ACTUAL TRANSPORTATION OF PASSENGERS.
  - (a) Freight trains, &c.
  - (b) Vehicles.
  - (c) Defective passengers.
  - (d) Gratuitous passenger.
  - (e) Trespassers.
- V. APPROACHES TO STATION AND CARS—CONSTRUCTION AND MAINTENANCE OF.
  - (a) Injuries from openings between platform and cars.
  - (b) Snow and ice.
  - (c) Snow and ice—platform of cars.
- VI. ENTERING AND LEAVING VEHICLES.
  - (a) Where passenger may do so.
  - (b) Injuries from other cars.
  - (c) Injuries from acts of third persons.
  - (d) Street cars—injuries from condition of the street.
  - (e) Injuries from gates, guards, doors, &c.
  - (f) Premature starting, and jerking cars—steam cars.
  - (g) Premature starting, and jerking cars—street cars.
- VII. MOVING CARS.
  - (a) Entering cars—liability—steam cars.
  - (b) Entering cars—liability—street cars.
  - (c) Entering cars—no liability—steam cars.
  - (d) Entering cars—no liability—street cars.
  - (e) Alighting from cars—liability—steam cars.

(f) Alighting from cars—no liability—steam cars.

(g) Alighting from cars—no liability—street cars.

VIII. PLATFORM OF CARS.

(a) Steam cars.

(b) Street cars.

IX. PASSENGER IN BAGGAGE, MAIL, OR EXPRESS CAR.

X. PASSENGER RIDING IN DANGEROUS PLACE.

XI. WILLFUL AND MALICIOUS ACTS OF SERVANTS.

XII. INJURIES FROM NEGLIGENCE OF OTHER PASSENGERS.

XIII. INJURIES FROM ASSAULT OF OTHER PASSENGERS.

XIV. INJURIES TO PASSENGERS FROM ASSAULTS OF THIRD PERSONS.

XV. INJURIES TO PASSENGERS FROM NEGLIGENCE OF THIRD PERSONS.

XVI. INJURIES TO PASSENGERS FROM EXTERNAL CAUSES.

XVII. COLLISION WITH CARS OF THE SAME LINE.

XVIII. COLLISION WITH CARS OF OTHER COMPANIES.

XIX. RULES, REGULATIONS AND USAGES.

(a) Passenger must pay fare or show ticket.

(b) Rule requiring passengers to purchase tickets before entering cars or pay extra fare on train is reasonable.

(c) Passenger must have an opportunity to purchase ticket before he is required to pay extra train rate.

(d) Passenger is entitled to a seat.

(e) Requirement that ticket be stamped.

(f) Requirement of identification by signing is reasonable.

(g) Carrier is bound by the direction or mistake of its conductor respecting tickets and trains.

(h) Connecting lines.

(i) Carrier is liable for mistakes of ticket agent.

(j) Mistakes of brakeman.

(k) Tickets for stations where train does not stop.

(l) Ticket taken up or canceled on train for point short of passenger's destination gives no right to ride on subsequent train.

(m) Ticket for continuous passage.

(n) Tickets limited in time.

(o) Non-transferable tickets.

(p) Lost ticket.

(q) Detaching coupon from ticket.

(r) Failure to stop train at scheduled station.

- (s) Carrying passenger beyond destination.
- (t) Special tickets.
- (u) At what place and under what circumstances passenger may be ejected.
- (v) Passenger cannot be exposed to danger or undue force in removal.
- (w) Re-entry after lawful expulsion.
- (x) Employment of force to compel observance of rules.
- (y) Ticket, non-surrender of, at gate—detention and imprisonment for.
- (z) Ladies' car.

**XX. DRAWING-ROOM AND SLEEPING CARS:**

**XXI. FERRY COMPANIES.**

**XXII. MEDICAL TREATMENT OF PASSENGERS.**

**XXIII. BAGGAGE.**

- (a) Where baggage may be carried.
- (b) Articles of unusual value in possession of passenger.
- (c) Where passenger and baggage properly checked on different trains.
- (d) Nature and extent of liability.
- (e) What is baggage.
- (f) What is not baggage.
- (g) When liable as a carrier after arrival.
- (h) When liable as warehouseman.
- (i) Who may recover for loss of.
- (j) Failure to deliver on demand.
- (k) Extra compensation.

**I. Who May Become and Remain a Passenger.**

It is the duty of a common carrier to accept for carriage, upon the same terms, and for the same service upon equal terms all persons who are not dangerous, and are not dangerous to other passengers.

"A railroad company has the power of refusing to receive as a passenger or to expel anyone who is drunk, disorderly, or who so conducts himself as to endanger the safety or interfere with the reasonable comfort or convenience of other passengers, and may exert all the necessary force to do so."

\* NOTE.—For cases relating to limitation of liability and to connecting carriers, see "Common Carriers of Goods," *ante*, p. 197.

† NOTE.—That carrier is a special and not a common carrier in transporting special circus cars, &c., but is common, and not special, in carrying passengers on freight trains generally. See "Common Carriers of Goods, Limitation of Liability," *ante*, p. 287.

power and means to eject from the cars anyone so imperiling the safety or annoying others; and this police power the conductor, or other servant of the company in charge of the car or train is bound to exercise with all the means he can command whenever the occasion requires it. If this duty is neglected without good cause, and a passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received, or permitted to continue as a passenger, the carrier is responsible. \* \* \* The fact that the individual may have drunk to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of intoxication and its effect upon the individual and the fact that, by reason of the intoxication, he is dangerous or annoying to the other passengers that gives the right and imposes the duty of expulsion." In this case it is said that while the passenger remained peaceful there was no occasion to remove him, but the opinion continues, "he did, however, thereafter make himself peculiarly obnoxious to the other passengers by his conduct and demeanor grossly insulting and annoying them, and gave occasion for the exercise of the power of removal, had the conductor seen fit, or been called upon to exercise it; and had he continued his annoying practices the conductor would have been faithless to his duty had he suffered him to remain on the car." *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 N. Y. 113.

*Thurston v. Union Pac. R. Co.*, 4 Dillon, 321.

An intoxicated man has a right to ride on a railroad train so long as he keeps quiet and does not interfere with others.

In this case the evidence tended to show, that the plaintiff was intoxicated at the time he was thrown down by the jerking of the car when he was about to alight. *Milliman v. N. Y. C. & H. R. Co.*, 66 N. Y. 642; affirming judgment for plaintiff.

*Pittsburg &c. R. Co. v. Pillow*, 26 Smith (Pa.) 510.

A rule of a street railroad company, requiring conductors not to allow intoxicated persons to ride on the cars, affords no protection to the company for the forcible ejection from its car of a person not disorderly or intoxicated, but afflicted with a disease (St. Vitus' dance) which produces involuntary motions resembling the movements of an intoxicated person.

A railroad company applies such a rule at its peril. It is within the power of the conductor to ascertain the real cause of the passenger's appearance, and if he errs the company is answerable for his mistake. *Regner v. Glens Falls, Sandy Hill &c. R. Co.*, 74 Hun, 202.

A man in a state of inebriety has a legal right to ride in a public con-

veyance so long as he remains quiet, and he cannot be legally ejected until he becomes dangerous or annoying to his fellow-passengers. *Thomson v. Manhattan R. Co.*, 75 Hun, 548.

A carrier may properly refuse to receive a passenger who has been chased a ticket and who is in such a state of intoxication as to be helpless and almost unconscious. *Freedon v. New York &c. R. Co.*, 2 Div. 306.

Plaintiff, weak from anaesthetics, was on one of defendant's cars when, by the order of the president, who thought him drunk, the conductor ordered plaintiff to leave the car, and placed his hand on his shoulder whereupon plaintiff complied with the order, being assisted in so by the conductor and a friend, he being helpless at the time. The physical contact of the conductor was in the slightest degree a straining power in causing plaintiff to act and leave the car, it was not a tuted force. It was error for the court to charge that no force was used in removing plaintiff from the car. *Watson v. The Oswego Railway Co.*, 7 Misc. 562. (Supreme Court, 1894.)

Right to eject passenger using vulgar and indecent language is not lost upon its being annoying to the other passengers. *Chicago &c. R. Co. v. Peletier*, 134 Ill. 120.

A railroad company is not bound to receive any person as a passenger who is drunk to such a degree as to be disgusting, offensive, disagreeable or annoying to other passengers; and is not liable in damages for refusing passage to such a one. *Pittsburg &c. R. Co. v. Valley*, 57 Ind. 576.

*R. Co. v. Valley*, 32 Oh. St. 345; see *Haley v. Chicago &c. R. Co.*, 21 Ind.

Plaintiff used improper language in consequence of being charged with failure to pay fare, and was ejected. Damages were covered. *Louisville &c. R. Co. v. Wolfe*, 128 Ind. 347.

A carrier is not required to receive one afflicted with a contagious disease. *Gilbert v. Hoffman*, 66 Iowa, 205.

A railroad company, which carefully and prudently removed from its train a passenger who had suddenly become insane, and placed him in the hands of a competent overseer of the poor, is not chargeable with negligence. *Atchison &c. R. Co. v. Weber*, 33 Kas. 543.

Intoxicated passenger, obnoxious and threatening, may be ejected and if thereafter he is run over, no liability attaches. *Louisville &c. R. Co. v. Logan*, 10 Ky. L. R. 798.

Indecent or profane language in the presence of ladies in street is a justified eviction and arrest. *Robinson v. Rockland &c. R. Co.*, 83 Me. 387; s. c., 29 L. R. A. 530.

No liability attaches for refusing passage to one in such a state of intoxication as that it is reasonably certain he will become offensive and annoying to other passengers. *Vinton v. Middlesex R.*, 11 Allen, 304; *Hudson v. Lynn &c. R. Co.*, 178 Mass. 64.

See *Commonwealth v. Power*, 7 Metc. 596; *Jenks v. Colman*, 2 Sumner, (U. S.) 221.

Where a contract for transportation is not one into which the carrier was under a legal duty to enter, recovery for its breach was not governed by a statutory provision regulating damages in cases of tort. *Louisville &c. R. Co. v. Spinks*, 104 Ga. 692.

Mere blindness is not sufficient to disqualify one as a passenger, unless otherwise incompetent to travel alone. *Zachery v. Mobile &c. R. Co.*, 75 Miss. 746; s. c., 41 L. R. A. 385.

The price of a passenger's right to carriage is his own good behavior, as well as the money he pays. *Eads v. Metropolitan Street R. Co.*, 43 Mo. App. 536.

*Chicago &c. R. Co. v. Pelletier*, 33 Ill. App. 455.

Actual commission of offense is not necessary, where intoxication is such as to make it reasonably certain one will be committed. *Edgerly v. Union Street R. Co.*, 67 N. H. 312.

Where a man with a live goat in his arms was refused transportation, it was held not a question for the jury, whether the company's regulation forbidding carrying live animals in the cars was reasonable, but for the court. *Daniel v. North Jersey &c. R. Co.*, 64 N. J. L. 603.

A sheriff may board a freight train at a station where a train is actually stopping, though it is not scheduled to stop there, under a statute permitting him to board such trains "between stations where such trains stop." *Allen v. Lake Shore &c. R. Co.*, 57 Oh. St. 79.

It is an obligation not growing out of contract, but imposed by law, that a common carrier should carry any one of good character. *Dictum in Saltonstall v. Stockton, Taney* (U. S.) 11.

Mere unchastity in a female passenger does not warrant refusal to carry her; but if her character is such as to furnish reasonable grounds of belief that her conduct will be offensive to other passengers, she may be excluded from the woman's car. *Brown v. Memphis &c. R. Co.*, 5 Fed. Rep. 499.

Passenger may be rejected if it is reasonable to suppose that he is taken with smallpox, although such is not the case. *Paddock v. Atchison &c. R. Co.*, 37 Fed. Rep. 841.

Carrier may refuse to receive an apparently harmless stranger providing it knew that he was insane in fact, or had grounds to suspect he

might be dangerous. *Meyer v. St. Louis &c. R. Co.*, 54 Fed. 116.

That a person, who has been refused continued first class accommodations on the ground that his ticket was bad, had, for a short time before his ticket was examined, enjoyed them, is no ground for refusing steamer accommodations, which he offered to pay for. *The Willamette Valley*, 71 Fed. Rep. 712.

Where a party had on previous occasions used obscene and indecent language and returned on the trip intoxicated, it was proper to refuse transportation unless she should promise not to repeat the offense. *Stevenson v. West Seattle Land and Improvement Co.*, 22 Wash. 2d.

A carrier is not required to carry passenger affected with contagious disease. *Walsh v. Ch. &c. R. Co.*, 42 Wis. 23.

## II. Discrimination against Passengers.

Carriers must provide for colored passengers, holding first-class tickets, accommodations precisely equal, in all respects, to those provided for white persons holding similar tickets.

A colored man secured berths on a steamboat, and asked the captain to charge to exchange them for a state-room, and upon refusal he left the boat and sued for discrimination against him on account of color. The court erroneously declined to charge, that if the plaintiff left the boat voluntarily he could not recover, as there was no evidence of an agreement to pay for a state-room, except by an exchange of berths, which the defendant was not bound to accept. Non-suit should have been granted. *Miller v. N. J. S. Co.*, 58 Hun, 424; rev'd judg't for pl'ff; aff'd, 170 N. Y. 612.

See *Indianapolis &c. R. Co. v. Renard*, 46 Ind. 293; *Sanford v. Calamash*, 2 Phila. (Penn.) 107.

By authorizing a connecting carrier to sell first class tickets to a negro, a company recognizes her title to such as an interstate passenger. *Carrey v. Spencer*, 72 N. Y. St. Rep. 108.

A colored man is as much entitled to carrier's protection as a white man; and may recover for its failure to protect him from assault by a fellow passenger. *Richmond &c. R. Co. v. Jefferson*, 89 Ga. 554.

Fare cannot be demanded of one in excess of what would, under the circumstances, be charged others. *Phillips v. Southern R. Co.*, 111 Fed. 284.

A company was liable for an insult to a colored woman by a white man permitted to enter a car set apart for the use of colored passengers. *Wood v. Louisville &c. R. Co.*, 101 Ky. 703.



Though a statutory provision requires separate compartments for blacks and whites, which by its terms is not applicable to officers and their prisoners, an officer with a negro prisoner cannot bring him into the car for whites. *Louisville &c. R. Co. v. Catron*, 102 Ky. 323.

Such provision for separate cars is reasonable, where equal accommodations are provided for each. *Ohio Valley R. Co. v. Lander*, 104 Ky. 431.

Defendant's driver ejected plaintiff, a colored person, from defendant's stage, and recovery was allowed. *Peck v. Cooper*, 112 Ill. 192.

Regulation providing that first-class ticket holders only entitled to sleeping car berths is reasonable. *Pullman Palace Car Co. v. Lee*, 48 Ill. App. 75.

The reasonableness of a rule that persons of plaintiff's race are not to use the cabin as passengers is for the jury. *Day v. Owen*, 3 Mich. 520.

Where a colored passenger was denied the privileges of the cabin, in accordance with the regulations of the steamship company, the question of the reasonableness of those regulations is a mixed one of fact and law. *Day v. Owen*, 5 Mich. 520.

See *Hall v. DeCuir*, 5 Otto, 485; *Civil Rights Cases*, 109 U. S. 3; *Bass v. C. & N. W. R. Co.*, 36 Wis. 450.

Failure to furnish a colored person's car with proper accommodations in violation of statutory requirement, subjects the carrier to liability for damages for pain and suffering caused thereby. It was no defense that accommodations in adjoining cars for whites were not used. *Henderson v. Galveston &c. R. Co.*, (Tex. Civ. App.) 38 S. W. Rep. 1156; s. c. on second appeal, 42 S. W. Rep. 1030.

Wilful refusal to carry is ground of recovery. *Kibler v. Southern R. Co.*, 64 S. C. 242.

Where a ticket with sleeping accommodations has been purchased by a negro at a point in Missouri to a point in Texas, he cannot be ejected from a berth in a white person's car without furnishing him with the same accommodations in a colored person's car, under a separate coach act. *Pullman Palace-Car Co. v. Cain*, 15 Tex. Civ. App. 503.

An act of Congress passed in 1863, which gave certain privileges which it asked to a railroad corporation, enacted, also, that "no person shall be excluded from the cars on account of color." Held, that this meant that persons of color should travel in the same cars that white ones did, and along with them in such cars; and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, although they were as good as those which they assigned exclusively to white persons, and in fact the very cars which were, at cer-

tain times, assigned exclusively to white persons. *Railroad Co. v. 17 Wallace's Reports*, 445. See *Civil Rights Cases*, 109 U. S. 3.

Where railroad company refused to carry colored woman, ex smoking car, it is liable to her in damages. *Gray v. Cincinnati & Northern R. Co.*, 11 Fed. Rep. 683.

*C. & N. W. R. Co. v. Williams*, 55 Ill. 185; *Coger v. N. W. & C. Packet Co.*, 145; see *Green v. Bridgetown*, 9 Cent. L. J. (Ga.) 206; *Civil Rights Cases*, 109 U. S. 3; *Hughes*, (U. S.) 541; *Westchester & C. R. Co. v. Miller*, 55 Pa. St. 200.

### III. Who Is a Passenger.

A person on the premises or vehicle, appropriated for the reception of passengers for the purpose of transportation by a common carrier, is a passenger, although he make no compensation for carriage, or such compensation be paid by another. This includes express messengers, mail carriers, persons in charge of stock, but not servants of the carrier riding from their work as a part of the compensation, nor trespassers, nor persons riding upon freight trains by invitation of employé, when the carrier or should have known that such train was not intended by the carrier for the transportation of passengers, and in the absence of authority on the part of such employé to extend such an invitation.

Although no fare has been paid, one who enters a steamboat for passage is a passenger. *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; 5 Hun, 523; s. c., 89 N. Y. 627; 125 id. 299.

*Carpenter v. Boston & C. R. Co.*, 97 N. Y. 494, rev'g 24 Hun, 104.

Plaintiff, ten years old, had passage to H. from N. Y., and received no additional charge having been asked her. She was hurt while falling over the side of the boat, where her hand was struck by the piles. Plaintiff was entitled to recover. *Doran v. The East River Ferry Co.*, 3 Lansing, 106.

Upon the employment of an unauthorized officer the defendant is liable for the transportation of prisoners of war. It was liable for negligence to soldiers in charge of prisoners, although posted on platform. *Truex v. Erie R. Co.*, 4 Lansing, 198.

When one boards a train under the *bona fide* belief that he is entitled to use a fifty trip family ticket, he is entitled to the rights of a passenger as to injuries negligently inflicted by the company. *Odell v. New York & C. R. Co.*, 18 App. Div. 12; s. c. aff'd, 162 N. Y. 625.

The relation begins upon one's purchasing a ticket and occupying the waiting-room provided for the purpose of awaiting the arrival of the train. Plaintiff was taken ill in waiting-room, ejected by order of the agent and killed on tracks in front of station. *Wells v. New York & C. R. Co.*, 25 App. Div. 365.

Where a person intending to pay his fare, though he has purchased no ticket, boards a train by a lawful entrance, though not by that at which an employé is stationed to examine tickets, he is a passenger, though, at the time of accident, standing where they are not permitted to ride. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

A person is none the less a passenger because of being on a chartered excursion train. *Texarkana &c. R. Co. v. Anderson*, 67 Ark. 123.

A ticket is not requisite to the relationship of carrier and passenger, where there is no ticket office at the station. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482.

The train having stopped to take the person aboard on his signifying his intention so to act, he becomes a passenger. *Western &c. R. Co. v. Voils*, 98 Ga. 446; s. c., 35 L. R. A. 655.

Knowledge that one has boarded the train while in motion, getting on between the tender and baggage car, without knowledge of his purpose in doing so, does not show acceptance of him as a passenger, though he holds free pass. *Illinois C. R. Co. v. O'Keefe*, 168 Ill. 115; rev'g s. c., 63 Ill. App. 102.

A purchaser of a ticket is not a trespasser on a freight train, though against the company's rules, and cannot be treated as such, where he boards it in reliance upon the statement of the ticket agent that he is entitled to do so. *Illinois C. R. Co. v. Davenport*, 177 Ill. 110; aff'g s. c., 75 Ill. App. 579.

The purchaser of a ticket about to step from the station platform to the car is a passenger. *Illinois C. R. Co. v. Treat*, 179 Ill. 576; aff'g s. c., 75 Ill. App. 327.

Carrier is not relieved of liability to plaintiff as passenger by the fact that he was received by an agent of the carrier for transportation without payment of the fare. *Benner &c. Co. v. Busson*, 58 Ill. App. 17.

While crossing defendant's tracks to take a train standing at a station for reception of passengers, deceased was killed by cars switched onto the track she was crossing. She was held to be a passenger. *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

A round trip ticket does not make one a passenger while approaching a station to board a train. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Boy of eleven, who not only has no money but has been notified that the car is not provided for passengers, is not a passenger. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453.

Where a person unable to catch a train by the regular route provided, takes a short cut without looking out for his safety, he has not acted in such a way as to be entitled to be treated as a passenger. *Chicago &c. R. Co. v. Weeks*, 99 Ill. App. 518.

Boy attempting to steal a ride by hanging on the outside of not a passenger, though he has the means of paying fare, if *Udell v. Citizens' Street R. Co.*, 152 Ind. 507.

That a person boarded a train erroneously thinking it stopped at destination, did not debar him from the rights of a passenger in paying his fare to the first regular stopping place, though he had no ticket, because the ticket office was closed. *Baltimore &c. R. Co. v. O'Ris*, 17 Ind. App. 189.

Slowing down a street car pursuant to a signal is an invitation to come a passenger and the relation is established upon stepping upon the running board of the car. *Citizens' St. R. Co. v. Merl*, 26 Ind. 284.

One taking a train with knowledge that it was an excursion train and a regular was not presumed to be a passenger thereon. *Fitzgerald v. Chicago &c. R. Co.*, 108 Iowa, 614.

By purchase of a ticket and entrance into the car one becomes a passenger and the relation is not terminated by his leaving it to avoid a collision. *Graddert v. Chicago &c. R. Co.*, 109 Iowa, 547.

Under a contract to haul cars for a circus proprietor, an employee of the latter has no claim against the railroad company for injury by a truck jumping the track. *Robertson v. Old Colony R. Co.*, 138 Mass. 525.

The purchase of a ticket is not necessary to sustain the relation of passenger at common law or under a statute permitting recovery against railroad companies for death of passengers. *Inness v. Boston &c. R. Co.*, 138 Mass. 433.

One becomes a passenger under such a statute by purchasing a ticket and mounting the platform to take the train. *Young v. New Bedford &c. R. Co.*, 171 Mass. 33; s. c., 41 L. R. A. 193.

One becomes a passenger on a street car, which has stopped at a place, by placing his foot on the running board thereof. *Gordon v. St. R. Co.*, 175 Mass. 181.

By getting on the steps or platform of a street car, where it has stopped at the usual place for the purpose, the relation of passenger and carrier is established. *Gaffney v. St. Paul &c. R. Co.*, 81 Minn. 459.

Also by permitting entrance on the steps of an electric trolley for others for the purpose of passage. *Barth v. Kansas City Electric R. Co.*, 142 Mo. 535.

By purchasing a ticket and entering a train standing at a place prepared for passage. *Choate v. Missouri &c. R. Co.*, 67 Mo. App. 100; *Holt v. Hannibal &c. R. Co.*, 87 id. 203.

Entrance into the car with purpose of becoming a passenger

without a ticket, was held sufficient, whether the fare was paid before or after the accident. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 1031.

Appearance for passage at flag station a reasonable period before train time, entitled one to damages for failure to stop the train, where agent was absent and the engineer failed to see him. *Thomas v. Southern R. Co.*, 122 N. C. 1005.

Coming to a waiting room to take a train within a reasonable period of train time, constitutes one a passenger, though no ticket be bought. *Phillips v. Southern R. Co.*, 124 N. C. 123; s. c., 45 L. R. A. 163.

Purchase of a ticket with the intention of becoming a passenger is sufficient. *Exton v. Central R. &c.*, 63 N. J. L. 356; aff'g s. c., 62 id. 7.

One struck by a falling sign board, while about to board a street car stopped pursuant to his signal, was held a passenger. *Carney v. Cincinnati Street R. Co.*, 8 Oh. S. & C. P. Dec. 587.

The relation held to exist as to one while taking a place on the car. *Altmeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224; s. c., 4 Oh. Leg. News, 300.

One with a transfer ticket approaching a car standing still to get on when struck by a piece of the trolley pole broken by the conductor while reversing it. *Keator v. Scranton Traction Co.*, 191 Pa. St. 102; s. c., 44 L. R. A. 546.

A soldier on defendant's train under contract between defendant company and the government is entitled to the privileges of a passenger. *Galveston &c. R. Co. v. Parsley*, 6 Tex. Civ. App. 150.

One with a ticket and intending to ride as a passenger is not *per se* a trespasser because he gets on at the baggage car platform and while the train is moving, where others in such relations have been accepted as passengers. *Martin v. Southern R. Co.*, 51 S. C. 150.

But, where one has no ticket and gets on a train at a place not provided for passage, until accepted, he is not a passenger merely because his intentions are *bona fide*. *Missouri &c. R. Co. v. Williams*, 91 Tex. 255; rev'g s. c., 40 S. W. Rep. 350.

A ticket is not essential to status of a passenger, in view of a statute allowing the payment of fare to the conductor. *Missouri &c. R. Co. v. Simmons*, 12 Tex. Civ. App. 500.

The entry of a waiting room for the purpose of procuring a ticket establishes the relation. *Texas &c. R. Co. v. Jones*, (Tex. Civ. App.) 39 S. W. 124; *St. Louis &c. R. Co. v. Franklin*, (Tex. Civ. App.) 44 S. W. Rep. 701.

Mistaken entrance of the wrong train by one having a ticket does not prevent his being a passenger thereon. *Gary v. Gulf &c. R. Co.*, 17 Tex. Civ. App. 129.

A servant is a passenger although his fare be paid by his master. *v. Midland R. Co.*, 19 C. B. (U. S.) 213; *Fairmouth R. Co. v. S* 54 Penn. St. 375.

Intention to take passage on train constitutes a person in default at a depot a passenger. *Grimes v. Penn. R. Co.*, 36 Fed. Rep. 72.

One does not become a passenger because he holds a mileage ticket where he does not go to the station or notify anyone of his intention to take passage, but, without going to the depot, starts across the track toward a train while at siding. *Southern R. Co. v. Smith*, 86 F. 292; s. c., 40 L. R. A. 746.

That fare had not been paid, is no bar to the relationship, where the conductor has not come for it. *Chicago &c. R. Co. v. Lee*, 92 F. 318.

(a). EXPRESS MESSENGERS.\*

An express messenger is a passenger and entitled to rights and protection nor is he chargeable with notice of an agreement between the express company and the railroad companies throwing all liabilities upon the former which he may recover from the railroad company. *Brewer v. N. Y. &c. R. Co.*, 124 N. Y. 59; s. c., 35 N. Y. St. R. 60.†

Express messengers and agents are entitled to the same protection as other passengers, unless otherwise unmistakably contracted. When an express agent is privy to contract with express company, exempting the agent from liability, it is liable. *Blair v. Erie R. Co.*, 66 N. Y. 313; *Penn. R. Co. v. Woodworth*, 26 Oh. St. 585; *Hammond v. N. E. R. Co.*, 130 (S. C.) 130; *Fordyce v. Jackson*, 56 Ark. 594; *Yeomans v. Contra Costa R. Co.*, 34 Cal. 71.

Where decedent, an express messenger, was killed while in a railroad car but not on duty as messenger (thus violating a rule of the express company, and of the railroad company), his representatives did not recover. *Kentucky Cent. R. Co. v. Thomas*, 79 Ky. 160.

Where an express agent is also a baggage master, he is only entitled to the rights of an employé as regards the railroad company. *Baugh v. B. & O. R. Co. v. McCamey*, 12 Oh. C. C. 543.

An express messenger, who, in his contract of employment, ratifies and confirms a contract between the express company and railroad company relieving the latter from liability for negligence, was held not entitled to the immunity of a passenger from such contracts. *Baugh v. B. & O. R. Co. v. Voigt*, 176 U. S. 498; rev'g s. c., 79 Fed. Rep. 50.

See this case under "Carriers of Goods, Limitation of Liability," ante.

\* See "Common Carriers of Goods," p. 197.

† Note.—Railroad Companies are required to carry mails by sec. 56, chap. 563, Laws of N. Y. 1890.

But, where an agreement between the railroad and the express company, providing that messengers were to receive free transportation in consideration of their assuming all risk, was made without their knowledge, they were allowed to recover. *Chamberlain v. Pierson*, 87 Fed. Rep. 420.

(b). MAIL AGENTS.

'The defendant owed to postal agent the same duty as to any other passenger. *Nolton v. Western R. Co.*, 15 N. Y. 444; *Blair v. Erie R. Co.*, 66 id. 313.

See *Penn. R. Co. v. Price*, 96 Pa. St. 256.

A postal agent is a passenger, and a contract for carrying mail stipulating against damages to agents is void. The United States statute does not authorize it, and as the absolute duty to carry the mail is imposed, it cannot be qualified. *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 562; aff'g 31 Hun, 100, and judg't for pl'ff.

Distinguishing *Penn. R. Co. v. Price*, 96 Pa. St. 256.

Carrier was not liable for injury to a mail clerk in one of its cars due to collision caused by the switching of a car by another company onto the track it was standing on in a terminal station. *Stoddard v. New York & C. R. Co.*, (Mass.) 63 N. E. Rep. 927.

A clerk in mail car on defendant's train, employed by the United States, may recover as a passenger for injuries received. *Mellor v. Missouri Pacific R. Co.*, 105 Mo. 455; *Magoffin v. Missouri Pac. R. Co.*, 102 id. 540.

Postal clerk is not a passenger, the same degree of diligence only being due to him as to employes; he is fellow servant with brakeman, within the meaning of a statute, by its terms inapplicable to passengers, giving to those not railroad employes, injured while at work on or about the railroad, only such rights as railroad employes would be entitled to. *Forman v. Pennsylvania R. Co.*, 195 Pa. St. 499.

Mail agent was contributorily negligent in not closing the side door of the mail car or putting up the safety bar. That he could not pull or kick the bar loose so as to put it in position was no excuse, where he did not attempt to get it loose by other means or close the lower part of the doorway. *Martin v. Philadelphia & C. R. Co.*, 200 Pa. St. 603.

A mail agent is a passenger and may recover for injuries negligently inflicted. *Gulf & C. R. Co. v. Wilson*, 79 Tex. 371; *Houston & C. R. Co. v. McCullough*, 22 Tex. Civ. App. 208.

A postal clerk is a passenger entitled to the comforts due them in-

cluding heating. *International &c. R. Co. v. Davis*, 17 Tex. C. 340.

A mail agent is a passenger and may recover for injuries *Arrowsmith v. Nashville &c. R. Co.*, 57 Fed. R. 165; *Norfolk & v. Shott*. 92 Va. 34.

(c). PERSONS IN CHARGE OF STOCK.

Person on stock car by right and in performance of his duty for the stock, may recover for injury there received. *Florida R. v. Webster*, 25 Fla. 394.

Shipper riding with his cattle by consent of the company is passenger and entitled to protection as such. *Illinois &c. R. Co.* 174 Ill. 13; aff'g s. c., 69 Ill. App. 363; *Chicago &c. R. Co. v.* 175 Ill. 293; aff'g s. c., 65 Ill. App. 435.

Where shipper of stock got on freight train at the suggestion of the train hand to help signal, it was held that no recovery could be had, thus voluntarily exposing himself to danger. *Atchison &c. R. Co. v. Lundley*, 42 Kas. 714.

A shipper traveling with stock may recover for injuries as a passenger though he had executed a release in consideration of free passage. *Memphis &c. Packing Co. v. Bell*, 100 Ky. 203; *Memphis &c. Packing Co. v. Buckner*, (Ky.) 57 S. W. Rep. 482.

Though not passenger, a person in a stock car with permission of the company, and for the purpose of caring for his stock, is entitled to recover for injuries inflicted on him in a collision. *Orcutt v. P. R. Co.*, 45 Minn. 368.

One in care of stock who mounted a train upon the statement of the conductor that it would be safe to do so, may recover for injuries sustained by the sudden starting of the same. *Olsen v. St. Paul &c. R. Co.* Minn. 536.

While a shipper of stock may have, under his contract, the right to go upon defendant's train, the same privilege does not extend to helping him, and such other cannot recover as passenger for injuries sustained from jumping off the train under apprehension of a collision. *Richmond &c. R. R. Co. v. Burnsed*, 70 Miss. 437.

Degree of diligence of company corresponds with mode of conveyance. One entitled to ride on top of train may rely on careful management of the same, and can recover for injuries resulting from company's negligence. *Tibby v. Missouri &c. R. Co.*, 82 Mo. 292.

Drover traveling with stock must submit to all the inconveniences naturally incident to such passage. *Omaha &c. R. Co. v. Neb.* 84.



Person in charge of cattle on a train and riding free is a passenger. *Railway v. Ivy*, 71 Tex. 409; and this notwithstanding a provision regarding him as an employé and as assuming all risks. *St. Louis & C. R. Co. v. Nelson*, (Tex. Civ. App.) 44 S. W. Rep. 179.

United States Supreme Court held that however the law might be in respect to a strictly free passenger, a drover traveling on a stock train to look after his cattle, and having a free pass for that purpose, could recover for injuries sustained by reason of defendant's negligence. *Railroad Company v. Lockwood*, 17 Wall. 357.

A cattle drover, transporting cattle on defendant's train, and himself riding free thereon, was injured by negligence of defendant's employés, precipitating him between the cars, and recovered. *Indianapolis & C. R. Co. v. Horst*, 93 U. S. 291.

Plaintiff, in charge of stock on defendant's train, cannot recover for injuries received by falling between the cars when the same was due to the switching off of the caboose as he was about to step upon it, on the ground that the conductor's statement that the caboose would not be switched off, was not the proximate cause of his injuries. *Chicago & C. R. Co. v. Elliott*, 55 Fed. Rep. 949.

Plaintiff recovered for injuries received by him while walking along the top of a freight train from colliding with an overhead bridge. He was in charge of cattle and had gone forward to examine them. *Chicago & C. R. Co. v. Carpenter*, 56 Fed. Rep. 451; *Nelson v. Southern P. R. Co.*, 18 Utah, 244 (snow sheds too low).

#### (d). SERVANT OF CARRIER RIDING TO OR FROM HIS WORK.

Where a person in the employ of a railroad company travels back and forth from his home to the place where his services are rendered, upon the cars of the company, and his transportation, free of charge, constitutes part of the contract of service, while so traveling he is an employé and not a passenger, and for injury to him through the negligence of a co-employé the company is not liable. *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267.

Citing *Russell v. H. R. R. Co.*, 17 N. Y. 134, where the person was injured while being taken home upon a gravel train at night, after his day's work was completed; *Gilshannon v. Stony Brook R. Corporation*, 10 Cush. 228, where the plaintiff was a laborer on the road and was conveyed in defendant's cars to and from the place of his work for a mutual convenience, and without contract for his transportation; *Seaver v. Boston & Maine R. Co.*, 14 Gray, 466; *Tunney v. Midland Ry. Co.*, 1 C. P. 291; and, distinguishing *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun, 488, affirmed 74 N. Y. 617, where an assistant surveyor, employed by the month, and having no duty to perform in connection with the running of the defendant's trains, nor in the care in reference thereto, was

killed while being transported on defendant's cars, free of charge, from home to the place where he was to perform the work; and, disapproving *nell v. A. V. R. Co.*, 59 Pa. St. 239, which was said to be in conflict with rule in the state of New York and not to be sound law.

This is the general doctrine. Wharton on Negligence, sec. 643, citing *v. R. Co.*, 36 Mo. 418; *Union Pac. R. Co. v. Nichols*, 8 Kan. 505; *Kansas v. Salmon*, 11 Kan. 83.

A station agent, riding home after hours on a passenger train in mission of a conductor, was held to be a passenger. *Louisville &c. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Where the foreman of a gang of laborers had finished hauling down was returning late at night, he was regarded as a passenger. *Do New Orleans &c. R. Co.*, 52 La. Ann. 1127.

Where a company issues certain tickets to employés living on the of the road, possession thereof gives one the character of a passenger. *Doyle v. Fitchburg R. Co.*, 166 Mass. 492; s. c., 33 L. R. A. 844; *v. Fitchburg R. Co.*, 162 Mass. 66.

Employés permitted to ride free of charge while in uniform were to be passengers. *Dickinson v. West &c. R. Co.*, 177 Mass. 365; s. L. R. A. 326.

A servant of a railroad company upon the company's business having a right under contract to a seat in company's cars, cannot fully be compelled to leave a seat to which he has been assigned. *&c. R. R. Co. v. Burns*, 22 Vroom, (N. J.) 340.

See "Master and Servant," negligence of co-employee, *post*, p.

An employé, whose contract gave him free passage, was held a passenger. *Simmons v. Oregon R. Co.*, (Or.) 69 Pac. Rep. 440.

Where an employé's contract entitles him to free transportation for the day's work, not obligatory as a part of his work, he is a passenger. *McNulty v. Pennsylvania R. Co.*, 182 Pa. St. 479; s. c., 38 L. R. A.

Free transit toward home after the day's work was held incidental to service and did not make employé a passenger. *Ionnone v. New York R. Co.*, 21 R. I. 452.

Customary carriage of an employé to his work, not being in violation of his duty, constitutes him a passenger though carried gratuitously. *Transit Co. v. Venable*, 105 Tenn. 460; s. c., 51 L. R. A. 886.

Where an employé, to be employed at a certain point, stipulated for free passage thereto, not in connection with such work, but for convenience, he was a passenger, though the pass was the ordinary employé's pass containing the usual exemptions which he had assumed. *Whitney v. New York &c. R. Co.*, 102 Fed. 850.

Where one was employed to work at a certain point, free passage

entitled him to rights of a passenger and stipulations for exemption from negligence were unavailing. *Williams v. Oregon &c. R. Co.*, 18 Utah, 210.

(e). RIDING ON FREIGHT TRAINS, ENGINE, &c., BY INVITATION OR OTHERWISE.

Railroad companies have a right to make a complete separation between their freight and passenger business. Where this is done the conductor of a freight train has such general authority only as is incidental to the business of moving freight, and no power whatever as to the transportation of passengers; and notice of this limited authority will be implied from the nature and apparent division of the business.

The presumption is that a stranger riding upon a freight train is not legally a passenger, and is not lawfully upon the train; and no liability for negligence can be imposed upon the company as to him, unless the special circumstances of the case rebut this presumption.

*Plaintiff was invited by the conductor of a coal train upon defendant's road to ride upon the train, with a promise to get him employment as a brakeman. No passenger car was attached to the train, but, aside from the coal cars, simply a "caboose" for the carriage of train implements and the accommodation of defendant's employes, in which plaintiff was invited to and did ride. Through the negligence of defendant's employes the train was run into by another and plaintiff injured. In an action to recover damages it appeared that, by a regulation of defendant, printed for the use of employes, passengers were forbidden to ride on coal trains; of this plaintiff had no actual notice. It did not appear that passengers were either habitually or occasionally permitted to ride in the caboose. There was nothing in the attendant circumstances indicating an apparent authority in the conductor to create between the parties the relations of passenger and carrier, or to make an arrangement for plaintiff's employment as a brakeman; and the facts did not establish that plaintiff was lawfully upon the train. Eaton v. The D. L. & W. R. R. Co., 57 N. Y. 382, rev'g judg't for pl'ff and distinguishing Dunn v. G. T. R. Co., 58 Me. 187; 10 Am. L. R. (N. S.) 623.*

**From opinion.**—"In *Lygo v. Newbold* (9 Exch. 302) the plaintiff contracted with the defendant to carry certain goods for her in his cart. The defendant sent his servant, who, without the defendant's authority, permitted the plaintiff to ride in the cart. On the way the cart broke and the plaintiff was injured. It was held that the defendant had not contracted with the plaintiff to carry her, and that he was not liable. The Supreme Court of Maine have sought to weaken the force of this case by the assertion that it was not the case of a common carrier. *Dunn v. Grand Trunk Railway Co.*, 58 Maine 187; 10 Amer. Law Reg. (N. S.) 623. The criticism seems to be unfounded, as the

question here at issue does not respect the duties of a common carrier to a passenger, but is the preliminary one, whether the plaintiff is a passenger. This depends upon the law of agency, and to this the decision in *Lygo v. Newbold* is strictly applicable. *Elkins v. B. & M. R. R. Co.* (23 N. H. 275) is favorable to the defendant. The railway company in that case had a regulation prohibiting the carriage of freight on passenger trains. It was held that, as it had not authorized or acquiesced in any deviation from the regulation, and had received no compensation for the carriage of the goods, it was not liable. Reference may also be made to the authorities establishing the proposition, that wherever an agent has powers over a definite subject, he cannot by his own act extend his powers to other subjects, even of a cognate character. Notice to the person dealing with him is immaterial. (*Benedict v. Martin*, 36 Barb. 288; *Gilbert v. Beach*, 5 Bosw. 445; 8 N. Y. 222; 11 id. 432.) The case of *Lawrenceburgh & Miss. R. R. Co. v. Montgomery* (7 Ind. Port. 476) is not opposed to these views. The only point bearing on the present subject was, whether the court below erred in not instructing the jury that a railroad company is not liable for an injury which may happen to a person who takes passage on a train engaged in transporting gravel and not engaged in carrying passengers. The court properly held that the request for this instruction was too broad. It added: 'In the case of *Fitzpatrick v. New Albany and Salem R. R. Co.* (id. 436) we decided that a person riding on a gravel train might, under certain circumstances, recover for an injury occasioned by a collision. Besides, the last qualification of the proposed instruction was calculated to mislead the jury, as it appeared that the company had carried passengers in gravel trains in a number of instances.' (P. 477.) This decision, owing to the special grounds upon which it was placed, has no bearing on the present case, the facts being materially different. The case of *Dunn v. The Grand Trunk Railway Co.* (*supra*), in its precise facts, is not opposed to the theory adopted in the case at bar. The plaintiff had paid his fare and entered the 'saloon' car of a freight train, contrary to the regulations of the company, but with the knowledge of the conductor. The company was held liable. The case differs from the one at bar in two respects: Payment of fare and the attachment of a 'saloon' car. What that was is not precisely stated. It may be assumed to be one fitted up for the accommodation of passengers. It might thus, perhaps, be inferred that the defendant had assented to a relaxation of its rules. The reasoning of the case is disapproved by a well-known text writer upon railways (Judge Redfield), and is unsatisfactory. The principle there acted upon is not to be extended beyond the precise facts of the case." \* \* \* \* \*

**From dissenting opinion.**—"I think no authority can be found holding that a person, under such circumstances, is unlawfully or wrongfully upon a train; but there are numerous authorities in this and other states holding otherwise. This being so, there is abundant authority for holding that he was entitled to protection against the willful or negligent acts of the defendant or its agents. In the case of *Lackawanna & Bloomsburgh Railroad Co. v. Chenewith* (52 Penn. 382), at the request of the owner of a freight car, the agents of a railroad company attached his car to a passenger train, contrary to the rules and instructions of the company, and it was held that the car was not unlawfully on the road, and that the owner was entitled to compensation for injury from negligence to which the attaching his car did not contribute.

In *Philadelphia & Reading Railroad Co. v. Derby* (14 How. [U. S.] 468), the plaintiff below was the president of another railroad company and a stockholder

in the defendant, and he was invited by the president of the defendant to ride with him, not in the usual passenger cars, but in a small locomotive car used for the convenience of the officers of the company; and he paid no fare for his transportation. It was held that he was lawfully in the car and that he could recover damages for injuries received by a negligent collision. \* \* \* \* \*

In *Carroll v. New York & New Haven Railroad Co.* (1 Duer 571) a passenger was riding in a baggage car, and although he would not have been injured if he had been in a passenger car, yet, as he took his place in the baggage car with the assent of the conductor, it was held that he was lawfully there, and that he was not a trespasser or wrong-doer, and that he could recover for injuries received in consequence of a collision. In *Tonawanda Railroad Co. v. Munger* (5 Denio 255) and *Munger v. Tonawanda Railroad Co.* (4 N. Y. 349) the action was to recover for two oxen killed upon the railroad by a passing train; and it was held that no recovery could be had because the oxen were unlawfully upon the railroad. If they had been lawfully there, no matter how they came there, the owner could have recovered by showing negligence on the part of the railroad company. In *Robertson v. The New York & Erie Railroad Co.* (22 Barb. 91) the plaintiff was badly injured while riding upon the engine, by reason of the negligence of the defendant. The plaintiff had no right to ride upon the engine and he knew it. It was held that he could not recover because he was unlawfully on the engine; and he was nonsuited. But it is said, in the opinion of the court, that if he had been lawfully there he could not have been properly nonsuited." \* \* \* \* \*

"It will thus be seen that there is a general rule that, wherever a person or his property may lawfully be, he is entitled to protection against the negligent acts of another, causing him injury or damage. If one be unlawfully in any place, and be injured in consequence of being there, by the carelessness of another, he is, generally, without remedy, because his own wrong contributed to the injury."

Although the caboose of the freight train was not properly a passenger car, passengers were carried thereon for hire, and the conductor received the plaintiff thereon and accepted his fare. This established plaintiff's right to ride as a passenger and he was entitled to the same care, as upon a passenger car. *Edgerton v. New York & Harlem R. Co.*, 39 N. Y. 227.

Where a boy is *sui juris*, he, it seems, by accepting the invitation of a street railroad employé to ride gratuitously, assumes the risk of injury from such employé's act of mere negligence. *Marks v. Rochester R. Co.*, 41 App. Div. 66.

A frequent relaxation of a rule forbidding a passenger to ride on freight cars does not abrogate it. *Hobbs v. Texas &c. R. Co.*, 49 Ark. 357.

That a train containing two empty coaches and the superintendent's car mixed with freight cars stopped at a station pursuant to signal, does not warrant one in assuming that it was intended to accommodate passengers. *Roberts v. Smith*, (Ariz.) 52 Pac. Rep. 1120.

Where one boards a freight train with the conductor's consent, who receives his fare, he is warranted in assuming that it is a local freight, compelled to carry passengers by statute and is entitled to rights of a passenger. *Arkansas M. R. Co. v. Griffith*, 63 Ark. 491.

Invitation by a motorman for a boy of ten to ride without fare is within the scope of his authority and the boy is entitled to the care due a passenger and not a trespasser. *Little Rock Traction &c. Co. v. Nelson*, 66 Ark. 494.

Motorman permitted a boy of 13 to play on the car and jump off while in motion to turn trolley; held negligence for which the company was liable. *Pueblo &c. R. Co. v. Shearman*, 25 Colo. 114.

Defendant company was liable where a conductor, of a gravel train, who had promised an employé of persons constructing a part of the road bed not to start the train till he had climbed aboard, started it, though knowing that the latter was in the act of doing so. *Florida &c. R. Co. v. Cain*, 100 Ga. 472.

Knowledge that a conductor has exceeded his authority in giving his consent to ride on a freight train against the rules of the company, prevents one becoming a passenger. *Cleveland &c. R. Co. v. Best*, 169 Ill. 301; rev'g s. c., 68 Ill. App. 532.

A trespasser on an engine cannot recover for injuries caused by the careless running of it, notwithstanding the servants of the company did not prevent him from doing it. *Barkley v. Chicago &c. R. Co.*, 37 Ill. App. 293.

Engineer has no authority to invite one to become a passenger and such invitation ordinarily does not create passenger relationship. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Where the defective car belonged to another company and defendant's only act in relation thereto was to switch it into the yards of a manufacturing corporation, defendant was not liable for an injury to one of its employés. *Atchison &c. R. Co. v. Bump*, 60 Ill. App. 444.

Where one was invited to ride on the "ice railway" at the world's fair on an experimental trip before it was opened for business the relation of carrier and passenger was held not to exist. *De La Vergne &c. Mach. Co. v. McLeroth*, 60 Ill. App. 529.

Where a conductor of a freight train has no authority to invite one to ride, his invitation and consent does not vest the one who accepts with the character of a passenger. *Stalcup v. Louisville &c. R. Co.*, 16 Ind. App. 584.

Where there are other passengers on a construction train, which looked like a freight train on which passengers were allowed, and plaintiff's ticket was accepted by the conductor though contrary to orders, he

was held a passenger. *Spence v. Chicago &c. R. Co.*, (Iowa) 90 N. W. Rep. 346.

A baggagemaster of a passenger train has no authority to invite a person to ride, and company is not liable to one riding on his invitation. *Peary v. Louisville &c. R. Co.*, 40 La. Ann. 32.

Riding on freight train, contrary to regulations, where fare was collected was not *per se* negligent. *Dunn v. Grand Trunk R. R. Co.*, 58 Me. 187.

See *Zump v. W. & M. R. Co.*, 9 Rich. (S. C.) 84; *Lawrenceburgh &c. R. Co. v. Montgomery*, 7 Port. (Ind.) 475; *Watson v. Northern R. Co.*, 24 Up. Can. (Q. B.) 98; *Carroll v. N. Y. &c. R. Co.*, 1 Duer (N. Y.) 578; *Creed v. Penn. R. Co.*, 5 Nerr. (Pa.) 139; *Great N. W. R. Co. v. Harrison*, 26 Eng. L. & Eq. 443; *Collett v. London &c. R. Co.*, 6 id. 305; *Washburn v. Nashville &c. R. Co.*, 3 Head (Tenn.) 638.

If plaintiff knew that conductor had no authority to permit persons to ride free,\* notwithstanding solicited and obtained free passage his fraud robs him of the privileges of a passenger. *McVeety v. St. Paul &c. R. Co.*, 45 Minn. 268.

The invitation to ride and the collection of fare less than the regular rate by a brakeman of a freight train having no authority to do so, does not constitute one a passenger. *Janny v. Great Northern R. Co.*, 63 Minn. 380.

Invitation by defendant's conductor to ride free on an engine does not make company liable to plaintiff as a passenger. *Files v. Boston &c. R. Co.*, 149 Mass. 204; *Stringer v. Missouri Pac. R. Co.*, 96 Mo. 299.

Nor has engineer such authority. *Virginia M. R. Co. v. Roach*, 83 Va. 375; *Whitehead v. St. Louis &c. R. Co.*, 99 Mo. 263.

A newsboy, who jumps on a car for the purpose of selling papers without intending to pay fare unless required to, is not a passenger. *Raming v. Metropolitan &c. R. Co.*, 157 Mo. 477; *Padgitt v. Moll*, 159 Mo. 143.

Defendant was not liable, where a boy of 12, without invitation, got upon the front platform of a street car and remained there till injured. Entrance was by the rear door only. He was held not a passenger. *Barlow v. Jersey City &c. R. Co.*, (N. J. L.) 51 Atl. Rep. 463.

One jumping on the steps of an engine without invitation for the purpose of stealing a ride is purely a trespasser. *Baltimore &c. R. Co. v. Railway Co.*, 3 Oh. N. P. 310; s. c., 3 Oh. Dec. 687.

It is not within the scope of the authority of a section foreman to carry persons on a handcar and one so riding was not allowed to recover for injuries inflicted by running an irregular train around a curve at high

\*NOTE.—A number of cases bearing on the authority of a trainman to invite a person to ride and the liability of the master therefore, have been collected under the head of "Agency," p. 1; and as to trespassers, see "Private Premises," post. As to gratuitous passengers, see p. 415.

speed without signals. *Rathbone v. Oregon R. Co.*, (Or.) 66 Pac. Rep. 909.

A person on a timber train without invitation of authorized agent cannot recover for injuries caused by a collision. *Railroad v. Meacham*, 91 Tenn. 428.

Boy riding on a freight train by collusion with brakeman is a trespasser. *Sands v. Southern R. Co.*, (Tenn.) 64 S. W. Rep. 478.

In the absence of evidence of knowledge that it is against the rules of the company to permit passage on freight trains, the acceptance of fare by the conductor does not make one a passenger. *St. Louis &c. R. Co. v. White*, (Tex. Civ. App.) 34 S. W. Rep. 1042.

Permission of brakeman to ride on freight train was without implied authority and did not operate as a suspension of the company's rules. *Galaviz v. International &c. R. Co.*, 15 Tex. Civ. App. 61.

A railway company was held liable for injury to child without sufficient intelligence to appreciate the danger, while riding on a push car at invitation of employes, regardless of the fact that it was a violation of the company's rules and that the employes did not know that he was *non sui juris*. *Missouri &c. R. Co. v. Rodgers*, (Tex. Civ. App.) 39 S. W. Rep. 383.

Otherwise if the boy had such a degree of intelligence as to enable him to comprehend the danger of his act. *Missouri &c. R. Co. v. Tona-hill*, 16 Tex. Civ. App. 625.

One does not become a passenger by boarding a freight train knowing it is against the rules of the company which it is trying to enforce, though in the face of frequent violations. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631; *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 708.

One invited by a conductor to ride in the locomotive has no authority to invite another to ride; especially in a box car, and no passenger relationship is thereby established. *De Palacios v. Rio Grande &c. R. Co.*, (Tex. Civ. App.) 45 S. W. Rep. 612.

Where plaintiff paid a brakeman to be carried on a freight train, a proposed instruction that if he did so knowing it to be against the rules, defendant was not liable, was improper as failing to consider whether it was to his master's interest for the brakeman to do as he did; especially, where there was no evidence of collusion to defraud. *Texas &c. R. Co. v. Black*, 23 Tex. Civ. App. 119.

While a trespasser on a train was trying to climb across a tender, the engineer, with knowledge of his perilous position, suddenly put on more steam, which sent the car forward with a jerk and threw him off. The



railway company was held liable. *Claiborne v. Missouri &c. R. Co.*, 21 Tex. Civ. App. 648.

A person, not a workman, riding on a work train, which is against the rules of the company, is presumably a trespasser. *International &c. R. Co. v. Hanna*, (Tex. Civ. App.) 58 S. W. Rep. 548.

Where a person knows or has notice of such facts as would put a reasonable man upon inquiry as to whether a freight train was allowed to carry passengers, he becomes a trespasser in boarding. *Purple v. Union P. R. Co.*, 114 Fed. Rep. 123.

(f). PERSONS ESCORTING FRIENDS TO OR FROM TRAINS.

A person upon lawful business at a place, where passengers are received or discharged, but not for the purpose of becoming a passenger, is entitled to the observance of reasonable care on the part of those in control of such premises. This includes such persons as escort friends to or from the trains; but the carrier need not accommodate the arrival and departure of its trains to the safety of such persons, should they enter the car for the purpose of receiving or parting with friends. If, however, a passenger, through decrepitude, require the services of an escort for the purpose of entering or alighting, the carrier must use due care to prevent injury to such person.

See, also, "Entering and Leaving Vehicles," *post*, p. 437.

It is not necessary that a train be held at a station long enough to permit a man to escort a woman to her seat in a car and get off before it starts up again. *Railway Co. v. Lawton*, 55 Ark. 428.

Railroad company is liable to one coming to the depot, for the purpose of meeting a relative, in placing a baggage truck in a narrow space reserved for passengers. *Denver &c. R. Co. v. Spencer*, 27 Colo. 313.

Plaintiff, not a passenger, but on the train to look for his wife and child cannot recover if, while train is standing waiting for freight trains to be removed, he gets off the platform and falls into a culvert. *Stiles v. Atlanta &c. R. Co.*, 56 Ga. 370.

Fast mail train need not accommodate its stops to the convenience of persons who get on it to see passengers off; and if it starts before they can get out no action lies for the inconvenience suffered. *Coleman v. Georgia R. Co.*, 84 Ga. 1.

A person who has not placed himself in the care of the carrier is not a passenger, and failure to hold its train until such an one can get on does not subject it to liability. *Spannagle v. Chicago &c. R. Co.*, 31 Ill. App. 460.

A railroad company's duty to one going upon the train to assist a passenger is only that of ordinary care. *Louisville &c. R. Co. v. Espenscheid*, 17 Ind. App. 558.

An old woman standing on station platform to bid friends good-by

was injured by the careless handling of a trunk, and the company was responsible. *Atchison &c. R. Co. v. Johns*, 36 Kas. 769.

Where a person walking along a platform, constructed for the use of the public, is injured by projecting machinery of unusual width, he may recover. *Sulliran v. Vicksburgh &c. R. Co.*, 39 La. Ann. 801; *Moses v. R. Co.*, 39 id. 649; *R. Co. v. Thompson*, 1 So. (Miss.) 840; *Dobiecki v. Sharp*, 88 N. Y. 203; *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519; *Chicago &c. R. Co. v. Wilson*, 63 Ill. 167.

A man who is waiting at a depot to meet his wife is a customer of the railroad company, and may maintain an action for injuries sustained by falling into an unprotected excavation. *McKone v. Michigan Central R. Co.*, 51 Mich. 601; *Jeffersonville &c. R. Co. v. Riley*, 39 Ind. 568; *Tobin v. Portland &c. R. Co.*, 59 Me. 183; see, however, *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Allender v. Chicago &c. R. Co.*, 37 Iowa, 264; *Bennett v. R. Co.*, 102 U. S. 577; *Central &c. R. Co. v. Perry*, 58 Ga. 461.

Plaintiff, not a passenger, did not have time to escort a women and child, in his charge to their seats, and leave the train before it started. Court held these facts fixed responsibility upon the company. *Doss v. Missouri &c. R. Co.*, 59 Mo. 27.

Though such a person is not entitled to the rights of a passenger, he is entitled to some degree of protection. *Whitley v. Southern R. Co.*, 122 N. C. 987.

See, also, *Daniel v. Railroad*, 117 N. C. 592.

One coming to meet his family is not a trespasser but a licensee entitled to the exercise of ordinary care, to whom the company is liable for failure to light an excavation made in levelling its station grounds. *Izlar v. Manchester &c. R. Co.*, 57 S. C. 332.

Plaintiff went to defendant's station to help two old and decrepit friends to get off the train, and was injured by a defect in the flooring of the station. Recovery was allowed. *Hamilton v. Texas &c. R. Co.*, 64 Tex. 251; *T. & P. R. Co. v. Best*, 66 Tex. 116.

See *Gillis v. R. Co.*, 59 Pa. St. 143; Wharton on Neg. sec. 642.

One coming to meet his family is not a trespasser but a licensee entitled to the exercise of ordinary care. *Gulf &c. R. Co. v. Williams*, 21 Tex. Civ. App. 466; *Gulf &c. R. Co. v. Wagley*, 15 Tex. Civ. App. 308.

Where train stopped a sufficient time to allow receipt and discharge of passenger, defendant was not liable to one boarding only to assist relatives with baggage, but giving no intimation of his intention to alight again. *Oxsher v. Houston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 550.

Where plaintiff left her own train and went upon another at a junction to meet a sister, defendant was not liable in the absence of knowledge that her presence was but temporary. The permission of the conductor of her own train to visit the other did not make her a passenger on the latter. *Bullock v. Houston &c. R. Co.*, (Tex. Civ. App.) 55 S. W. Rep. 184.

Where a man had gotten on train to assist his wife, and after all passengers had gotten off, was injured by the sudden jerking of the cars while in the act of getting off, no recovery was allowed. *Griswold v. Chicago &c. R. Co.*, 64 Wis. 652.

Liability for injuries caused by defective depot platforms does not extend to the case of a person accompanying one in charge of stock who is about to take defendant's train. *Dowd v. Chicago &c. R. Co.*, 84 Wis. 105.

(g). WHEN PASSENGER CEASES TO BE SUCH.\*

Plaintiff, having been carried by his destination, remained on the car, without paying another fare, until he returned to it again on the round trip, and was injured, while attempting to alight, by the sudden starting of the car. It was held that, whether a passenger or a trespasser, he was entitled to the exercise of ordinary care to avoid injury to him, and a charge, which, while describing him as a passenger, at the same time stated that ordinary care was the measure of defendant's duty, was not prejudicial. The court were of opinion that plaintiff was a passenger on the return trip. *Rosenberg v. Third Avenue R. Co.*, 47 App. Div. 323; s. c. aff'd, 168 N. Y. 681.

The relation of passenger and carrier as such ceases when one leaves the depot platform for home, though on the tracks. *St. Louis &c. R. Co. v. Beecher*, 65 Ark. 64.

Plaintiff had just alighted and gone a few steps when he was shot by the conductor as the result of words between them. He was allowed to recover on the ground that, as he had not left the company's premises nor had reasonable time to leave, he was still a passenger. *Brunswick &c. R. Co. v. Moore*, 101 Ga. 684.

Relationship on a street car continues until passenger arrives at his destination and has had reasonable opportunity to alight. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

It ceases, where a passenger has actually left the train and gone to a hotel, though he intends to resume his ride later. *King v. Central &c. R. Co.*, 107 Ga. 754.

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\* Note.—See also "Entering and Leaving Vehicles," *post* p. 437.

It continues until he has had a reasonable time to alight. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; aff'g s. c., 68 Ill. App. 635.

But ceases upon alighting from a street car at a safe place. *West Chicago &c. R. Co. v. Walsh*, 78 Ill. App. 595.

By proceeding along a track instead of to the safe exit provided he becomes a trespasser. *Illinois &c. R. Co. v. Oberhoefer*, 76 Ill. App. 672.

A passenger is such until he has a reasonable opportunity to leave the car. *Chicago Terminal Transfer Co. v. Schmelling*, 99 Ill. App. 577.

Plaintiff was still a passenger while stepping from the platform of a car in motion, it having started before he had time to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

The relationship was held to continue while the train was waiting for dinner, and plaintiff, who had eaten dinner and returned to the car, had gone back on the platform. *St. Louis &c. R. Co. v. Coulson*, 8 Kan. App. 4.

Street car passenger does not cease to be such immediately upon alighting, but is entitled to the care due a passenger in management of cars on a parallel track. *South Covington &c. R. Co. v. Beatty*, (Ky.) 50 S. W. Rep. 239.

A person who has left a train at a place other than a depot, for the purpose of going home, ceases to be a passenger, and no recovery can be had if he is killed while crossing the tracks. *Buckley v. Old Colony R. Co.*, 161 Mass. 26.

Passenger getting off at an intermediate station surrenders his place as passenger; but he has the right to re-enter and resume his journey. *DeKay v. Chicago &c. Co.*, 41 Minn. 178.

One who gets on a wrong train, and upon its coming to a stop, leaves it voluntarily and starts back to the station, is not a passenger and cannot recover for injuries sustained by falling into a cattle guard. *Finnegan v. Chicago &c. R. Co.*, 48 Minn. 378.

Nor is one who, after alighting, crosses over to the opposite side of the train to see the engineer on private business. *Hendrick v. Chicago &c. R. Co.*, 136 Mo. 548.

The relationship continues until he has had time to leave the premises by the usual route. *Pittsburg &c. R. Co. v. Martin*, 3 Oh. Dec. 493.

Where train sometimes stopped at plaintiff's station, he was not a trespasser in boarding, though he would be after he refused to leave at an intermediate station on being told that it would not stop on that occasion. *Baldwin v. Grand Trunk R. Co.*, (Mich.) 87 N. W. Rep. 380.

Passenger ceases to be such by voluntarily leaving the train for a purpose not incident to the journey at a place not a regular station, when the

train was stopped on a side track to let another pass. *Chicago &c. R. Co. v. Sattler*, (Neb.) 90 N. W. Rep. 649.

One carried beyond his destination through failure of the conductor to notice his signal, is still entitled to the rights of a passenger. *Toledo &c. R. Co. v. Fuller*, 17 Oh. C. C. 562.

One who alighted from a street car in a safe place in the street, not under the control of the carrier, and attempted to cross the street behind the car, was held to be a pedestrian and not a passenger. *Smith v. City &c. R. Co.*, 29 Or. 539; *Street Railroad v. Boddy*, 105 Tenn. 666; s. c., 51 L. R. A. 885.

The relationship is not suspended while a car is waiting to be transferred from one train to another. *St. Louis &c. R. Co. v. Nelson*, (Tex. Civ. App.) 44 S. W. Rep. 179.

Temporarily getting off the train at an intermediate station is not an abandonment of one's rights as a passenger. *Missouri &c. R. Co. v. Overfield*, 19 Tex. Civ. App. 440.

The relation continues until the passenger has actually alighted, and does not terminate when destination is reached. *Ft. Worth &c. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654.

See, also, *Railway v. Finley*, 79 Tex. 80; *Railway v. Russell*, 8 Tex. Civ. App. 578.

Where plaintiff by his own negligence has been carried by his destination, there was no duty after alighting at the wrong destination to keep the depot warm for an hour after departure of the train. *St. Louis &c. R. Co. v. Ricketts*, 22 Tex. Civ. App. 515.

There is no duty to passenger as such at destination after a reasonable time to leave the premises has elapsed. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 59 S. W. Rep. 844.

The relationship does not cease while a passenger is alighting at an intermediate station for any reasonable purpose, as refreshment, exercise, or sending messages. *Alabama &c. R. Co. v. Coggins*, 88 Fed. Rep. 455.

Where, in order to complete an exit by the way customarily used, it is necessary to cross intervening tracks, one is a passenger during such transit. *Chesapeake &c. R. Co. v. King*, 99 Fed. Rep. 251.

That plaintiff had formed the intention of remaining at the depot until daylight, did not terminate the relation, where injury occurred immediately upon alighting. *Chicago &c. R. Co. v. Wood*, 104 Fed. Rep. 663.

The relation ceases after alighting and proceeding towards a section house on private business. *Krantz v. Rio Grande &c. R. Co.*, 12 Utah, 104.

It continues while passengers are being transferred from one train to another some distance away, on account of an accident. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

#### IV. Degree of Care Required in the Actual Transportation of Passengers.

In the actual transportation of passengers the carrier should use every precaution, that human skill and foresight can provide, in the selection and manufacture of the material used, the construction and maintenance of way and vehicles, and in the operation thereof, and should adopt any improved apparatus, known to have been tested and to practically contribute to safety, provided the adoption thereof be reasonable.

In the use of highly dangerous agencies and appliances, for the purpose of actual transportation, the slightest negligence causing injury, renders the carrier presumptively liable, and the slightest defect causing injury is presumptive evidence of negligence. (See "Evidence, Presumption of Negligence," *post*, p. 1095.)

A carrier is not required to take such precautions as, it is apparent after the accident, would have prevented it, but in the actual transportation of passengers, such as would be dictated by the utmost care and prudence of a very cautious person, before the accident and without knowledge, that it was to occur. The action was for damages sustained by the plaintiff in consequence of the negligence of the defendant and its servants in the construction of its railroad and machinery, failure to maintain fences and careless running of a train of cars in which he was a passenger. *Bowen v. New York Cent. R. Co.*, 18 N. Y. 408; *aff'd* judg't for pl'ff.

See, also, *Bissell v. N. Y. Central R. Co.*, 25 N. Y. 442.

**From opinion.**—"After the onus had been cast upon them, they (the carriers) are bound to show that there has been no negligence whatsoever; and that the damage or injury had been occasioned by inevitable casualty or by some cause which human care and foresight could not prevent. *Story on Bailments*, sec. 601a; 2 *Greenl. Ev.*, 222; *Angell on Carriers*, sec. 569; *Christie v. Griggs*, 2 *Camp*. 79; *Laing v. Colder*, 8 *Barr*. 479; *Ingalls v. Bills*, 9 *Metc.* 15; *Hegeman v. Western Railroad*, 3 *Kern*. 24."

A common carrier of passengers is bound to use every precaution that human skill and foresight can provide (*Carrol v. S. I. R. Co.*, 58 N. Y. 126) and to do the same in adopting improvements to insure safety. The fact that the means of safety proven useful by science are not used by skillful manufacturers of machinery is not conclusive evidence against their adoption by carriers.

Plaintiff was a passenger on a steamboat; an explosion of the boiler

took place, and plaintiff was scalded. *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, aff'g judg't for pl'ff.

The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract, and is imposed by the custom of the realm; or, in other words, by the common law. *Carroll v. The Staten Island R. Co.*, 58 N. Y. 126.

*Bretherton v. Wood*, 3 Brod. & Bing. 54; *Philadelphia &c. R. Co. v. Derby*, 14 How. U. S. 483; *Allen v. Sewell*, 2 Wend. 338; *Bank of Orange v. Brown*, 3 Wend. 158; *Steamboat v. King*, 18 How. U. S. 474; *Nolton v. Western R. Co.*, 15 N. Y. 444; *Gillenwater v. Mod. &c. R. Co.*, 5 Jude. 339; *Farwell v. Boston R. Co.*, 4 Met. 49; *Redfield on Railways*, 210; *Pierce Am. R. R. Law*, 477; *Lake Erie &c. R. Co. v. Acres*, 108 Ind. 548.

Charge that carrier was not an insurer, but was bound to use the utmost diligence and care, was, as a whole, proper. *Taber v. D., L. & W. R. Co.*, 71 N. Y. 489; aff'g judg't for pl'ff.

Hawser apparatus recoiled and injured passenger. This *ipso facto* raised the presumption of negligence. If the latent defect could have been discovered, it should have been; the consequences to be apprehended measures the care required; failure to give the usual warning of the intended use of hawser was evidence of negligence. *Miller v. Ocean S. S. Co.*, 118 N. Y. 199; judg't for pl'ff was aff'd.

*Distinguishing Kelly v. M. R. Co.*, 112 N. Y. 443.

During the great blizzard of March 12, 1888, a train on the elevated railway, on account of the ice and snow, was not stopped in sufficient time to prevent a collision with another train, that had been stalled at a station. The evidence showed, apparently without contradiction, that an attempt to stop the train was made at such a distance, or a greater distance, from the first train as had, in all practical experience on that railway, been previously found sufficient. The court refused to dismiss the complaint on the ground or to charge that, if the jury found that a proper effort was made to stop the train at a distance from the first train as great as or greater than had theretofore been found sufficient in the operation of that railway, the defendant would not be liable. Held, no error. The court submitted the question to the jury, whether it was negligence on the part of defendant to attempt to operate its railway at all under the circumstances. This was error. *Connelly v. Manhattan R. Co.*, 142 N. Y. 377, rev'g 68 Hun, 456, and judg't for the pl'ff.

Where a passenger was thrown from the platform of a horse car by its motion when driven upon a temporary switch on a bridge in process of repair, judgment for plaintiff was reversed for error of trial court

in charging that, "in respect to carrying passengers a railroad company is bound to exercise all the care and skill which human prudence and foresight can suggest to secure the safety of its passengers." *Stierle v. Union R. Co.*, 156 N. Y. 70, 684.

From opinion.—Page 73. "The obligation of carriers of passengers to exercise the highest degree of care which human prudence and foresight can suggest, only exists with respect to those results which are naturally to be apprehended from unsafe road beds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking, (*Morris v. N. Y. C. & H. R. R. R. Co.*, 106 N. Y. 678; *Palmer v. Penn. Co.*, 111 id. 488; *Palmer v. D. & H. C. Co.*, 120 id. 170). In every case the degree of care to be exercised is dependent upon the circumstances and, if the accident is attributable to the existence of defects in the road, or in the mechanical appliances availed of for operation of the railroad, by reason of which there was a possibility of loss of life or limb to the traveling public, the strict rule requiring the highest degree of care and of human skill would be applicable." Page 685.—"In the present case, there was no situation of danger, and the accident occurred, whether under the plaintiff's or the defendant's theory of its occurrence, while the driver was simply changing his car from one track to another, over a switch, in order to cross the bridge. In doing so the duty imposed upon the defendant by law was that of exercising reasonable care; or such care as an ordinarily careful and prudent man would exercise under the circumstances, and that instruction had been, in fact and very correctly given, by the trial judge in his main charge. The strict rule, embodied in the plaintiff's subsequent request to charge, would be proper in a case where the accident resulted from a situation from which grave injury might be expected and which, therefore, imposed upon the carrier's servants, the duty to exercise the utmost skill and foresight to avoid it. Such was the situation in the *Maverick Case* (36 N. Y. 378), and in the *Coddington Case* (102 N. Y. 66)." \* \* \* "There is nothing in this application for a reargument other than an attempt to show that in our decision of the case we have changed a rule of care applicable to the carrier of passengers. We have done nothing of the kind; but have simply pointed out what the proper rule was under the issue and the circumstances disclosed by the record."

In the absence of evidence of excessive speed, proof that plaintiff received a violent wrench from the motion of a trolley car in rounding a curve was held insufficient to warrant submission of defendant's negligence to the jury. *Ayers v. Rochester R. Co.*, 156 N. Y. 104; rev'g s. c., 88 Hun, 613.

A locomotive was left standing upon a side track two tracks east of the main track with its fire banked and in charge of an employé, and had been in his charge in this condition for about six hours when such employé went several hundred feet away; while away the engine was moved by some means not disclosed across several switches and up to and upon the main track, and started north with no lights and at full speed, and after a distance collided with a passenger train injuring a passenger thereon. It was held that the defendant was not guilty of



negligence, as such a danger could not have been foreseen. The court charged that if the engine were started by some one other than an employé of the defendant, the defendant was not liable, but if the act were done by an employé, whether negligently or willfully, the defendant would be liable; and it refused to charge that if the act were done maliciously by one of the defendant's employés other than the one in charge, the defendant would not be liable. This refusal to charge was error, and it was held that if some wrongdoer, other than an employé in charge, criminally placed the engine on the south bound track and started it northward, the defendant was not liable. The absence of a watchman from the engine was not the proximate cause of the accident. *Mars v. D. & H. C. Co.*, 54 Hun, 625.

A motorman, learning of a wreck ahead, switched his car into the track used by cars going in the opposite direction, where his careless management of his car resulted in a head-on collision. A charge imposing on defendant the duty to exercise a very high degree of care and skill to see that no injury resulted, was held proper. *Koehne v. New York &c. R. Co.*, 32 App. Div. 419; s. c. aff'd, 165 N. Y. 603.

**From opinion.**—"There is no doubt that the first opinion in that case," (*Stierle v. Union R. Co.*, 156 N. Y. 70), "did give rise to a very general impression in the legal profession that the rule imposing the highest degree of care upon carriers for the protection of their passengers had been limited in its application so as to confine it to the maintenance of the roadbed, engines, cars and other appliances of a railway corporation, and that it was not to be applied to the conduct of the agents and servants of the corporation in the operation of the road. That this view of the decision was erroneous, however, has been made plain by the Court of Appeals itself in the opinion delivered upon the motion for a reargument (50 N. E. Rep. 834). In this opinion Judge Gray expressly declares that the court has not changed any rule of care applicable to carriers of passengers and affirms the correctness of the decisions in *Maverick v. Eighth Avenue R. Co.*, (36 N. Y. 378) and *Coddington v. Brooklyn Crosstown R. R. Co.*, (102 id. 66) in both of which cases it was held that the common carrier was bound to exercise the highest degree of care and prudence in the management of the vehicle in which it undertook to transport the injured passenger. In the case at bar the conditions of things on defendant's road at the time and place of the accident certainly called for the exercise of a very high degree of care on the part of the motorman in charge of the respective cars, which were rapidly approaching one another upon the same track, to avoid a collision and consequent injury to their passengers."

So, where a truck attempted to cross in front of a cable car, which continued at full speed until run into by the truck, it was held proper to charge "that the responsibility of a common carrier of passengers is such as to require a high degree of care for their safety and the discharge of this duty requires of such a carrier the exercise of all the care and vigilance that human foresight may suggest to secure the

safety of its passengers." *Keegan v. Third Ave. R. Co.*, 34 App. Div. 297; s. c. aff'd, 165 N. Y. 622.

Defendant's negligence was for the jury, where it appeared that a passenger's injury was received in a collision with a truck, due to the fact that driver started the car as a wagon ahead, loaded with boards, turned off the track up a grade onto a side street obstructed by wagons, some of which were coming toward it and impeding its progress. *O'Malley v. Metropolitan Street R. Co.*, 3 App. Div. 259; s. c. aff'd, 158 N. Y. 674.

Where defendant's driver might have seen a heavily loaded wagon coming down grade toward the track in time to have avoided collision, its negligence was for the jury, and a dismissal of the complaint was error. *Hurley v. New York &c. Brew. Co.*, 13 App. Div. 167.

Where the cause of the falling of an upper berth in a steamboat is unexplained, the defendant may properly be held negligent being bound to use the utmost care for the safety of its passengers. *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302.

It was held that there was no sufficient evidence of negligence by the defendant to go to the jury, where plaintiff was tipped over in her chair at a table in the dining car, while the train was rounding a curve, at average speed, though others were not disturbed, light articles were not thrown off the table, and no accident had ever before occurred, through the use of such chairs. *Nelson v. Lehigh Valley R. Co.*, 25 App. Div. 535; second appeal, 37 App. Div. 631; s. c. aff'd, 165 N. Y. 635.

It was for the jury to say whether defendant was negligent, where a passenger rose from his seat to signal the conductor and the rough motion of the car caused his body to sway outward and strike a trolley wire pole between the tracks. *Schmidt v. Coney Island &c. R. Co.*, 26 App. Div. 391.

A smoker on the front platform of a street car turned to pay his fare to the conductor through the front door when the car was rapidly driven on a temporary turnout and the violent motion threw him off upon the ground. Defendant's negligence was properly submitted to the jury. *Dillon v. Forty-second Street &c. R. Co.*, 28 App. Div. 404.

See, also, *Seelig v. Metropolitan Street R. Co.*, 18 Misc. 383.

So held also, where a passenger was thrown over the dash board of the front platform by the sunken and unusual application of the brakes. *Bradley v. Second Avenue R. Co.*, 34 App. Div. 284.

A charge that defendant's duty as to inspecting its cars must be "such as is sufficient to insure, or, rather, such as experience has shown to be sufficient to insure against accidents of this kind," was proper where it appears that the word "insure" was used in the same sense as the word

"secure" and not in the sense in which it is used in reference to carriage of goods. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125.

Where it appears without contradiction that a car left the track where there were several switch tracks and while it was going at a pretty good rate, there is sufficient evidence of negligence to take the case to the jury. *Hollahan v. Metropolitan Street R. Co.*, 73 App. Div. 164.

Evidence of jerking by a street car in rounding a curve is not *prima facie* negligence. Excessive speed or unusual jolt must be shown. *Merrill v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 122.

Plaintiff, a steerage passenger, while walking upon the upper deck of a steamer in port, among piles of baggage without objection from the deck hands or officers, was struck by falling pieces of baggage. In the absence of satisfactory evidence of the cause of the fall, the case was held to be within the rule of *res ipsa loquitur*. *Horowitz v. Hamburg-American Packet Co.*, 18 Misc. 24.

**From opinion.**—"The facts touching the fall of the baggage as narrated above bring the case squarely within the rule of *res ipsa loquitur*, (*Volkmar v. Man. R. Co.*, 134 N. Y. 418; 16 Am. & Eng. Encyc. of Law, 448; 2 Rice on Ev. 1099), which when applied to the relation of carrier and passenger is at least of undiminished intensity, (*Miller v. O. S. S. Co.*, 118 N. Y. 199; *Phila. W. & B. R. Co. v. Anderson*, 20 Am. St. Rep. 483, and note, also cases collated in note b. 15 L. R. Ann. 35)."

A plea, that employes believed that the course pursued to avoid a collision was the best under the circumstances, was held insufficient without alleging facts sufficient to show that such would have been the course of a reasonably prudent man similarly situated and possessing the requisite skill for the position. *Highland &c. R. Co. v. Swope*, 115 Ala. 287.

Street car driver was negligent in going upon a railroad crossing without stopping to look or listen in violation of a city ordinance. *Selma Street &c. R. Co. v. Owen*, (Ala.) 31 South. Rep. 598.

Defendant was negligent, where the escape of a trolley car was due to failure to furnish a man at each end of the car, or the failure of the motorman to shut off the current in front before going to the rear to adjust the trolley. *Redfield v. Oakland &c. R. Co.*, 110 Cal. 277; modified in Banc, 42 Pac. Rep. 1063 on another point.

Carrier of passengers owes them the highest degree of care in their transportation. Injury of passenger's hand caught in door swung to by the sudden jerking of a train stopped at a regular station, raised a presumption of negligence. *McCurrie v. Southern P. Co.*, 122 Cal. 558.

A charge requiring of a carrier of passengers the care of an extremely cautious person surrounded by similar circumstances was held not too exacting. *Bosqui v. Sutro R. Co.*, 131 Cal. 390.

It was not negligence to so arrange a train that it would climb a mountain and clear the track of snow, in order to make its schedule time. *Denver &c. R. Co. v. Pilgrim*, 9 Colo. App. 86.

Carrier was not liable for injuries from a snow slide, which derailed a train, in a place where there was no reason to anticipate it, and was not required to use a rotary plow when the test of years had shown an ordinary plow to have been sufficient under similar circumstances. *Denver &c. R. Co. v. Andrews*, 11 Colo. App. 204.

Plaintiff was not negligent *per se*, where he passed from one car to another while the train was in motion and was thrown by an unusual lurch in rounding a curve, and a direction of a verdict for defendant was held error. *McAfee v. Huidekoper*, 9 App. D. C. 36; s. c., 34 L. R. A. 720.

The "extraordinary" diligence required of carriers of passengers by statute, construed to mean "that extreme care and caution which every prudent and thoughtful person" exercises under like circumstances; a charge requiring the "utmost care and diligence" held error. *East Tennessee &c. R. Co. v. Miller*, 95 Ga. 738.

Defendant's trainman going through train slammed the door shut and caught the hand of passenger who was following, unknown to the trainman. Defendant not liable. *Ham v. Georgia &c. R. Co.*, 97 Ga. 411.

Though a conductor has carried a passenger past his station, he has no implied authority to direct a hotel keeper to keep such passenger over until the next train, and the company is not liable for negligence of the hotel keeper. *Central &c. R. Co. v. Price*, 106 Ga. 176.

A charge that carriers are required to use more than ordinary and reasonable care and diligence and that too much cannot be required, was held too strict. *Florida &c. R. Co. v. Lucas*, 110 Ga. 121.

While not an insurer it is bound to use, even towards a passenger on a freight train, extraordinary diligence. The duty is regarded as a public duty and one that cannot be waived by private contract. *Central &c. R. Co. v. Lippman*, 110 Ga. 665.

A woman and her children holding a first class ticket were made to ride in a smoking car, whereby she and her children were made sick. Company was liable, not being such accommodations as were usually provided. *Southern R. Co. v. Wood*, 114 Ga. 159.

Where the highest degree of care would have anticipated and provided against an accident, it was no excuse that its like had never occurred before. *Illinois &c. R. Co. v. O'Connell*, 160 Ill. 636; aff'g s. c., 59 Ill. App. 463.

But a passenger on a street car is not bound to use the highest degree,

but only ordinary care, for his own safety. *West Chicago &c. R. Co. v. McNulty*, 166 Ill. 203; aff'g s. c., 64 Ill. App. 549.

Charge that the highest degree of care must be used consistent with the practical operation of the road, held proper. *West Chicago &c. R. Co. v. Kromshinsky*, 185 Ill. 92; aff'g s. c., 86 Ill. App. 17; *West Chicago &c. R. Co. v. Luka*, 72 Ill. App. 60; *Chicago &c. R. Co. v. Morse*, 98 id. 662; *Chicago &c. R. Co. v. Murphy*, 99 id. 126.

Buggy, going along near the track in the same direction, came in contact with a car, injuring passenger. Refusal to charge that it was unnecessary to ring the gong when the party in the buggy knew of the position of the car, was sustained. *West Chicago Street R. Co. v. Tuerk*, 193 Ill. 385; aff'g s. c., 90 Ill. App. 105.

A charge that the highest degree of care should be used "proper and consistent with the efficient use and operation of the cars," was held error. "Practicable" instead of "proper" should have been used. *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397.

**From opinion.**—"The qualification should have been 'practicable' instead of 'proper.' What a jury might regard as 'proper' in this connection is problematical. The qualification of 'practical' should not have been omitted from this instruction, nor should the qualification of 'proper' have been substituted in lieu of it. The element of practicability is an essential to the rule. *Tuller v. Talbot*, 23 Ill. 357; *P. C. & S. L. R. Co. v. Thompson*, 56 Ill. 138; *C. & A. R. Co. v. Pillsbury*, 123 Ill. 9; *C. & A. R. Co. v. Arnol*, 144 Ill. 261; *C. C. R. Co. v. Engel*, 35 Ill. App. 490; *P. & P. R. Co. v. Greso*, 79 Ill. App. 127."

Evidence that plaintiff was caused to stumble and fall over a satchel in the aisle of a street car by a sudden jolt in starting it, held sufficient to sustain verdict for her. *West Chicago &c. R. Co. v. Nash*, 64 Ill. App. 548.

Those engaged in the operation of passenger elevators are carriers of passengers. *Western Union Teleg. Co. v. Woods*, 88 Ill. App. 375.

Where there is evidence as to negligence in a passenger allowing his finger to slip in the crevice of a door and in a conductor in shutting the door seeing the hand near it, the question of the negligence of each was for the jury. *Romine v. Evansville &c. R. Co.*, 24 Ind. App. 230.

Clause in an instruction that the carrier was bound to carry safely, held not objectionable when followed by another, defining its duty as the greatest degree of care consistent with the mode of transportation, and not the utmost conceivable care. *Chicago &c. R. Co. v. Grim*, 25 Ind. App. 494.

The highest degree of care is not required toward one boarding a moving street car without knowledge of the motorman and conductor, and, where they attempted to stop immediately on discovering his posi-

tion, the company was not liable. *Citizens' St. R. Co. v. Merl*, 26 Ind. App. 284.

Companies operating under a trackage agreement are jointly liable for injuries to which the negligence of each has contributed. *Chicago &c. R. Co. v. Martin*, 59 Kan. 437.

And one is not relieved of liability for its negligence resulting in injury to a passenger of the other by the fact that its train was subject to the latter's control in the use of the tracks. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

An instruction that "the railway company is, by law, chargeable with a higher degree of care and diligence in dealing with passengers than is exacted of individuals under similar conditions," held erroneous. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

A horsecar company is not bound "as far as human forethought and care shall enable it, to carry the plaintiff with safety." *Louisville &c. R. Co. v. Weams*, 80 Ky. 420.

Failure on part of carrier to use the utmost degree of care and skill which prudent men are accustomed to use under like circumstances, constitutes actionable negligence. *Louisville &c. R. Co. v. Berg*, (Ky.) 32 S. W. Rep. 616; *Brown v. Louisville R. Co.*, (Ky.) 53 S. W. Rep. 1041.

Degree of care required is determined by the law of the state where the injury occurred. Charge requiring "utmost human care and foresight known to prudent and careful men" held proper. *Louisville &c. R. Co. v. Harmon*, (Ky.) 64 S. W. Rep. 640.

Recent inspection by competent servants held not "the utmost care and skill which prudent men are accustomed to use," &c. Care required of passenger is such as "might be reasonably expected of a person of ordinary prudence situated as" plaintiff was. *Davis v. Paducah &c. R. Co.*, (Ky.) 68 S. W. Rep. 140.

Railroad company is not bound to stop and rescue a passenger thrown or pushed off without its fault, where it will endanger the safety of the other passengers by collision. *Reed v. Louisville &c. R. Co.*, (Ky.) 47 S. W. Rep. 591; s. c., 44 L. R. A. 823; rehearing denied in 48 S. W. Rep. 416; s. c., 44 L. R. A. 824.

Going from one car to another car while train is in motion held negligence and judgment for plaintiff, who was thrown from the platform by a sudden jolt, was set aside, though the jerk was caused by a defective coupling. *Bemiss v. New Orleans &c. R. Co.*, 47 La. Ann. 1671.

Passenger is charged with the exercise of ordinary care only. *Clerk v. Morgan's &c. R. Co.*, (La.) 31 South Rep. 886.

"Highest degree of care and diligence practicable under the circum-

stances" held a proper measure of carrier's duty. *Baltimore &c. R. Co. v. Nugent*, 86 Md. 349; s. c., 39 L. R. A. 161.

The highest degree of care consistent with the proper management of the road is required. *Jordan v. New York &c. R. Co.*, 165 Mass. 346; s. c., 32 L. R. A. 101.

Oily waste, used by a brakeman to smother a blazing lamp, caught fire and plaintiff, in the apprehension of danger, attempted to go to the next car and was injured while doing so. Defendant's negligence was properly submitted to the jury. *Gannon v. New York &c. R. Co.*, 173 Mass. 40; s. c., 43 L. R. A. 833.

Failure to take a seat was not negligence, where, after coming through seven coaches, plaintiff peered forward and the rest appeared to him to be crowded also. Neither the brakeman nor the conductor informed him that there were vacant seats. *Farnon v. Boston &c. R. Co.*, 180 Mass. 212.

Motorman was not *per se* negligent in letting go the brake without knowing whether the dog is set so as to hold it. *Etson v. Ft. Wayne &c. R. Co.*, 114 Mich. 605.

Error to refuse direction for defendant, where it appeared that derailment was due to the intentional removal of a rail from the track by third parties. *Whipple v. Michigan C. R. Co.*, (Mich.) 90 N. W. Rep. 287.

That a passenger in a freight train was taken off on an irregular side trip, without warning, for the relief of a snow bound train, and the exposure to cold resulted in injury, held sufficient to sustain finding of negligence. *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

Plaintiff was pushed from platform of street car owing to its overcrowded condition. The carrier held liable for negligence. *Reem v. St. Paul City R. Co.*, 77 Minn. 503.

In determining whether it was negligence to fail to provide two employes on a car, the expense thereof, the amount of traffic as well as the dangers to be encountered are elements of consideration. *Palmer v. Winona R. &c. Co.*, 78 Minn. 138.

That plaintiff signaled car to stop and started to run towards it, was not sufficient to require the motorman to anticipate that he might fall, so as to require him to have the car under control. *Winchell v. St. Paul City R. Co.*, (Minn.) 90 N. W. Rep. 1050.

Plaintiff contracted a severe illness from riding in cold weather in an unheated car. He neglected to take advantage of stops at stations to go forward to baggage car and procure from his baggage additional wraps. It was held error not to submit negligence of the company and contributory negligence of plaintiff to the jury. *Taylor v. Wabash R. Co.*, (Mo.) 38 S. W. Rep. 304; s. c., 42 L. R. A. 110.

Failure to employ a skillful conductor and gripman was negligence. *Olsen v. Citizens' R. Co.*, 152 Mo. 426; *Hausberger v. Sedalia R. & Co.* 82 Mo. App. 566.

See, also, *Sweeney v. Kansas City & C. R. Co.*, 150 Mo. 385.

The attempt on the part of a shipper, permitted to ride in the box car with his stock, to come to the caboose in compliance with the conductor's instruction was not negligence *per se*. *Nurse v. St. Louis & C. R. Co.*, 61 Mo. App. 67.

Street car companies must exercise the very highest degree of care of a very prudent person. *Parker v. Metropolitan & C. R. Co.*, 69 Mo. App. 54; *Posch v. Southern & C. R. Co.*, 76 Mo. App. 601; *Choquette v. Southern & C. R. Co.*, 80 Mo. App. 515.

See, also, *O'Connell v. St. Louis & C. R. Co.*, 106 Mo. 482.

Where a brake, which is not obviously dangerous, has never been known to have kicked loose before, it is not negligent to continue its use. *Holt v. Southwest Missouri & C. R. Co.*, 84 Mo. App. 443.

The "utmost care and skill which prudent men would use and exercise in like business and under like circumstances," held applicable to passengers in freight cars. *Fullerton v. St. Louis & C. R. Co.*, 84 Mo. App. 498.

Where a belt line switches whole trains from point to point it is a common carrier being more than a mere switching company, and is charged with the corresponding degree of care. *Fleming v. Kansas City & C. R. Co.*, 89 Mo. App. 129.

"Criminal negligence" of plaintiff under a statute, making railway companies liable for injuries to passengers unless caused by latter's criminal negligence or violation of former's rules, construed to mean a flagrant and willful disregard of one's safety. *Chicago & C. R. Co. v. Hague*, 48 Neb. 97; *Chicago & C. R. Co. v. Hyatt*, 48 Neb. 161.

Such act is within the police power of the state; and is not amended by, or in conflict with, a statute giving to personal representatives of a decedent a right of action where the deceased would have been entitled to maintain one. *Chicago & C. R. Co. v. Zernecke*, 59 Neb. 689.

But such act does not apply to street railways so that lack of ordinary care on part of plaintiff in such cases is a bar. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672.

Street railways must use the utmost skill and diligence and foresight consistent with business. *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672; *East Omaha & C. R. Co. v. Godola*, 50 Neb. 906.

Driver of stage was not negligent in stopping, on hearing scream from



within, nor in failing to give notice of his starting after stopping for a parade. *Haile v. Clayton &c. Co.*, 61 N. J. L. 197.

On a conflict of evidence as to unusual violence in the motion of the train, it was properly left to the jury to determine whether plaintiff used care in changing her seat in proportion to the increased risk. It was not error to refuse to charge that it was negligence *per se* to leave a seat while the train was in motion. *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

Due inspection of cars by a railroad company does not mean that it must be so continuous as to enable it to know the exact condition of a car at any moment. *Proud v. Philadelphia &c. R. Co.*, 64 N. J. L. 702; s. c., 50 L. R. A. 468.

The dangers which should be apprehended in the exercise of the high degree of care required, include those of overcrowding, especially the entrance and exit of trolley cars. *Hansen v. North Jersey &c. R. Co.*, 64 N. J. L. 686; rev'g s. c., 43 Atl. Rep. 663.

*Res ipsa loquitur* not applicable to an unexplained fall from a street car. *Paynter v. Bridgeton &c. Co.*, (N. J. L.) 52 Atl. Rep. 367.

Failure to apply the brakes in time to avoid collision in coupling was negligence. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 1031.

Approved appliances in general use are required but not "all known and approved machinery necessary to protect its passengers." *Witsell v. West Asheville &c. R. Co.*, 120 N. C. 557.

Failure to provide a conductor on a passenger car, where the train ran on schedule time and carried a good many passengers, was a breach of its duty. *Means v. Carolina &c. R. Co.*, 124 N. C. 574; s. c., 45 L. R. A. 164.

Driver of hack must use all reasonable care in keeping a careful and prudent lookout to avoid dangers in the street. *Fisher v. Tryon*, 15 Oh. C. C. 541.

A charge defining carrier's duty as "ordinary and reasonable care" held error; the highest degree of care is required. *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638; *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224.

Where plaintiff was injured by a collision between his train and some coal cars which had been set in motion by boys while the cars were standing braked on a siding, no recovery was allowed. *Fredericks v. Northern Cent. R. Co.*, 157 Pa. St. 103.

It was not *per se* negligence to run a car with a crowded platform around a sharp curve at 15 to 20 miles an hour, but the question of negligence was properly left to the jury. *Reber v. Pittsburg &c. T. Co.*, 179 Pa. St. 339.

Evidence that plaintiff was thrown from her seat in a street car by

the violent motion of the car in passing from the old rails to those of a new system in the course of installation, is sufficient to take the case to the jury. *Smedley v. Hestonville &c. R. Co.*, 184 Pa. St. 620.

Defendant's negligence was for the jury, where motorman left his post and jumped in among the passengers, leaving the power on and the controller in flames. *Dunlay v. United Traction Co.*, 18 Pa. Super. Ct. 206.

Fact of injury on a train raises presumption of negligence though it be not shown to have been the proximate cause of injury. *Doolittle v. Southern R. Co.*, 62 S. C. 130.

An instruction to the effect that the high degree of care which a very prudent and competent person would exercise under the circumstances, is the measure of care required of carriers of passengers, held correct. *St. Louis &c. R. Co. v. McCullough*, 18 Tex. Civ. App. 534; *Missouri &c. R. Co. v. Scarsborough*, (Tex. Civ. App.) 51 S. W. Rep. 356; *McCarty v. Houston &c. R. Co.*, 21 Tex. Civ. App. 568; *Texas Midland R. Co. v. Brown*, (Tex. Civ. App.) 58 S. W. Rep. 44; *Houston &c. R. Co. v. George*, (Tex. Civ. App.) 60 S. W. Rep. 313; *Houston &c. R. Co. v. Greer*, 22 Tex. Civ. App. 5; *Dallas &c. Street R. Co. v. Broadhurst*, (Tex. Civ. App.) 68 S. W. Rep. 315; *Citizens' R. Co. v. Craig*, (Tex. Civ. App.) 69 S. W. Rep. 239.

Such degree of care applies as well to providing seats in cars as to roadbeds, etc. *International &c. R. Co. v. Anthony*, 24 Tex. Civ. App. 9.

But requirement to use "the utmost degree of care" to provide for the safety of passengers is too strict. *Houston &c. R. Co. v. Greer*, 22 Tex. Civ. App. 5; *McCarty v. Houston &c. R. Co.*, 21 Tex. Civ. App. 568. But see *Fort Worth &c. R. Co. v. Rogers*, 24 id. 382.

A clause in an instruction, describing the carrier's duty as care proportionate to the nature and risk incurred and such as would be ordinarily used by persons of great care and prudence under similar circumstances, was held contradictory to another clause, which followed it, requiring ordinary care to provide railings, etc., which are reasonably safe for the purpose for which they are used, and judgment accordingly reversed. *Parvin v. International &c. R. Co.*, (Tex. Civ. App.) 54 S. W. Rep. 638.

Plaintiff was not negligent in taking passage while pregnant, where it was not ordinarily dangerous. *St. Louis &c. R. Co. v. Ferguson*, (Tex. Civ. App.) 64 S. W. Rep. 797.

In going from one car to another while the train is in motion one assumes only risks from ordinary causes and he is entitled to recover for being thrown by an unusual jerk. *San Antonio &c. R. Co. v. Choate*, 22 Tex. Civ. App. 618.

An instruction stating particular things a carrier must do to be dili-

gent, held error. That should be left to the jury. *Christie v. Galveston &c. R. Co.*, (Tex. Civ. App.) 39 S. W. Rep. 638.

Defendant was not negligent, where hot gruel was spilled by a steward when run against by another. *The Anchoria*, 77 Fed. Rep. 994.

Failure to use reasonable care and effort to provide food and accommodations for passengers aboard a steamer was actionable negligence. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

Carrier is bound to provide reasonable seating capacity for an unusual crowd, which it has notice of and has solicited. *Trumbull v. Erickson*, 97 Fed. 891.

Right of recovery under a statute imposing liability for injury to passengers not due to contributory negligence, being remedial and not penal in its nature, is substantial and may be enforced anywhere, once having arisen within the state. *Clark v. Russell*, 97 Fed. Rep. 900.

Plaintiff was on the point of opening the door of a forward car which he was passing to, at the direction of the trainman, from a rear car, which was being detached from the train, when the brakeman shouted "look out." In apprehension of danger ahead, he suddenly stepped back into the space left by the detached car and was injured. He was not allowed to recover. *Butts v. Cleveland &c. R. Co.*, 110 Fed. Rep. 329.

Misstep on part of passenger is not *prima facie* evidence of negligence. *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186.

That a method of starting a car which is dangerous is usual, is no excuse; and a charge that there was no liability, if the defendant's officers were satisfied in their own mind that the method used was reasonably safe, was erroneous. *Dickert v. Salt Lake City R. Co.*, 20 Utah, 394.

An instruction to the effect that defendant was not the insurer of the safety of its passengers, and not liable unless the injury resulted from a defect which could have been discovered by the usual and ordinary methods of inspection, held objectionable standing alone, but not misleading when taken in connection with one charging that "it was the duty of the defendant to use the utmost care and skill which prudent men" in the same kind of business would use under similar circumstances. *Major v. Oregon &c. R. Co.*, 21 Utah, 141.

Instruction that carriers must use the utmost care and diligence for safety of passengers and are liable for slightest neglect against which human prudence and foresight might have guarded, held correct. *Reynolds v. Richmond &c. R. Co.*, 92 Va. 400; *Norfolk &c. R. Co. v. Tanner*, (Va.) 41 S. E. Rep. 721.

It was not negligence *per se* to go from one car to another on a moving train in search of a seat. *Chesapeake &c. R. Co. v. Clowes*, 93 Va. 189.

The highest degree of care and skill which may be expected of intelligent and prudent persons engaged in the business, is the standard of care and a charge is erroneous, which requires simply such "ordinary care as" such persons usually use. *Payne v. Spokane Street R. Co.*, 15 Wash. 522.

Such extraordinary care does not include anticipation and provision against plaintiff's own conduct. *Brown v. Seattle City R. Co.*, 16 Wash. 465.

Failure to furnish proper seating accommodations, compelling passengers to ride on platforms, was negligence. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Requirement of the highest degree of care to "prevent injuries" construed not to mean that carrier is insurer. *Clukey v. Seattle Electric Co.*, (Wash.) 67 Pac. Rep. 379.

Inability, by the exercise of extraordinary care and prudence, to foresee an accident exonerates the carrier. *Davis v. Chicago & C. R. Co.*, 93 Wis. 470.

Where the journey is temporarily suspended by an accident, and, while plaintiff is waiting for another train, he is injured by voluntarily approaching the scene of the accident, the exercise of ordinary care and prudence only is due him, and it was held error to charge the carrier with a higher degree. *Conroy v. Chicago & C. R. Co.*, 96 Wis. 243; s. c., 31 L. R. A. 419.

"The highest degree of skill and care which a careful and vigilant man would observe in like circumstances" held erroneous as inconsistent with the proper standard, which is expressed as the highest degree of care reasonably to be expected from human vigilance and foresight in view of the circumstances consistent with the practical operation of the road. *Wanzer v. Chippewa Val. Electric R. Co.*, 108 Wis. 319.

#### (a). FREIGHT TRAINS, &C.

Passenger in freight train injured by a jolt such as is usual and necessary in coupling the cars cannot recover. *Crine v. East Tennessee & C. R. Co.*, 84 Ga. 651.

Passenger does not, by riding in a freight train, assume risks other than such as are incident to such mode of conveyance conducted with the utmost care, consistent with the practical operation of the train. *Southern R. Co. v. Crowder*, 130 Ala. 256.

A passenger on a train partially composed of freight cars to which some jolting and jerking is necessarily incident, is bound to exercise ordinary care to obtain a seat. *Macon & C. R. Co. v. Moore*, 108 Ga. 84.

The assumption of risk from the usual joltage incident to passage in a freight train does not relieve a carrier of the exercise of extraordinary care to prevent unusual joltage. *Central &c. R. Co. v. Lippman*, 110 Ga. 665; *Garland v. Southern R. Co.*, 111 Ga. 852.

Passenger on freight train is entitled to same care as on a regular passenger train. *Pennsylvania R. Co. v. Newmeyer*, 129 Ind. 401.

By riding in the caboose of a freight train a passenger does not assume the unusual jolts due to the negligent application of the air brake; and plaintiff is not *per se* negligent in leaving her seat to get a drink of water. *Indiana &c. R. Co. v. Masterson*, 16 Ind. App. 323.

Jury should say whether getting up and leaning forward in a moving caboose to spit in the stove was negligence. *St. Louis &c. R. Co. v. Burrows*, (Kan.) 61 Pac. Rep. 439.

But the mere fact of being thrown from a freight train is not evidence of an unusual movement thereof. *Cincinnati &c. R. Co. v. Jackson*, (Ky.) 58 S. W. Rep. 526.

It was negligence for a through freight train, going at 30 miles an hour, to follow in violation of rules a passenger train, running 23 miles an hour, within 4 to 11 minutes of it. *Louisville &c. R. Co. v. Richmond*, (Ky.) 67 S. W. Rep. 25.

Passenger in charge of live freight assumes the risks necessarily incident to passage on a freight train. *Heyward v. Boston &c. R. Co.*, 169 Mass. 466.

So a passenger in a combination car in a freight train assumes the risk from the ordinary jolting and jerking of the train. *Olds v. New York &c. R. Co.*, 172 Mass. 73.

The highest degree of care consistent in the practical operation of a freight train is required, though that does not equal the care required if it were a regular passenger train. *Moore v. Saginaw &c. R. Co.*, 115 Mich. 103.

So, where one rides on construction train he assumes the risks necessarily incident to its operation. *Rosenbaum v. St. Paul &c. R. Co.*, 38 Minn. 173.

The highest degree of care consistent with the practical operation of a freight train in view of the nature and purpose thereof is required. *Schilling v. Winona &c. R. Co.*, 66 Minn. 252; *Steele v. Southern R. Co.*, 55 S. C. 389.

If a railroad company receive a person on a special train not used for transporting, it assumes the duties of carrier to him, and is liable for the negligent running of the train over a poorly constructed piece of road. *Wagner v. Missouri Pac. R. Co.*, 97 Mo. 512.

While the highest degree of care must be used regardless of the kind

of vehicle, *Mith v. St. Louis &c. R. Co.*, 87 Mo. App. 422; the passenger takes the risks necessarily incident to that method of travel. *Wait v. Omaha &c. R. Co.*, 165 Mo. 612; *Erwin v. Kansas &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 88.

Though one in charge of stock was compelled to ride on the top of the cars by reason of the disconnection of the caboose, he took the risk of stepping from one car to another while in motion. Failure to direct for defendant was held error. *Neville v. St. Louis &c. R. Co.*, 158 Mo. 293.

By riding in a freight train under a pass to care for his stock, one assumes the risk naturally incident to that method of travel, otherwise the railroad is under the duty of a carrier for hire. *Missouri &c. R. Co. v. Tietken*, 49 Neb. 130; *Omaha &c. R. Co. v. Crow*, 47 id. 84.

More care is required of one traveling on a freight train than on a passenger train. *Wallace v. Western &c. R. Co.*, 98 N. C. 494.

Negligence of a shipper in riding on a train with his stock does not prevent recovery, where the conductor, knowing of the imminence of a collision and the plaintiff's ignorance thereof, fails to warn him. *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Passenger left the caboose and went to the platform with knowledge that the train had broken in two. His negligence was for jury. *Ft. Worth &c. R. Co. v. Riggs*, (Tex. Civ. App.) 60 S. W. Rep. 61.

Where one in charge of stock on a drover's pass is informed that the train will remain standing for some time and is directed to attend to his stock, he may assume that it will not start without notice to him and that it is therefore safe and he is free to assume a position otherwise dangerous. *Missouri &c. R. Co. v. Jahn*, 18 Tex. Civ. App. 74.

The mere jolting incident to passage on a freight train is not negligence as to passenger thereon. *Runnels v. Houston &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 172.

Defendant was not negligent, where it had posted notices in its cabooses, stations, etc., forbidding carriage of passengers on freight trains under penalty of discharge, and had taken constant measure to detect violations and to enforce the rule. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

The duty toward one riding on a freight train in charge of stock does not depend on the question of the payment of fare. *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 945.

The highest degree of care possible on that kind of a train is the measure of care required. *Sprague v. Southern R. Co.*, 92 Fed. Rep. 59.

Failure to warn one in charge of stock on a freight train of his inability to pass under a snow shed, while standing erect on top of the

cars, was a question of negligence for the jury. *Saunders v. Southern R. Co.*, 13 Utah, 275.

Ticket holder who boards freight train by mistake is not a trespasser and may recover for forcible removal. *Boggess v. Chesapeake &c. R. Co.*, 37 W. Va. 279.

It was for the jury to say whether plaintiff was negligent in momentarily standing in the aisle of a caboose with back toward the door, knowing a coupling was to be made sometime soon. *Harden v. Chicago &c. R. Co.*, 102 Wis. 213.

(b). VEHICLES, TRACKS, &c.

Whether a company buys or manufactures cars and machinery, the utmost care and skill must be used to render them safe. If latent defect could only have been discovered in the process of manufacture and not at all by external examination, the carrier is liable from injury therefrom. Whether the carrier was negligent in not adopting improvements for safety is for the jury. *Hegeman v. Western Railroad Corporation Co.*, 13 N. Y. 9, aff'g judg't for pl'ff.

A railroad company is liable for injury to a passenger for failure to use any improved apparatus, which is known to have been tested and to practically contribute to safety, and the adoption of which is reasonable and practical. *Smith v. N. Y. & N. H. R. R. Co.*, 19 N. Y. 127.

A carrier is bound absolutely to provide road-worthy vehicles, and is liable for the defect of the axle *not* discoverable by any practicable mode of examination. *Alden v. N. Y. R. R. Co.*, 26 N. Y. 102, aff'g judg't for pl'ff.

Enlarging the strictness of the rule as laid down in *Hegeman v. The Western Rd. Corporation*, 3 Kern. 2.

A boat was surrounded by bulwarks three or four feet high with gangways closed by rails hinged to the bulwarks and of the same height and leaving space beneath open. A passenger's hat blew off and he sprang to get it, slipped under the rail and was drowned. The boats had been so made for many years. Defendant was not liable. *Dougan v. C. T. Co.*, 56 N. Y. 1; 6 Lansing, 430.

The master of a ship is liable for acts done by a person under him, whether he hires him or not. A cup used in fumigating a ship, by order of health officer, was left where a child, a passenger, drank out of it and died. The master was liable. *Kennedy v. Ryan*, 67 N. Y. 379, rev'g nonsuit.

The plaintiff, in the under berth of a vessel, was partially paralyzed by screams, and also by the noise caused by an upper berth falling, and

was taken from her berth to allow mending of the upper berth and was thrown by the rolling of the ship against a door and picked up by a steward and left in a wet place. The defendant was bound to use ordinary care and skill in the construction and erection of the berths in the ship, and to use materials of sufficient strength and so far as practicable, such as would be safe and secure against the commotion of the elements, and the violence occasioned thereby. The defendant was liable for the resulting injuries. *Smith v. British & N. Am. R. M. S. Packet Co.*, 86 N. Y. 408, aff'g judg't for pl'ff.

In a suit by a passenger, a latent defect, as in the spindle of a drawbar, will only relieve from liability where no reasonable degree of skill and foresight could guard against or discover it. This duty is not discharged without the utmost care and diligence, which human prudence and foresight will suggest to secure the safety of its passengers. And this vigilance is to be exercised by the company to see that its road and appliances used in operating it, are and remain in good condition and free from defects. *Palmer v. Pres't &c. D. & H. C. Co.*, 120 N. Y. 170, aff'g 46 Hun, 486, and judg't for pl'ff.

A company with whose car a collision took place was also made a party to this action and the witness was allowed, under proper objection, to state whether the inspection made of the brake rod was an adequate way for the examination of these rods, and whether this examination was a proper and adequate one. It was held that the evidence was improper and that the case was different from asking an expert witness whether a vessel was properly loaded, as that was a question requiring the opinion of an expert. It was also held that the question as to whether the inspection was adequate depended upon very many other conditions and that the exercise of the greatest diligence was not required in behalf of this plaintiff who was not this defendant's passenger. The question whether the inspection was adequate will be controlled and modified by a variety of circumstances respecting the use and observation of brakes, the previous experience of the company with them, and the jury were to determine the question from all the facts. *Schneider v. Second Ave. R. Co.*, and the *Houston &c. R. Co.*, 133 N. Y. 583, reversing judgment for plaintiff on account of the admission of evidence.

Where some companies leave the backs of the steps of their omnibuses open, while others close them, there being advantages and disadvantages in both methods, it was held not negligent to use the former method instead of the latter, especially where no accident similar to the one complained of had ever occurred before. *Frobisher v. Fifth Ave. Transp. Co.*, 151 N. Y. 431; rev'g s. c., 81 Hun, 544.

Plaintiff on defendant's ship, through the alleged imperfect lighting



of the dining saloon, tripped and fell on a socket in the floor used to secure the tables against the rolling of the sea. The plaintiff's evidence would not have justified a finding that there was a want of sufficient light in the saloon, and even had there been a lack of light, that could neither have caused nor prevented the accident, and the court erred in charging the jury that the defendant was bound to use the utmost care and diligence, as it was bound to use only ordinary care in a case where no question arose as to defects in machinery or in the mechanical appliances for the transportation of passengers. In this case the sockets, if the proximate cause of the accident, were visible defects. *Bruswitz v. Netherlands Am. S. Nav. Co.*, 64 Hun, 262, rev'g judg't for pl'ff.

The failure of a railroad corporation to place a chain or similar barrier across the opening in the railing at the end of the platform of a passenger coach in a train, when a freight car is next to such coach, is a fact from which a jury, in case of an accident, may impute negligence to the corporation. *Newton v. The Central Vermont R. Co.*, 80 Hun, 491; s. c., aff'd, 151 N. Y. 624.

Defendant was liable for failure to repair upon request, a defective port in a steamship, whereby plaintiff's berth became wet and unhealthy. *Barker v. Cunard S. Co.*, 91 Hun, 495.

Carrier was held liable, where, owing to the failure of a defective brake to operate, a street car collided with a cart and the jar threw a passenger from the platform and injured him. *Weber v. Metropolitan Street R. Co.*, 22 App. Div. 628.

Car switched on a siding was blown back on the main track; except for a defect in the brake, it would not have moved. Brake was the paramount cause of collision with train on main track. *France v. Rome & C. R. Co.*, 25 App. Div. 315.

The duty of a carrier in respect to the rod holding the curtains of an electric car, not being the very highest degree of care, it is not liable, where they were blown down under pressure of a very high wind, when they were such as were in common use, made by reputable makers and no defect would have been revealed, had an inspection been made. *Leyh v. Newburgh & C. R. Co.*, 41 App. Div. 218; s. c. aff'd, 168 N. Y. 667.

Defendant was held not negligent in respect to an appliance called a plunger on the platform of one of its cars, where it appeared that there were no better or safer cars made than those used by defendant. *Smith v. Kingston & C. R. Co.*, 55 App. Div. 143; s. c. aff'd, 169 N. Y. 616.

Where plaintiff was injured through the car catching fire by reason of the defective insulation of the cables beneath the car, the court was requested to charge "that the care required of defendant is not extraordinary care, but only the care that is necessary in reference to the

use of the appliances, and the danger incident to their becoming out of order." The court's reply, "that is true; in the use of motive power like electricity, power of such appalling possibilities, it should be a very high degree of care," was held correct. *Leonard v. Brooklyn Heights R. Co.*, 57 App. Div. 125.

A shock received by plaintiff from controller box in flames, held evidence of negligence. *Buckber v. Third Ave. R. Co.*, 64 App. Div. 360.

Defendant held not liable because the side bar was not down on the left side of the car, from which plaintiff was thrown while rounding a curve, as the bar was not designed to keep people from falling out. *Whitaker v. Staten Island &c. R. Co.*, 65 App. Div. 451.

Held error to dismiss complaint, where it appeared that plaintiff was struck by fall of a small fire extinguisher fastened to sides of car by old worn wire. *Allen v. United Traction Co.*, 67 App. Div. 363.

Defendant was not liable, where folding doors were thrown down by the action of the sea upon plaintiff's foot, which was thrust under a rail into the opening made for the doors. *Leroy v. North German Lloyd S. Co.*, 16 Misc. 162.

Or where door catch which caught plaintiff's dress, was new, in good order and similar to that in general use from which no such accident had happened before. *Atwood v. Metropolitan Street R. Co.*, 25 Misc. 758.

See, also, *Langley v. Metropolitan Street R. Co.*, 36 Misc. 804.

Duty of railroad company is performed if it use such machinery and appliances as other well regulated railroad companies use. *Louisville &c. R. Co. v. Jones*, 83 Ala. 376.

Carrier was not negligent, where a defect in the air brake was due to a latent defect or interference by a third party without its knowledge or consent. *Western R. Co. &c. v. Walker*, 113 Ala. 267.

Failure to provide the front wheels of a street car with guards was evidence of negligence for the jury. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

The injury complained of was sustained in an accident caused by the breaking of the flange of a car wheel while the car was going at excessive speed. The fact that the latent defect which caused the break was undiscoverable by the best known tests, was not ground for reversing a verdict for plaintiff, as the question whether the defect or the speed was the proximate cause was for the jury. *Johnsen v. Oakland &c. R. Co.*, 127 Cal. 608.

Measure of care and liability are not lessened by the crudeness of the train. *Green v. Pacific Lumber Co.*, 130 Cal. 435.

Though defects are undiscoverable after a car is turned over to a carrier, it is liable if they could have been discovered by the exercise of the

utmost care &c., while in the hands of the manufacturer. *Siemsen v. Oakland &c. R. Co.*, 134 Cal. 494.

A car is not negligently constructed because a *bolt* projects beneath the platform steps so as to strike the leg of one who accidentally falls and is dragged under it. *Posten v. Denver &c. T. Co.*, 11 Colo. App. 187.

As to negligence in a railroad, where a car wheel broke while running at high speed, see *Chesapeake &c. R. Co. v. Howard*, 14 App. D. C. 262, 287.

Where the distance between car tracks is the minimum authorized by law, defendant cannot be held negligent in the construction of its tracks as matter of law. *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60.

Measure of care required of a carrier held to apply as much to coach accommodations as to safety in carriage. *Chicago &c. R. Co. v. Dumser*, 161 Ill. 190; aff'd s. c., 60 Ill. App. 93.

Raising and leaving the iron flanges upon the platform of a car without notice, so as to endanger passengers passing from one car to another, is negligence; and it was contributory negligence to fail to see them by the aid of artificial light, where the place had been passed in safety only a short time before. *Chicago &c. R. Co. v. Gates*, 61 Ill. App. 211; s. c. aff'd, 162 Ill. 98.

Fall of railroad trestle, caused by sudden and unexpected rising of waters, does not subject defendant to liability. *Wabash &c. R. Co. v. Koenigsaw*, 13 Ill. App. 505.

In case of latent defects in roadbed, a charge that the carrier was negligent, if by the exercise of the highest degree of care it might have discovered and repaired the defect, though it had not sufficient time to repair after actual discovery held proper. *West Chicago Street R. Co. v. Stephens*, 66 Ill. App. 303.

Failure to provide a mat to cover the space between car platforms was not negligence. *Louisville &c. R. Co. v. Stout*, 66 Ill. App. 298.

Where plaintiff, while riding on the foot board of an overcrowded trolley car, was injured by an obstruction near the track, the questions of negligence and contributory negligence were properly submitted to the jury. *West Chicago Street R. Co. v. Marks*, 82 Ill. App. 185.

Injury to a passenger in the act of alighting from a train, caused by the fall of a lantern, held to raise a presumption of negligence and make it error for trial court to direct a verdict of defendant. *Cramblet v. Chicago &c. R. Co.*, 82 Ill. App. 542.

It was for the jury to say whether a derailment was due to a broken axle. *Brownfield v. Chicago &c. R. Co.*, 107 Iowa. 254.

Train on which plaintiff rode fell through a bridge undergoing repairs and the court held, that unless some cause were shown for the disaster against which the company could not have guarded, it would be

liable to the imputation of negligence. *Louisville &c. R. Co. v. Pedigo*, 108 Ind. 481.

It was not actionable negligence to carry an extra vestibule car with locked doors, where it was 60 feet from the platform, as the train was drawn up to the depot. Plaintiff, who boarded the front platform of the locked car as the train started, after ample opportunity to enter the other cars, was injured in an attempt to pass from it to them. *Cleveland &c. R. Co. v. Wade*, 18 Ind. App. 346.

Where plaintiff remained at a window while there were plenty of other seats, he could not complain because the window was defective and could not be lowered. *O'Donnell v. Louisville &c. R. Co.*, (Ky.) 42 S. W. Rep. 846.

Where the defect in a trolley wire could not have been discovered by means of a reasonable examination, the company was not liable for its breaking. *Baltimore &c. R. Co. v. Nugent*, 86 Md. 349; s. c., 39 L. R. A. 161.

Failure to have gates on platforms of street car, held not negligence. *Byron v. Lynn &c. R. Co.*, 177 Mass. 303.

See, also, *Kingman v. Lynn &c. R. Co.*, (Mass.) 64 N. E. Rep. 79.

Company was not liable, where a passenger, in order to go from one part of the train to another, and unable to pass through the crowded aisles stepped off on the ground at a place he knew to be dangerous. *Kellog v. Smith*, 179 Mass. 595.

The breaking of a pin in a switching apparatus of the most approved design, purchased from a reputable maker, due to a defect that could not have been discovered by the most careful inspection, was held no evidence of negligence. *Buckland v. New York &c. R. Co.*, (Mass.) 62 N. E. Rep. 955.

The fact that there was no bell rope on a train made up of freight and passenger cars does not fix the liability upon company. *Oviatt v. Dakota &c. R. Co.*, 43 Minn. 300.

Negligence was for the jury, where a temporary track was constructed by spiking 50-pound rails on ties placed without ballast on a well worn cedar pavement, and a car was derailed by a broken rail. *Edlund v. St. Paul City R. Co.*, 78 Minn. 434.

Failure to inspect a bridge before crossing after a severe storm, which was liable to injure it, was held negligence. *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609.

Failure to have a headlight was negligence. *Cleveland &c. R. Co. v. St. Bernard*, 15 Oh. C. C. 588.

Negligence was for the jury, where an accident on a curve was caused by a broken rail that had been used for 16 years and had been reduced

by wear five pounds to the yard and had been broken and patched with splices. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339.

In the absence of evidence that lack of a signal caused the accident in which plaintiff was injured, direction of verdict for defendant was held proper. *Foreman v. Pennsylvania R. Co.*, 195 Pa. St. 499.

Failure to have a third step to a car will not permit recovery where plaintiff steps down without looking. *Coburn v. Philadelphia &c. R. Co.*, 198 Pa. St. 436.

Where drainage was insufficient in ordinary weather, the company was liable. *Philadelphia &c. R. Co. v. Anderson*, 94 Pa. St. 351; *Sullivan v. R. Co.*, 6 Cas. (Pa.) 231; *Laing v. Colder*, 8 Barr. (Pa.) 479; *Meier v. R. Co.*, 14 P. F. Smith (Pa.), 225; *Grote v. Chester &c. R. Co.*, 2 Exch. 251; *Francis v. Cockrell*, L. R., 5 Q. B. 184.

Company not relieved from liability for injuries caused by the washing away of an embankment, due to insufficient drainage, although a competent engineer had approved of the same. *Philadelphia &c. R. Co. v. Anderson*, 13 Norr. (Pa.) 351.

Test of liability is, whether company used that degree of care and prudence which cautious persons would have used under the apparent circumstances of the case. Company not bound to provide, in constructing roadbed, against extraordinary floods unknown to common experience. *R. Co. v. Halloren*, 53 Tex. 46.

A tree stood so near a track that it was blown upon it, and as a consequence a train was derailed. The company should have cut it down, notwithstanding it stood on land of another, because of the likelihood of its proving to be an obstruction. *I. & St. L. R. Co. v. Vallie*, 60 Tex. 481.

Railroad company should cut down bushes near the track, to avoid possibility of cattle suddenly stepping out from them upon it. *Eames v. T. & N. O. R. Co.*, 63 Tex. 660.

No recovery is allowed a passenger for injuries caused by the malicious act of a third person in derailing car. *Houston &c. R. Co. v. Lee*, 69 Tex. 556.

If a culvert breaks as the result of the breaking of a dam, liability attaches, providing the culvert was defective. *Bonner v. Wingate*, 78 Tex. 333.

A latent defect not discoverable by a competent and skilled person on reasonable inspection, does not charge a carrier with negligence. But continued wet weather and a fall of snow does not excuse a failure to keep a track in repair. *Missouri &c. R. Co. v. Johnson*, 72 Tex. 95.

Prior proper inspection not revealing a defect, was no defense to an action for an injury from an accident resulting from a subsequent im-

proper one which should have revealed it. *Houston &c. R. Co. v. Summers*, (Tex. Civ. App.) 49 S. W. Rep. 1106; s. c. aff'd, 92 Tex. 621.

Failure to completely reverse the seats in a car so that one is liable to catch his fingers in the bars thereof, was evidence of negligence to go to the jury. *Missouri &c. R. Co. v. Dill*, (Tex. Civ. App.) 40 S. W. Rep. 347.

Carrier is not negligent where the most careful inspection would not have revealed the defect which caused the accident. *Texas &c. R. Co. v. Buckalew*, (Tex. Civ. App.) 34 S. W. Rep. 165; *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 708.

Plaintiff cannot recover for injuries from the fall of a car window, where it appears that he raised it and there was no evidence of any defect in the apparatus for holding it up. *Texas &c. R. Co. v. Johnson*, (Tex. Civ. App.) 65 S. W. Rep. 388.

Passenger's negligence in remaining on a train, cold and crowded, when he was aware of its condition and could have left it before it started, was for the jury. *Texas &c. R. Co. v. Rea*, (Tex. Civ. App.) 65 S. W. Rep. 1115.

Shock as plaintiff took hold of handhold to board a car raised presumption of negligence. *Dallas &c. R. Co. v. Broadhurst*, (Tex. Civ. App.) 68 S. W. Rep. 315.

Failure to warm cars is negligence especially when used by women with children. *Ft. Worth &c. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435.

Defendant was chargeable with notice of the cold condition of car, where its servants had passed through it while in such condition. *Texas &c. R. Co. v. Kingston*, 68 S. W. Rep. 518.

Brakes on the rear car were not as effective as those on the forward cars, though sufficient when the car was coupled to the train. A drunken person uncoupled the rear car while the train was in motion, automatically setting the brakes on the whole train; the forward stopped more suddenly than the rear car, causing a collision which injured plaintiff. It was for the jury to say whether it was bound to anticipate such a contingency. *Texas &c. R. Co. v. Storey*, (Tex. Civ. App.) 68 S. W. Rep. 534.

Plaintiff recovered for injuries caused by fall of window, though the window catches were in good order, where it was a new car and it was at times difficult to raise the window up to the catches. *International &c. R. Co. v. Phillips*, (Tex. Civ. App.) 69 S. W. Rep. 107.

Carrier was obliged "to use that high degree of care which would have been exercised by very cautious, prudent and competent persons under similar circumstances," in heating cars and providing seating accommodations. *St. Louis &c. R. Co. v. Campbell*, (Tex. Civ. App.) 69 S. W. Rep. 451.

Carrier was held liable for failure to provide accommodations for a woman with children other than in a car with men who drink and smoke, besides being filthy and indecent. *Texas &c. R. Co. v. Hughes*, (Tex. Civ. App.) 41 S. W. Rep. 821.

A charge which required defendant to secure the reasonable safety of a bridge in time of danger, held error, as the measure of its duty was the exercise of that high degree of care which very prudent and cautious persons would use under the circumstances. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

Carrier failed to furnish safe means of alighting, where the step box, besides being too small, was too far under the step and slanting from the unevenness of the ground. *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424.

The duty of a railroad company, to exercise a high degree of care for the safety of its passengers, requires that degree of care to be exercised in providing seats in its cars, as well as in providing the cars or the road-bed or in running its trains. *International &c. R. Co. v. Anthony*, (Tex. Civ. App.) 57 S. W. Rep. 897.

The best appliances obtainable are not required, but only such as are approved by use. *Texas Midland R. Co. v. Jumper*, 24 Tex. Civ. App. 671.

A latent defect in a rail, not discoverable by any degree of foresight, not chargeable to company. *Anthony v. Louisville &c. R. Co.*, 27 Fed. Rep. 724.

See *Brignoli v. Chicago &c. R. Co.*, 4 Daly, (N. Y.) 182; *Heazle v. Indianapolis &c. R. Co.*, 76 Ill. 501.

Though under no obligation to furnish vestibuled trains, by undertaking to do so, the carrier assumes the obligation of keeping them in reasonably safe condition. *Bronson v. Oakes*, 76 Fed. Rep. 734.

Failure to provide an ash can for engine, which will not permit the escape of sparks to the injury of passengers on a station-platform while passing, was held negligence. *Philadelphia &c. R. Co. v. Young*, 90 Fed. Rep. 709.

It was negligence to run a train down grade at such a speed on slippery tracks that its control could not be secured by locking the brakes. *Danville Street Car Co. v. Payne*, (Va.) 24 S. E. Rep. 904.

Escape of electricity into the iron handles on dash board of an electric car, by reason of which plaintiff was injured, attributable to the company's negligence. *Burt v. Douglas &c. R. Co.*, 83 Wis. 229.

### (c). DEFECTIVE PASSENGER.

A sick person is entitled to more care than a well one, in getting off a

car, or in crossing a street. *Sheridan v. Brooklyn City and Newtown R. Co.*, 36 N. Y. 39.

A carrier owes a passenger who becomes unfit to travel by reason of sickness, the duty of placing him in charge of an officer of the law, authorized to take charge of persons in his condition, or otherwise securing his safety. And, where such a one was ejected from a waiting room by a policeman at the request of the station agent and was killed while wandering upon the tracks, the carrier was held liable. *Wells v. New York & C. R. Co.*, 25 App. Div. 365.

If a railroad company contracts to take a sick passenger it must afford him time and assistance in getting off. *Louisville & C. R. Co. v. Trunk*, 119 Ind. 542.

Knowledge of abnormal sensitiveness does not increase measure of the care required, but increases the measure of liability in case of injury. *Spade v. Lynn & C. R. Co.*, 172 Mass. 488.

Plaintiff was taken sick in a trolley car. The conductor paid no attention to her repeated requests to stop the car and let her get off. She arose, staggered toward the door and fell in a faint. The defendant's liability was held properly submitted to the jury. *Newark & C. R. Co. v. McCann*, 58 N. J. L. 642; s. c., 33 L. R. A. 127.

An infirm passenger is not negligent *per se* in carrying bundles or in holding on to the back of the seat while his child is passing on ahead of him. *Tillett v. Norfolk & C. R. Co.*, 118 N. C. 1031.

A woman of 63 and crippled was negligent in leaving her seat in a freight train caboose at a time when she should have expected a coupling of the cars. *Felton v. Horner*, 97 Tenn. 579.

More care required of carrier where passenger is decrepit or in feeble health. *East Line & C. R. Co. v. Cushing*, 69 Tex. 306.

Failure to give personal announcement of a station, as requested, in the absence of notice of passenger's sickness, did not bind the company. *Chicago & C. R. Co. v. Boyles*, 11 Tex. Civ. App. 522.

Railroad company was liable for carelessness of a brakeman in carrying an invalid out of the car. *International & C. R. Co. v. Anderson*, 15 Tex. Civ. App. 180.

It was negligent to start a train before one known to be a cripple has had time to gain a seat. *Central Texas & C. R. Co. v. Holloway*, (Tex. Civ. App.) 54 S. W. Rep. 419.

Intoxication does not relieve a passenger of the care due from a sober man. A drunken passenger, who obstinately persisted in riding on the platform in spite of the conductor's protests, was thrown from the train, while rounding a curve, and run over. A verdict for the plaintiff was set aside. *Fisher v. West Virginia & C. R. Co.*, 42 W. Va. 183; s. c., 33 L. R. A. 69.



## (d). GRATUITOUS PASSENGER.\*

The carrier owes the same care to a gratuitous passenger as to one making compensation.

Where a railroad corporation voluntarily undertakes to convey a passenger upon its road, whether with or without compensation, if such passenger be injured by the culpable negligence or want of skill of the agents of the company, the latter is liable, in the absence of an express agreement exempting it.

Where a passenger is carried gratuitously, the liability of the carrier for an injury caused by gross negligence, arises not from any implied contract, but from the violation of a duty imposed by the circumstances. *Nolton v. Western Railroad Corporation*, 15 N. Y. 444, aff'g judg't for pl'ff.

**From opinion.**—"The law always imposes upon every one who attempts to do anything, *even gratuitously*, for another, to exercise some degree of care and skill in the performance of what he has undertaken. The leading case on this subject is that of *Coggs v. Bernard*, *Ld. Ray*. 909. There the defendant had undertaken to take several hogsheads of brandy belonging to the plaintiff, from one cellar in London, and to deposit them in another; and in the process of moving, one of the hogsheads was staved and the brandy lost, through the carelessness of the defendant or his servants. Although it did not appear that the defendant was to receive anything for his services, he was, nevertheless, held liable by the whole court. \* \* \* The present case falls clearly within this principle of liability. There can be no material difference between a gratuitous undertaking to transport property, and a similar undertaking to transport a person. If either are injured through the culpable carelessness of a carrier, he is liable."

Where a passenger riding on a pass was killed, the company would have been liable but for stipulation on pass exempting it from liability. *Perkins v. New York Central R. Co.*, 24 N. Y. 196, rev'g judg't for pl'ff.

**From opinion.**—"Assuming that the pass on which the deceased was riding is to be regarded as a free ticket, and that the defendants were carrying the deceased gratuitously, independently of the question whether Mr. Perkins (injured person) expressly agreed to assume all risk of accidents upon the trip, the defendant would be clearly liable for any injury sustained by him, if he had survived the same; and in this action, on the same ground, would be liable also to the plaintiff."

This is the accepted doctrine. *Wharton on Negligence*, sections 355, 436, 437, 641.

A person lawfully on defendant's cars, but refusing to pay fare, may be ejected; but if injured while thus a passenger he may recover in damages. *Ohio &c. R. Co. v. Muhling*, 30 Ill. 9.

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\* NOTE.—See "Common Carriers of Goods," p. 197.

To one riding on a free pass, a railroad is liable for gross negligence. *Illinois R. Co. v. O'Keefe*, 63 Ill. App. 102.

An employé on a pass is entitled to the same care as other passengers. *St. Louis &c. R. Co. v. Waggoner*, 90 Ill. App. 556.

Plaintiff, who was employed in building a bridge on defendant's railroad and was injured while riding to his work free on defendant's cars, could recover for such injuries. *Gillenwater v. Madison &c. R. Co.*, 5 Ind. 339.

A person riding on a free pass may recover for injuries received in a collision on defendant's road. *Louisville &c. R. Co. v. Gaylor*, 126 Ind. 126.

The court held that payment of fare was not a prerequisite towards establishing the relation of carrier and passenger, and negligence of defendant's employés fixed liability on the company for plaintiff's injuries, notwithstanding he rode upon a free pass. *Rose v. Des Moines Valley C. Co.*, 39 Iowa, 246.

Where the ride is free by invitation of conductor, though against the rules of the company, the same care is due as to passengers for hire. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Where one is permitted by conductor to ride to a certain point if he would throw a switch there, he becomes a trespasser upon returning to the train after that object was accomplished. *Cincinnati &c. R. Co. v. Jackson*, (Ky.) 58 S. W. Rep. 526.

The plaintiff, a girl of nine years of age, got upon the front platform of defendant's street car, on invitation of the driver, became a passenger without hire, and recovered for injuries caused by driver's negligence. *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

Passenger on a free pass containing stipulation limiting liability, is held to that provision. *Quimby v. Boston &c. R. Co.*, 150 Mass. 365.

*Contra* *Bryan v. Missouri Pac. R. Co.*, 32 Mo. App. 228.

In an action against a *carrier of goods*, it is not necessary to allege that a compensation was agreed upon. *Hall v. Cheney*, 36 N. H. 26.

Where passage on freight caboose was permitted the duty was the same to passengers free and for hire. *Dorsey v. Atchison &c. R. Co.*, 83 Mo. App. 528.

If usage implies payment to carrier for transfer of goods he will be liable for any loss, notwithstanding absence of contract for payment, unless caused by inevitable accident or through public enemies. *Kirtland v. Montgomery*, 1 Swan, (Tenn.) 452.

Wife and child of company's employé riding without tickets to where employé is at work, are not trespassers, and recovery may be had for in-

juries to child from derailment of the car. *Galveston &c. R. Co. v. Sneed*, 4 Tex. Civ. App. 31.

Where plaintiff was on a work train without the knowledge of defendant's officers, who had at all times used reasonable efforts to enforce its rule forbidding carrying anyone but employes thereon, he was a trespasser. *International &c. R. Co. v. Hanna*, (Tex. Civ. App.) 58 S. W. Rep. 548.

The plaintiff, a *stockholder*, carried free on defendant's boat, was injured in a collision, and recovered. *Philadelphia &c. R. Co. v. Derby*, 14 How. (U. S.) 468.

Plaintiff, although carried free as a "steamboat man," was allowed to recover for injuries received by him, due to the collision of defendant's boat with another boat. *Steamboat New World v. King*, 16 How. (U. S.) 469.

Person invited to ride on a train on a logging road, is entitled to proper and adequate care, though not a passenger for hire. *Albion Lumber Co. v. DuNobra*, 72 Fed. Rep. 739.

One riding on a free pass is entitled to same rights as passenger for hire. *Farmers' L. &c. Co. v. Baltimore &c. R. Co.*, 102 Fed. Rep. 17.

Passenger on a free pass assuming risk of acts of negligence cannot recover, though the giving of the pass is contrary to law. *Duncan v. Maine C. R. Co.*, 113 Fed. Rep. 508.

A child of three years and six months of age riding free on defendant's train recovered for injuries received notwithstanding acts 7 and 8, Vict. chap. 85, sec. 6, providing for free passage of children on railway train under the age of three, and carriage of children of between three and twelve years of age for half rate. *Austin v. R. Co.*, 2 Q. B. 442.

A steamboat captain undertaking, without charge, to carry money for passengers is bound to use a degree of diligence adequate to the performance of the trust. *Jenkins v. Mottou*, 1 Sneed. (Ky.) 248; *Eddy v. Livingston*, 35 Mo. 487; *Tracy v. Wood*, 3 Mason, 132.

#### (e). TRESPASSERS.

Dr. Wharton extends the same doctrine to trespassers on cars where the carrier does not eject them. Wharton on Negligence, sec. 354.

On this subject that learned author says:

"If a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser supposing him to continue such, is not withdrawn from the protection of that law, which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the car-

riage. If the carrier *omits to do this*, and if the person in question remains voluntarily with the carrier's consent, then the trespass passes into a *quantum meruit* contract of carriage on the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage, on the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence and skill which the carrier is bound to exercise towards all other passengers."

This position does not seem to harmonize with the authorities. Why should a carrier stop and delay its train to expel a trespasser? If the carrier's servants neglect to eject a tramp, it would simply be a wrongful permission given by the agent to the trespasser to steal a ride with the full participation of the latter in the wrong doing.

Failure to take precautions in operating cars along a street to prevent children getting on, was not negligent, where the cars were small and ran at a slow rate. *Jefferson v. Birmingham R. &c.*, 116 Ala. 294; s. c., 36 L. R. A. 458.

Brakeman, with authority to eject tramps, acted within scope of his employment in ejecting for insufficient fare. *Southern R. Co. v. Wildman*, 119 Ala. 565.

The only duty a street railway owes trespassing boys is not to wantonly injure them after discovering their peril. *Little Rock Traction &c. Co. v. Nelson*, 66 Ark. 494.

That one is a trespasser does not justify wilful and unnecessary violence in his expulsion. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

In the absence of an assumption of the risk of negligence a passenger on a free pass has the same rights as one paying fare. *In re California Nav. &c. Co.*, 110 Cal. 670.

A trespasser wantonly pushed from a moving car has a right of action within Ga. Co. sec. 2321, though the act was not within the scope of the authority of the brakeman doing it. *Smith v. Savannah &c. R. Co.*, 100 Ga. 96; *Savannah &c. R. Co. v. Godkin*, 104 Ga. 655; *Fink v. Ash*, 99 Ga. 106.

But a trespasser cannot recover for an expulsion unless it was accompanied by wantonness. *Wabash R. Co. v. Kingsley*, 177 Ill. 558; rev'g s. c., 78 Ill. App. 236.

Forcible expulsion of one not a passenger from a waiting room was justified in the case of an intoxicated person, who not only conducted himself improperly, but vomited upon the floor. *Chicago &c. R. Co. v. Randolph*, 65 Ill. App. 208.

Where a boy stealing a ride, when struck at by the driver, jumped and fell under another car, his negligence was for the jury. *Hagerstrom v. West Chicago Street R. Co.*, 67 Ill. App. 63.

That one was a trespasser does not prevent recovery for willfully ejecting him with unnecessary force and while the train was in motion. *Illinois C. R. Co. v. Davenport*, 75 Ill. App. 579; s. c. aff'd, 177 Ill. 110.

Failure of a conductor of a pay car, whose platforms are enclosed by gates, to keep a lookout to prevent persons getting thereon, was not negligence. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453.

A trespasser may recover for the wilful acts of defendant's brakeman and conductor in ejecting him while the train was moving at the rate of 12 to 15 miles an hour; having implied authority as to ejection, defendant was liable for its abuse by them. *Sanders v. Illinois C. R. Co.*, 90 Ill. App. 582.

Brakeman was acting beyond the scope of his employment in expelling a trespasser with unnecessary violence. *Lake Shore &c. R. Co. v. Peterson*, 144 Ind. 214.

But conductor has such authority, and defendant is liable for willful injury in the expulsion of a trespasser. *Baltimore &c. R. C. v. Norris*, 17 Ind. App. 189.

That one was negligent in boarding a freight train, not carrying passengers, does not relieve defendant of liability for the wilful acts of its employes in using excessive force in expelling him. *Lake Erie &c. R. Co. v. Matthews*, 13 Ind. App. 355.

One, boarding a caboose without defendant's knowledge or consent to visit a passenger, was only entitled to the rights of a trespasser. *Earl v. Chicago &c. R. Co.*, 109 Iowa, 14.

It was for the jury to say whether it was negligence to eject a boy of 14 while the train was going at the rate of nine or ten miles an hour. *Union P. R. Co. v. Mitchell*, 56 Kan. 324.

But a conductor is under no obligation to stop and put a boy of 11 off short of the place most convenient for it; and defendant was not negligent for leaving piles of coal upon the side of the track, upon which he jumped to his injury. *Louisville &c. R. Co. v. Webb*, 99 Ky. 332.

It was held error to direct a verdict for plaintiff, where defendant's brakeman loosed plaintiff's grasp while attempting to board a freight train beginning to move and going at about four or five miles an hour. *Louisville &c. R. Co. v. Bernard*, (Ky.) 37 S. W. Rep. 841.

A carrier was held liable for ejection of a trespasser from a moving train at a dangerous place at night. *Young v. Texas &c. R. Co.*, 51 La. Ann. 295.

Brakeman was not negligent in uncoupling the cars after telling a trespasser who had a foot on each car to let go. *Leonard v. Boston &c. R. Co.*, 170 Mass. 310.

That a boy of 11 jumped from a slowly moving freight train in obedi-

ence to command of brakeman, did not make defendant liable, where his fright was not such as to deprive him of self control. *Mugford v. Boston &c. R. Co.*, 173 Mass. 10.

Judgment reversed for refusal to charge that railroad company was not liable for injuries to a trespasser ejected by a brakeman without authority to eject trespassers. *Hartigan v. Michigan &c. R. Co.*, 113 Mich. 122.

See, also, *Randall v. Chicago &c. R. Co.*, 113 Mich. 115.

A trespasser is entitled to notice of the dangerous speed at which the forward part of a train, broken in two, is backing to meet the latter, where the train hands know of his peril and are in a position to warn him or avoid it. *Pettit v. Great Northern R. Co.*, 62 Minn. 530.

In the absence of rule withholding it, a brakeman was held to have apparent authority to eject a trespasser, though he does not act under it where he was bribed to allow the party to ride, but nevertheless ejects him without subsequent express authority, and the railroad company was not responsible for his act. *Brevig v. Chicago &c. R. Co.*, 64 Minn. 168.

Where plaintiff was on the train through collusion with the conductor to cheat defendant out of a portion of its fare, he could not complain of being pushed off while the train was in motion by other employes on refusal to make it up. *Williams v. Mobile &c. R. Co.*, (Miss.) 19 South. Rep. 90.

Where a flagman forcibly ejects a boy from a rapidly moving train contrary to rules, defendant was liable for his injuries. *Southern R. Co. v. Hunter*, 74 Miss. 444.

See, also, *Howell v. Illinois C. R. Co.*, 75 Miss. 242; s. c., 36 L. R. A. 545; *Yazoo &c. R. Co. v. Anderson*, 77 id. 28.

Where a brakeman had authority to eject and was in a position to enforce his commands to get off, a trespasser was permitted to recover for injuries received in jumping while the train was in motion under such threats. *Farber v. Missouri P. R. Co.*, 139 Mo. 272.

Where defendant had tried to keep news boys off its cars it was not liable to one struck by the tongue of a wagon while riding on the running board to sell papers. *Padgitt v. Moll*, 159 Mo. 143.

The general authority to keep trespassers off includes the specific authority to eject. *Brennan v. Santa Fe Receivers*, 72 Mo. App. 107.

The implied authority of a brakeman to eject trespassers was not affected by the fact that such authority was given expressly to conductors. Defendant was liable for brakeman's use of unnecessary force in ejecting trespasser. *West Jersey &c. R. Co. v. Welsh*, 62 N. J. L. 655.

While a licensee assumes the risk incident to travel on a hand car, he does not deprive himself of a right of recovery for gross negligence in

running a train at high speed out of schedule on a dark stormy night without a head light or notice to the foreman of the hand car. *Willis v. Atlantic &c. R. Co.*, 122 N. C. 905.

Defendant was liable for a wanton assault in ejecting one from a train, though he may have been there unlawfully. *Toledo & R. Co. v. Marsh*, 17 Oh. C. C. 379.

A person who boards a train through collusion with the brakeman paying only part of the fare, and without knowledge of the conductor, is trespasser entitled only to protection from wantonness. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41.

So, also, a newsboy on train in violation of defendant's rule. *Duff v. R. Co.*, 91 Pa. St. 458.

*Flower v. Penn. R. Co.*, 69 Pa. St. 210; *Kirby v. Penn. R. Co.*, 76 id. 506; *Towanda Coal Co. v. Neeman*, 86 id. 418.

Motorman was negligent in frightening off a boy, too young to be regarded as a trespasser, who was stealing a ride, instead of taking him in or stopping to put him off. *Levin v. Second Ave. Traction Co.*, 194 Pa. St. 156.

A boy of six, stealing a ride on the side step of a moving car, became frightened and fell off, when the conductor on discovering him shook his finger and told him to get off, but without making any show of force. A verdict for the company was sustained. *Feingold v. Philadelphia Traction Co.*, 7 Pa. Dist. R. 445.

Nor was defendant liable when, upon being commanded to leave a car, a boy of eight ran through it on to the steps, and around the dashboard, dropping to the ground in the middle of the track, where he was injured by the sudden start of the car. *Pope v. United Traction Co.*, 30 Pittsb. L. J. (N. S.) 62.

Compelling one to jump from a moving train is not excused because he boarded it while moving. *Martin v. Southern R. Co.*, 51 S. C. 150.

Defendant was not liable for injury through mistake of its servants in executing a practical joke upon a boy riding with their consent. *International &c. R. Co. v. Cooper*, 88 Tex. 607.

Defendant was not liable to one stealing a ride in a dangerous position where he was not discovered in time to avoid injury. *Southerland v. Texas &c. R. Co.*, (Tex. Civ. App.) 40 S. W. Rep. 193.

Otherwise, where it might have been avoided after discovery of peril, but no effort was made to do so. *De Palacios v. Rio Grande &c. R. Co.*, (Tex. Civ. App.) 45 S. W. Rep. 612.

Riding on a switch engine, knowing it to be against the company's rules, is such negligence as to prevent recovery, notwithstanding defendant's

gross negligence in running it at excessive speed. *Wilcox v. San Antonio &c. R. Co.*, 11 Tex. Civ. App. 487.

Defendant was liable for the willful act of its engineer in ejecting a boy by throwing hot water over him, regardless of any question of negligence in stealing a ride or in trying to escape from the hot water. *Galveston &c. R. Co. v. Zantzinger*, (Tex. Civ. App.) 49 S. W. Rep. 677; s. c. aff'd, 53 S. W. Rep. 379.

Railroad must use reasonable and ordinary care in ejecting a trespasser. *Texas &c. R. Co. v. Lyons*, (Tex. Civ. App.) 50 S. W. Rep. 161; *Houston &c. R. Co. v. Grigsby*, 13 Tex. Civ. App. 639; *Texas &c. R. Co. v. Black*, 23 Tex. Civ. App. 119.

Though carrier was grossly negligent it was not liable to one who was a trespasser and not known to be on the train. *Crawleigh v. Galveston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 140.

Defendant was held entitled to an instruction for a verdict where plaintiff's fall, while train was going 15 to 20 miles an hour, was caused by a trainman's stepping on his fingers, and kicking him in the back of the head. He was told to get off at the next stop but persisted in getting on again after the train had started. *Johnson v. Chicago &c. R. Co.*, 94 Fed. Rep. 473.

Brakeman as such has no implied authority to eject trespassers, but such authority may be inferred from a course of action. Where, however, the company's rules required brakemen to report trespassers to the conductor, prior acts of expulsion by the brakeman in the presence of the conductor and with his consent, furnish no evidence of authority in the brakeman to expel of his own motion. *Chesapeake &c. R. Co. v. Anderson*, 93 Va. 650.

An infant trespasser was allowed to recover of a railroad company for increasing the speed of its train to a dangerous rate and then compelling him to jump. *Washington &c. R. Co. v. Quayle*, 95 Va. 741.

It was not an act of willful negligence in a trainman to command a trespasser, used to boarding and leaving slowly moving trains, to get off, where nothing was done calculated to cause him to lose his self control. *Bolin v. Chicago &c. R. Co.*, 108 Wis. 333.

## V. Approaches to Stations and Cars—Construction and Maintenance of.

In respect to approaches to stations, stairways, station platforms, removal and treatment of ice on platforms of cars, cinders from locomotives, the carrier is not bound to use the high care and skill required in actual transportation, but only that ordinary care and skill that a man of ordinary prudence would use under the circumstances; and the existence of the



defect does not usually raise a presumption of negligence, although as in other relations, such defect may appear to have been so dangerous in its nature or to have existed for such a length of time as to place the burden on the defendant of showing that it did not exist by his default. *Kelly v. Manhattan R. Co.*, 112 N. Y. 443.

Gross negligence to leave hole in floor of platform where passengers alight, whereby their landing is rendered unsafe.

Plaintiff had a right to rely upon the floor being free from holes, without taking special pains to ascertain whether it was or not before she stepped upon it. *Ferris v. Union Ferry Co.*, 36 N. Y. 312; *Davenport v. Ruckman*, 37 id. 568, 573; *Liscomb v. J. R. Trans. Co.*, 6 Lansing, 75, aff'g judg't for pl'ff.

The plaintiff's intestate was, through the neglect of the conductor's promise to awaken him, carried past his station and the conductor advised him to go to station "N," and then to take a train back to his station. The train that he was on stopped two hundred and fifty feet west of station "N" and the returning train was two hundred and fifty feet east of that station. The passenger attempted to walk from one train to the other, and fell into a cattle guard and was killed. There was evidence, that passengers sometimes took the return train, where it stood, and it was doubtful whether it drew up to and stopped at the station. Defendant was held liable. (See Reporter's notes, p. 154.) *Hulbert v. N. Y. C. R. Co.*, 40 N. Y. 145.

There was a brass plate on each step of the stairway of a steamboat. Where the plate turned over the nose of the step, it was smooth and slippery. A passenger slipped thereon and was injured. It was the usual way of covering such steps and no accident had happened before. The defendant was not liable. *Crocheron v. North Shore S. I. F. Co.*, 56 N. Y. 656.

In an action for injuries while ascending the stairs of defendant's boat, the claim was that the stairs were too slippery to be safe. The steps were covered with brass plates raised in the form of stars and no accident had happened thereon although many thousand passengers had been carried during that year. An expert testified that the stairs were of the best form constructed. The brass was raised with some kind of device, the plaintiff's foot when he slipped was on the step only to the hollow of the foot. Defendant was not liable. *Hughes v. The New Jersey Steamboat Company*, 11 Misc. 65.

The plaintiff, going from the car to a highway, fell in a cattle guard outside of the limit of the highway and on the depot grounds. For jury. *Hoffman v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 605, affirming 13 Hun, 589.

The company must provide a passenger with a safe way to the train, and must use reasonable care not to expose him to danger on the prem-

ises, and must use the utmost vigilance against interference or violence from another. The plaintiff, on the station platform, was injured by a bag thrown from the train by the postal clerk pursuant to a long custom. *Carpenter v. Boston & Albany R. R. Co.*, 97 N. Y. 494, rev'g 24 Hun, 104.

Citing *Nolton v. Western R. Co.*, 15 N. Y. 444; *Blair v. E. R. Co.*, 66 id. 313; *Penn. R. Co. v. Price*, 23 Alb. L. J. 69; *Muster v. C. M. St. P. Ry. Co.*, 21 N. W. 223. (See post, "Injuries from Negligence of Third Persons," p. 533.)

Plaintiff, defendant's passenger, was injured while going on defective station platform to telegraph office in station. *Clusman v. L. I. R. Co.*, 9 Hun, 618, aff'g judg't for pl'ff; s. c. aff'd, 73 N. Y. 606.

There was sidewalk alongside of the defendant's depot leading to the street; depression in stone caused an outgoing passenger, in the evening, to break her ankle. Same rule of care applies to the defendant as to a municipality. Evidence that stone was replaced after the accident was proper to show that the defendant had control of the sidewalk. For jury. *Bateman v. N. Y. C. & H. R. R. Co.*, 47 Hun, 429, aff'g judg't for pl'ff.

Citing *Clemence v. Auburn*, 66 N. Y. 334; *Goodfellow v. Mayor*, 100 N. Y. 19.

A passenger, in the dark, descending stairway to the walk, felt her way, until she supposed that she had reached the bottom of the steps, and then stepped off and was injured. For jury. *Flagg v. Manhattan R. Co.*, 49 N. Y. Supr. Ct. 251; s. c. aff'd, 101 N. Y. 624.

On account of the wreckage in the way the passengers were transferred, under the guidance of a brakeman, with a lantern, to another train beyond the wreck, and the plaintiff, being infirm, became nervous and exhausted, fell behind the others, stumbled and fell. A recovery was sustained. *Weld v. N. Y., L. E. & W. R. Co.*, 68 Hun, 249.

Defendant was negligent, where, with knowledge of the practice of mail clerks to throw mail bags upon platform, which might become a source of danger to its passengers in boarding trains, it failed to keep such platform sufficiently lighted to enable them, by the use of diligence, to avoid injury. *Ayres v. Delaware &c. R. Co.*, 4 App. Div. 511; s. c. aff'd, 158 N. Y. 254.

It was for the jury to say whether defendant was negligent in allowing the employes of another on its premises to obstruct a passageway to its ticket office with his legs; and whether plaintiff was negligent in allowing her attention to be diverted from the passage in front of her while getting out her money. *Lycett v. Manhattan R. Co.*, 12 App. Div. 326; s. c., second appeal, 48 id. 624.

Defendant was negligent in continuing to sell tickets, where the platform was so crowded already that the admission of more people might

push those along the edge off, where there was no railing. *McGearty v. Manhattan R. Co.*, 15 App. Div. 2.

A passenger, who attempted to cross tracks through a gateway in a fence, used only by employes, at a station where an overhead crossing was provided, was held negligent as a matter of law. *Riester v. New York &c. R. Co.*, 16 App. Div. 216.

Plaintiff was negligent in stumbling over a hose three or four inches in diameter on the wharf in plain sight, in broad daylight, and with plenty of room. *Strutt v. Brooklyn &c. R. Co.*, 18 App. Div. 134.

Rule of *res ipsa loquitur* held not to apply, where a passenger was injured by the explosion of a heating apparatus of the kind in general use, while in the waiting room of a hotel temporarily used by a railroad company as a depot, and, in the absence of evidence of negligence, defendant was not liable. *Kirby v. Delaware &c. Canal Co.*, 20 App. Div. 473; s. c., second appeal, 48 id. 636; s. c. aff'd, 169 N. Y. 579.

Defendant was not negligent in failing to light the steps to its platform, where there were large electric lights upon the platform and within the station, whose light was obstructed by plaintiff's body as he came out of the doorway, and a shadow thereby cast upon the steps; especially where plaintiff was not a passenger or intending to become one, but came to get a meal at the station restaurant. *Hauk v. New York &c. R. Co.*, 34 App. Div. 434.

Plaintiff failed to establish defendant's negligence or his own freedom from negligence, where, in alighting from a train to a platform, which was 14 inches below the last step of the car and about six inches away from it, he felt for it with his cane and put his left leg, which was shorter than the other, upon it, and stepped into the space between the steps and the platform with his right leg and was injured. *Gabriel v. Long Island R. Co.*, 54 App. Div. 41.

Company was not liable where the rubber on a stairway had been out of order only a few minutes. *Foley v. Manhattan Elev. R. Co.*, 89 Hun, 606.

Defendant was not bound to anticipate that a passenger would so heedlessly and violently push open a swinging door as to injure another passenger. *Kiernan v. Manhattan R. Co.*, 28 Misc. 516, rev'g 27 Misc. 841.

Platforms need not be absolutely safe; carrier is only bound to use ordinary care. *St. Louis &c. R. Co. v. Barnett*, 65 Ark. 255.

Carrier held liable for failure to open and heat waiting-room. *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136.

Carrier is not bound to insure a safe exit, as, where passenger voluntarily left the train several hundred yards from the station and was run

over by another train. *Central R. v. Thompson*, 76 Ga. 770; *Raben v. Central Iowa R. Co.*, 74 Iowa, 732.

A petition charging a railroad company with negligence in leaving a large splinter of wood projecting on a platform so as to catch in one's foot and cause injury, held to state a cause of action. *Wilkes v. Western &c. R. Co.*, 109 Ga. 794.

Where defendant had drawn up its car in front of a slope in a platform on which grease had been spilled, and plaintiff slipped and fell while trying to enter the car, it was held error to charge that plaintiff was "not bound to be looking to see whether he is going to tread into a hole or stumble over an obstacle when he is passing along a platform to a train." *Savannah &c. R. Co. v. Flaherty*, 110 Ga. 335.

Peremptory instructions for defendant properly refused, where plaintiff caught her dress on a coupling pin three inches above car platform, though such was the customary position of the pin and a like accident had never happened. *Illinois C. R. Co. v. O'Connell*, 160 Ill. 636; aff'g s. c., 59 Ill. App. 463.

There is no duty as such to light car vestibules or close the door thereto or light grounds not in the immediate vicinity of the station. *Ward v. Chicago &c. R. Co.*, 165 Ill. 462; rev'g s. c., 61 Ill. App. 530.

Where a platform was not obviously dangerous, and has for years proved sufficient, the continuation of its use was not negligence. Cinder platform 20 to 23 inches below car step. *Illinois C. R. Co. v. Hobbs*, 58 Ill. App. 130.

Changing a depot from one side of its tracks to the other without notice was not negligence; nor failure to light grounds where there was no station. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

Deceased approached a station without overhead or underground crossing and, while crossing defendant's tracks on the surface to take a train standing at the station, was killed by cars suddenly switched onto the track she was crossing. Defendant was held negligent. *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

It was negligence not to provide guards to handle a crowd which there was reasonable cause to anticipate. *Illinois C. R. Co. v. Treat*, 75 Ill. App. 327.

Where defendant has used ordinary care to make the approaches to its station safe, it is not liable to a licensee in the use thereof. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Where the caboose carrying plaintiff as a passenger had stopped reasonably near a station platform long enough to permit her to alight, defendant was not liable for carrying her beyond her destination. *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

That one is intoxicated is no excuse for maintaining a dangerous stairway from defendant's platform. *Chicago &c. R. Co. v. Lawrence*, 96 Ill. App. 635.

To protect itself from liability for injuries from particular exit, carrier must prevent its use. *Chicago &c. Transfer Co. v. Schmelling*, 99 Ill. App. 577.

A passenger, who on hearing the name of his station called out, steps out in the night after the train has come to a stop, and alights in a culvert, may recover for injuries received. *Columbus &c. R. Co. v. Farrell*, 31 Ind. 408.

Platform need not be such as to enable one to get off either end of the train. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

Ordinary and reasonable care to secure safety is the rule applicable to platforms and not the highest degree of diligence. *Hiatt v. Des Moines &c. R. Co.*, 96 Iowa, 169.

A person was injured by a trunk, the accident occurring by reason of an employé's negligence and by the platform being coated with ice, and recovered. *A. T. &c. R. Co. v. Johns*, 36 Kas. 769.

Plaintiff was not negligent *per se* in going out upon a platform again, during a stop for refreshments, after he had eaten and returned to the car. *St. Louis &c. R. Co. v. Coulson*, 8 Kan. App. 4.

A platform is sufficiently lighted where it is such as to enable passengers to ascertain by the exercise of reasonable care that the platform and not the ground opposite is to be used as a means of exit. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 37 S. W. Rep. 952.

See, also, *Louisville &c. R. Co. v. Ricketts*, 93 Ky. 116;

It was held error in a charge to present the issue as to whether there was sufficient light to make a platform safe, when plaintiff was injured by getting off on the side opposite the platform and the issue raised was whether the platform was sufficiently lighted to show him which was the proper side to get off on. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939.

Railroad company was negligent in obstructing the passage from its trains to the waiting-room by a freight train, where no other way out was practicable, so that plaintiff was exposed to a storm. *Louisville &c. R. Co. v. Keller*, (Ky.) 47 S. W. Rep. 1072.

Failure to sufficiently light a platform was held not the proximate cause of injury to plaintiff who left the train while in motion. *Berry v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 699.

Plaintiff was negligent in passing dangerously near a baggage car while passing to an eating house at a meal station, where a safe and

equally convenient route had been provided. *Duvernet v. Morgan's &c. S. Co.*, 49 La. Ann. 484.

Reasonable diligence in providing a safe steamboat landing is all that is required. *Bacon v. Casco Bay &c. Co.*, 90 Me. 46.

It was held negligence to leave a dangerous hole in a dark toilet room with an open door from it leading into the waiting-room of a depot, open for the sale of tickets. *Jordan v. New York &c. R. Co.*, 165 Mass. 346; s. c., 32 L. R. A. 101.

Plaintiff was himself negligent in walking off the end of a platform, invisible on account of insufficient light. *Bradley v. Grand Trunk R. Co.*, 107 Mich. 243.

Plaintiff, coming to a depot to see a friend off, at dusk ascended the steps of a platform. During a half hour's wait it had become dark and on her return she forgot the steps, stepped off the platform and fell. The lamp at the steps was not lighted. Judgment for defendant notwithstanding a verdict. *Emery v. Chicago &c. R. Co.*, 77 Minn. 465.

A passenger who alights at a flag station and on account of extraordinary rains is obliged to step into a pool of water has no action for injuries resulting from wetting her feet. *Alabama &c. R. Co. v. Stacy*, 68 Miss. 463.

Conductor had promised to transfer passenger from one train to another, at a safe place, but, instead, stopped the train near a deep water-way into which passenger fell; recovery was allowed. *Griffith v. Missouri Pac. R. Co.*, 98 Mo. 160.

It was negligent as a matter of law to leave unguarded and unlighted for four days in a station platform four feet above the ground, a hole six feet long and eight inches wide. *Fullerton v. Fordyce*, 144 Mo. 519.

Invitation by company's employes charges it with greater responsibility. *Chance v. St. Louis &c. R. Co.*, 10 Mo. App. 351.

One making his way back to the station, after alighting from train, fell into a cattle guard and recovered. *Winkler v. St. Louis &c. R. Co.*, 21 Mo. App. 99. See *Lewis v. Flint &c. R. Co.*, 54 Mich. 58.

A railroad's duty as to station platform requires only the exercise of ordinary care to keep it in a reasonably safe condition. *Robertson v. Wabash R. Co.*, 152 Mo. 382.

Inclination of  $\frac{1}{2}$  inch to a foot from platform to "crossover," held not negligent construction. *Newcomb v. New York &c. R. Co.*, (Mo.) 69 S. W. Rep. 348.

Defendant was negligent, where, notwithstanding plaintiff's negligence in placing himself in a dangerous position on a platform, by the exercise of reasonable care it could have discovered his danger in time to have avoided injury. *Zumault v. Kansas City &c. Air Line*, 71 Mo. App. 670.

Defendant was negligent, where the train was not drawn up to its platform and the gate of the car was opened for plaintiff to get out upon the ground. *Talbot v. Chicago &c. R. Co.*, 72 Mo. App. 291.

Knowledge that an approach to a platform was constructed on a steep incline did not make plaintiff negligent in using it. *Union P. R. Co. v. Evans*, 52 Neb. 50.

Failure to open a station as a waiting room, as required by statute, imposes liability for damages resulting therefrom. *Boothby v. Grand Trunk R. Co.*, 66 N. H. 342.

That there was another safe way did not make it negligent for plaintiff to use a customary passage between a ticket office and a baggage room which is apparently safe; defendant was negligent where it knew or should have known of the danger and failed to remedy it. *Exton v. Central R. Co.*, 62 N. J. L. 7; s. c. aff'd, 63 id. 356.

Where a safe exit has been provided a railroad is not liable for passage at any other place, which it has not invited a passenger to use. *Abbott v. Delaware &c. R. Co.*, 65 N. J. L. 310.

Failure to light and guard a freight platform did not relieve plaintiff of consequences of his negligence in using it, without knowing whether it was safe or not. *Railroad Co. v. Aller*, 56 Oh. St. 754.

Failure to light a walk over a street temporarily erected for the use of passengers during a freshet was not negligence *per se*. *Finseth v. Suburban R. Co.*, 32 Or. 1; s. c., 39 L. R. A. 517.

The presence of a step on depot platform, upon which plaintiff fell, was not in itself proof of negligence in the company. *Graham v. Penn. R. Co.*, 139 Pa. St. 149.

Plaintiff, while standing on a platform, was struck by the body of a woman hurled against him by a passing train, while she was negligently on an adjacent crossing. He was not allowed to recover. *Wood v. Pennsylvania R. Co.*, 177 Pa. St. 306; s. c., 35 L. R. A. 199.

That the track was 20 inches below the level of the platform did not permit recovery, where plaintiff jumped off the second step of the car. *Kurfess v. Harris*, 195 Pa. St. 385.

The duty as to reasonable safety extends throughout the grounds leading to the station. Defendant held liable for leaving cut, made in process of grading, at the edge of its grounds without light or guard. *Izlar v. Manchester &c. R. Co.*, 57 S. C. 322.

A railroad company cannot avoid a statutory duty to light a platform by contracting with another to do it. *Texas &c. R. Co. v. Reich*, (Tex. Civ. App.) 32 S. W. Rep. 817.

Railway held liable for injuries received by falling in an unguarded

hole in the floor of a station closed. *Texas &c. R. Co. v. Neal*, (Tex. Civ. App.) 33 S. W. Rep. 693.

The lighting of the platform must be sufficient to enable persons to board or alight from trains in safety. *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

Refusal to charge that plaintiff could not recover for failure to open, warm and light a station, where he would not have used it if it had been, was held error. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 41 S. W. Rep. 499.

Failure to sell tickets at a station is no evidence of abandonment, where they are sold to it and trains stop there. *Gulf &c. R. Co. v. Williams*, 21 Tex. Civ. App. 466.

Only reasonable care is required as to the keeping of a station platform in a condition of safety. *Trinity &c. R. Co. v. O'Brien*, 18 Tex. Civ. App. 690.

Carrier was not liable for injury to plaintiff on a dark night by falling through a hole in a part of the platform known to him to be reserved exclusively for freight. *Houston &c. R. Co. v. Grubbs*, (Tex. Civ. App.) 67 S. W. Rep. 519.

Carrier was not obliged to keep a place 130 feet from its station, to which passengers have no occasion to go, lighted and in a safe condition. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 733.

Defendant was bound to use extraordinary care to prevent passengers from alighting upon a narrow platform between two tracks so constructed as to be dangerous to passengers. *Illinois C. R. Co. v. Davidson*, 76 Fed. Rep. 517.

Defendant was held liable to an owner of baggage, permitted or invited to enter a baggage room to point out baggage wanted, for injuries from a defective door. *Illinois C. R. Co. v. Griffin*, 80 Fed. Rep. 278.

It was negligence *per se* to use, deliberately and in spite of warning, a wet and dangerous slippery entrance to a steamer, where a safe gang-plank is provided. *Plant Invest. Co. v. Cook*, 85 Fed. Rep. 611.

It was negligence *per se* to go to the edge of an unlighted platform on a dark rainy night to sit down, assuming that it is level with the ground. *Missouri &c. R. Co. v. Turley*, 85 Fed. Rep. 369; *rev'g s. c.*, (In. Terr. App.) 37 S. W. Rep. 52.

Failure to take steps to prevent the practice of throwing mail bags upon a platform from a moving train, is negligence, provided the company has notice, express or implied, of the practice. *Southern R. Co. v. Rhodes*, 86 Fed. Rep. 422.

The duty towards those who come upon a platform to deliver parcels to passengers, as to its safety, is no greater than that of a municipality as to its sidewalks. *Clark v. Howard*, 88 Fed. Rep. 199.



Whether a railroad company has performed the duty it owes the public about its grounds in a given case is a question for the jury; it is not necessarily limited by the company's rules. *New England R. Co. v. Hyde*, 101 Fed. Rep. 401.

Where a woman in the night-time and while the lamp on the platform was being trimmed, walked out upon the platform and fell off, no recovery was allowed. *Reed v. Axtell*, 84 Va. 231.

A railroad company is responsible to one who was injured by reason of its failure to provide a safe approach to its mail car where it was shown to be a custom for people to deposit mail on the train. *Hale v. Grand Trunk R.*, 60 Vt. 605.

Negligence in approaching an unlighted platform was for the jury. *Sullivan v. Delaware &c. Canal Co.*, (Vt.) 47 Atl. Rep. 1084.

Passenger may assume platform of station is safe. She is not required to go beyond ordinary care in looking out for dangers. Not negligent in stepping backward on platform while assisting children to get on. *Barker v. Ohio River R. Co.*, (W. Va.) 41 S. E. Rep. 148.

It is negligence *per se* to leave a hole unguarded where it is likely passengers will fall into it. *Green v. Penn. R. Co.*, 36 Fed. Rep. 66.

Plaintiff was a passenger and entitled to recover for injuries received by the falling of a lantern on defendant's boat, if his purpose was to take passage, although he did not prepay his fare, nor purchase a ticket. *Mellquist v. The Wasco*, 53 Fed. Rep. 546.

A passenger has a right to rely upon directions of a conductor as to the best way of getting on train. *Irish v. Northern Pac. R. Co.*, 4 Wash. 48.

It was negligence in a passenger to leave a platform at a safe distance away and go within dangerous proximity to a burning oil tank. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

The fact that there was no station platform and plaintiff injured her knee in alighting from defendant's train did not make the company liable, it being shown that her knee had been weak before. *McGinney v. Canadian Pac. R. Co.*, 7 Manitoba L. R. 151.

Railroad companies are bound to furnish lights, and other facilities for passengers on depot platforms. *Peniston v. Chicago &c. R. Co.*, 34 La. Ann. 777; *Quaife v. C. & N. W. R. Co.*, 48 Wis. 513; *Beard v. Connecticut &c. R. Co.*, 48 Vt. 101; *Stewart v. International &c. R. Co.*, 53 Tex. 289; *Nicholson v. Lancashire &c. R. Co.*, 3 Hurls. & Colt. (Exch.) 534; *Buenemann v. St. Paul &c. R. Co.*, 32 Minn. 390; *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124.

Railroad companies must provide means for safe egress. *Stewart v. I. & G. &c. R. Co.*, 53 Tex. 289; *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124; *Patten v. Chicago &c. R. Co.*, 32 Wis. 533; *Imhoff v. Chi-*

cago &c., 20 id. 364; *Osborn v. Union Ferry Co.*, 53 Barb. 629; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 211; *Columbus &c. R. Co. v. Farrell*, 31 Ind. 408; *Jeffersonville &c. R. Co. v. Parmalee*, 51 id. 42; *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519; *Ensley R. Co. v. Chewaing*, 93 Ala. 242; *Stokes v. Suffolk &c. R. Co.*, 107 N. C. 178; *East Tenn. &c. R. Co. v. Watson*, 98 Ala. 634.

(a). INJURIES FROM OPENINGS BETWEEN PLATFORM AND CARS.

The plaintiff, about to enter the defendant's car from the depot platform, was preceded by a lady whose dress covered the space between the platform of the station and the platform of the car, and plaintiff stepped without looking: her foot passed through the space and she was injured. The fact that similar accidents had happened at other stations was properly received and was sufficient to call the attention of the defendant to the danger of such a condition, yet, as there must be some space between the cars and the platform, the fact that other accidents had happened would not render the defendant negligent, for the passenger, by the use of reasonable care in boarding cars, could have avoided the accident. She was familiar with the station and took no pains to avoid the opening and she was guilty of contributory negligence. *Hanrahan v. M. R. Co.*, 53 Hun, 420, setting aside verdict for the plaintiff; *aff'd*, 130 N. Y. 658.

The plaintiff stood on the platform, not connected with the depot but used to take certain trains; a train not stopping at the platform, and the sides of whose cars protruded over the platform from three to five inches, hit and hurt the plaintiff. He was not obliged to guard against the improper construction of the defendant's cars and his own negligence was for the jury. *Dobieck v. Sharp*, 88 N. Y. 203; distinguishing *Rigg v. M. S. &c. R. Co.*, (Part 1,  $\frac{1}{2}$  2 Jurist. N. S.) 525; *Watkins v. Great Western R. Co.*, 37 L. T. (N. S.) 193.

A passenger fell between the car and the station, where there was a space of eleven inches. The plaintiff did not take hold of the rail of the car, nor pay attention to the station platform. Such platform had been in use for many years without accident. Where a structure has proven adequate for many years it may be continued.

On the evening when this accident happened, the evidence tends to show that it was dark, that the platform was not plainly visible. It was somewhat lighted by light, which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing, until her foot touched the platform, and

then she would have been safe. It was not the duty of the defendant to furnish some one to aid her in alighting from the car. *Lafflin v. B. & S. W. R. Co.*, 106 N. Y. 136, rev'g judg't for pl'ff.

If, on account of a curve of the track at the terminal station, a space, several feet long, between the platform of the car and the platform of station is necessary, a plank or some device to make it safe should be used or the passengers should be warned or assisted or at least the place should be well lighted.

While some light came through the car windows, it did not reach the hole, which was in the shadow of the end and lower part of the cars.

If plaintiff had known of the hole, or if it had been light enough for her to see by the exercise of ordinary care, a different question would have been presented. Under the circumstances, which she had the right to assume, existed, she was under no obligation, as matter of law, to look before she put her foot down, but it was a question of fact for the jury to decide, not only, whether she should have been more vigilant; but, also, whether, if she had looked, she could have seen the hole in the surrounding darkness. *Boyce v. Manhattan R. Co.*, 118 N. Y. 314; affirming 22 J. & S. 286, and judg't for pl'ff; as to lighting such places see *Fox. v. Mayor*, 70 Hun, 181.

A station was located on a curve convex toward the track, causing an inevitable opening of from five to seven and three-quarter inches (plaintiff and her witnesses so guessed) between the station and the ends of the car. The fact of its existence was not evidence of negligence.

But, if the necessary opening is so wide at a given station, as to exceed the ordinary natural step of a passenger, it may become a source of danger and require further precaution on the part of the company. *Ryan v. Manhattan R. Co.*, 121 N. Y. 126, rev'g judg't for pl'ff, distinguishing, *Boyce v. Manhattan R. Co.*, 118 N. Y. 314, as in that case, no negligence was imputed to the company for the existence of the opening, but for leaving it unguarded and unlighted.

**From opinion.**—"In her testimony she (plaintiff) estimated by the eye that the width of the opening was fourteen to fifteen inches. *She did not* notice the opening at all, until just as she was lifted out of it, and was looking straight at the car and not at the opening when she stepped in. This was contrary to her habit and without any apparent reason. No one else stepped into the opening. The other passengers seem to have found no difficulty and encountered no risk. She alone, paying no attention to her steps, went blindly into the opening. If she had exercised even ordinary care there is no reason to suppose that her safety would have been endangered."

A platform of a station was on a curve whereby the ends of the car were, by plaintiff's statement, eighteen to twenty inches from the platform, and the center of the car from four to seven inches therefrom, and

by the defendant's statement the ends of the car were eleven and one-half inches and the center one inch therefrom. The plaintiff usually got off at the center of the car, but on this occasion alighted at the end of the car and fell into the opening. The evidence was conflicting as to whether the station was dark or brilliantly illuminated. Under the same conditions a large number of persons had boarded and alighted from the cars without similar accident. There was no evidence that appliances for covering such openings were in general use. A recovery was reversed on the ground that the question of negligence depended wholly upon the proper lighting of the place and not upon the existence of the space. The plaintiff's claim that she was jostled by other passengers did not enlarge the defendant's liability. *Fox v. Mayor*, 70 Hun, 181.

Where defendant's platform was so constructed as to leave a space between its edge and the edge of its car platform of from 8½ to 12 inches, which passengers in a crowd could not see, though the platform was well lighted, it owed its passengers the duty of warning them of the danger, though a general one was sufficient and specific warning to each was not called for. *Langin v. New York &c. Bridge*, 10 App. Div. 529.

Defendant was not liable to a passenger, who, on alighting from a car, the last step of which was 14 inches above the platform, catches his foot in a space six inches wide between the car and the platform. *Gabriel v. Long Island R. Co.*, 54 App. Div. 41.

Negligence in leaving space of 26 inches between cars and station guardrail was for the jury. *Barth v. Kansas City &c. R. Co.*, 142 Mo. 535.

#### (b). SNOW AND ICE.

It is the duty of a railway company to remove snow and ice from the station platform, or protect the passengers by covering it with ashes, &c. It is no excuse that servants appointed to do this neglected their duty. A passenger may assume that the platform is safe. The charge "that the defendant was not bound to keep its platform in such condition, that it would have been impossible for any passenger to slip, but in such condition that a person, using the ordinary care which people use, when not apprised of danger, would not slip" is correct. The degree of care imposed upon the defendant in respect to passengers is quite different from that imposed upon one, who simply permits the public, by bare license to go upon his premises. *Weston v. N. Y. Elevated R. Co.*, 73 N. Y. 595, aff'g judg't for pl'ff.

A snow storm ended at 4 A. M. and the accident occurred at 5:30 A. M. There was a covered stairway with a projecting roof, a hand rail and rubber on the stairs. The plaintiff, "B's" intestate, slipped and was killed.

The defendant was only bound to use ordinary care and was not liable; it could not properly be charged with negligence for a failure to throw on the steps ashes, sawdust, or something of that character during the storm, or between the time of its stopping and the happening of the accident; and that, therefore, the motion for nonsuit should have been granted. In the approaches to the cars, such as platforms, halls, stairways and the like, a less degree of care is required than in the actual operation of trains, and for the reason, that the consequences of a neglect of the highest skill and care, which human foresight can attain to are naturally of a much less serious nature. The rule, in such cases, is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. *Kelly v. Manhattan R. Co.*, 112 N. Y. 443, rev'g judg't for pl'ff.

Plaintiff slipped on icy and steep gangplank of defendant's boat, which he was crossing to take passage; defendant's employé seized him while falling and pulled him so violently on the deck, that he fell and broke his leg. Employé acted within the scope of his employment. *Simonin v. N. Y., L. E. & W. R. Co.*, 36 Hun, 214, aff'g judg't for pl'ff.

Plaintiff's wife fell on steps of defendant's station; snow the day before. The day of the accident, it had thawed in the middle of the day, and the dripping from the roof falling on the stairs froze during the night and became slippery; no ashes or sand were sprinkled on the steps, although some was sprinkled on the platform. Question of reasonable care was for the jury. *Ainley v. M. R. Co.*, 47 Hun, 206, aff'g judg't for pl'ff.

Passenger slipped on station platform, while alighting from the defendant's cars. There had been snow the day before. Day of accident there was snow and sleet and hard wind, and the platform was slippery; no sand or ashes on platform. For jury. A different rule is applicable to the portion of the platform where passengers must alight from that relating to parts of platform, that passengers had option to use or not. *Timpson v. Manhattan R. Co.*, 52 Hun, 489, aff'g judg't for pl'ff.

No recovery was allowed where plaintiff, while going down a flight of steps slippery from a fall of snow, slipped on a step slightly worn from use, in the absence of evidence to show how long the snow had been allowed to remain or that the worn condition of the step contributed to the accident. *Rusk v. Manhattan R. Co.*, 46 App. Div. 100.

Permitting ice to accumulate on a platform from dripping eaves without an effort to remove it is negligence; but it is contributory negligence, knowing of its existence, to step back upon it without looking. *Waterbury v. Chicago & C. R. Co.*, 104 Iowa, 32.

Plaintiff was not negligent in assuming that a car was at the platform

when snow so covered a ditch as not to indicate the contrary. *Chesapeake &c. R. Co. v. Friel*, (Ky.) 39 S. W. Rep. 704.

Failure to warn passenger, alighting at a place beyond the station on invitation of brakeman, of the slippery condition of a rail of a side track covered by snow, was negligence. *Mensing v. Michigan C. R. Co.*, 117 Mich. 606.

Where the accumulation of ice was upon steps at the end of the platform obviously designed for the use of employes only, plaintiff could not recover. *De Blois v. Great Northern R. Co.*, 71 Minn. 45.

Where one or more safe and convenient planked crossings had been provided for access to trains over intervening tracks, a company was not liable for accident caused by stepping on a rail in crossing in the snow elsewhere. *Cincinnati &c. R. Co. v. Wagner*, 15 Oh. C. C. 395.

Knowledge that a sloping platform was slippery with an accumulation of ice and snow did not make it negligent *per se* to use it, though steps were provided. *Rathgebe v. Pennsylvania R. Co.*, 179 Pa. St. 31.

Failure to light platforms to enable passengers to alight in safety is negligence. *Texas &c. R. Co. v. Lee*, 21 Tex. Civ. App. 174.

Mere slipperiness, caused by the elements, did not permit recovery by one going upon the platform to deliver parcels to a passenger. *Clark v. Howard*, 88 Fed. Rep. 199.

#### (c). SNOW AND ICE—PLATFORM OF CAR.

A thin covering of snow on platform of a car, and some slight spots of ice, along the edges of the platform, were gathered during the trip. It had snowed during the night, and the weather was cold. The platform was well constructed with the proper steps and rail.

The plaintiff fell from the platform and was hurt. It was held that the defendant was not obliged to remove snow that had fallen through the night, or sand the platform at once. The rule holding railroad corporations to the use of the utmost care in discovering defects has regard only to such appliances as will be likely to occasion great danger if the defects exist therein.

It appeared, that the plaintiff was aware of the condition of the platform, having passed over it two or three times, previous to the accident, and slipped thereon. It was held, that if the defendant were negligent, the plaintiff was negligent also. *Palmer v. Pennsylvania R. Co.*, 111 N. Y. 488, rev'g judg't for pl'ff.

From opinion.—“The rule laid down by the trial court in *Weston v. New York Elevated Railroad Company*, as approved in 73 New York, 595, in reference to a permanent platform at an elevated railroad station in the city of New York, was that ‘the defendant was not bound to keep its platform in such a condition that it would have been impossible for any passenger to slip, but in such a con-

dition that a person using ordinary care, which people use when not apprised of danger, would not slip.' This was applied in a case where the snow had fallen long before the accident, and an effort had been made by the railroad company to remove it, but it had imperfectly performed that duty. We think even such a rule is not applicable to the removal of snow and ice on cars attached to a railroad train in course of transit, traveling in the night, during a continuous storm. The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes, in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad company owes to its passengers.

We are not referred to any case laying down the precise degree of care and diligence required of such corporations under such circumstances, but we think it must be somewhat analogous to that imposed upon municipal corporations, in respect to the removal of snow and ice from public streets. Those corporations are required to remove dangerous accumulations of snow or ice in a street or public place within a reasonable time after they have occurred; but they are not to be deemed negligent if they do not remove all traces of such obstructions, when they do not constitute something more than the presence of a danger, arising alone from their inherent quality of being slippery. *Taylor v. Yonkers*, 105 N. Y. 202; *Kinney v. City of Troy*, 108 id. 570; *Kaveny v. City of Troy*, id. 572."

The duty as to the safety of platforms does not extend to the front one of an express car. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Negligence is not proven where there is a rain and snow storm and it does not appear how long the steps have been slippery. *Pittsburg &c. R. Co. v. Aldridge*, 27 Ind. App. 498.

Failure to remove snow on a step likely to cause one to slip was negligence; a warning given as she fell was ineffectual to charge plaintiff with contributory negligence. *Gilman v. Boston &c. R. Co.*, 168 Mass. 454.

The degree of care as to keeping platform and steps of cars free from ice, is the utmost care in view of the natural conditions met with. *Herbert v. St. Paul &c. R. Co.*, 85 Minn. 341.

## VI. Entering and Leaving Vehicles.

### (a). WHERE PASSENGER MAY DO SO.

The carrier should provide stations at which passengers may enter and leave cars, and should use reasonable and ordinary care to make the same safe, and a passenger should only use the places so appropriated and prepared by the carrier. However, the direction or invitation of the carrier's agent, the necessities of the occasion, or the custom of the carrier, or other circumstances may justify such entry or alighting at other places. The passenger should use the reasonable care that a man of ordinary prudence would observe under the circumstances.

Unless permitted to do so, by the custom of the company, a passenger may only enter or leave a train, at the station, provided by the company.

But when the company has been in the habit of receiving and discharging passengers at other places, it is not negligence for passengers to get on or off, at those places, while the train is standing still, and there is no apparent danger in so doing. *Keating v. N. Y. C. & H. R. Co.*, 49 N. Y. 673; aff'g 3 Lansing, 469, judg't for pl'ff.

It was for the jury to say whether plaintiff was negligent, upon the announcement of the arrival of his train by a doorman, in rushing out of a station with other passengers and across a track to a platform preparatory to boarding the train there without looking or listening for other trains. *Beecher v. Long Island R. Co.*, 161 N. Y. 222; aff'g s. c., 35 App. Div. 292.

The plaintiff purchased an excursion ticket issued in the name of the defendant from Norwood to Jersey City and return. Returning, she went beyond Norwood to Sparkill with the intention of returning to Norwood by another train. She attempted to take such train while standing at a place, not a station, and was injured by the starting of the train. Held, that at time of taking the train at Sparkill she held no contractual relation to the defendant and could not recover, and that under the circumstances stated, where a person attempts to take a train with no conductor or brakeman in sight, the defendant is not liable for the consequences. *Phillips v. N. R. Co. of N. J.*, 62 Hun, 233, aff'g judg't for def't.

See *Hulburt v. N. Y. C. R. Co.*, 40 N. Y. 145.

A railway company is bound to provide a reasonably safe place at which its passengers may leave its cars, and to have its train stop long enough to permit a diligent passenger to do so.

A passenger leaving the cars of a railway company is bound to use caution, and the question of contributory negligence should be submitted to a jury to determine. *Onderdonk v. The New York and Sea Beach Railway Company*, 74 Hun, 42; s. c., aff'd, 148 N. Y. 756.

Where a car is in its accustomed position at the platform of a railroad station, open and apparently ready to receive passengers, it is an invitation to persons desiring to take the train to enter the car. *Daley v. The Port Jervis, Monticello and New York Railroad Company*, 80 Hun, 174.

As to its stations, a railroad is bound only to provide a reasonably safe place and to guard against accidents reasonably to be apprehended by prudent men. *Kirby v. Delaware &c. Canal Co.*, 20 App. Div. 473; second appeal, 48 id. 636; s. c. aff'd, 169 N. Y. 575.

It was for the jury to say whether defendant, who had carried plaintiff past her station, was negligent in stopping at a place, where there was a steep embankment, for the purpose of allowing her to alight and whether



she was negligent in alighting there and sliding down such embankment. *Minor v. Lehigh Valley R. Co.*, 21 App. Div. 307.

See, also, *Flack v. Nassau & C. R. Co.*, 41 App. Div. 399.

Where defendant had been accustomed to allow passengers to board its freight trains while standing some distance away from stations; it was for the jury to say whether plaintiff was negligent in backing its engine up to such a train so as to injure one who was in the act of entering at such a place and whether plaintiff was negligent in attempting to board under such circumstances. *Jones v. New York & C. R. Co.*, 46 App. Div. 470.

When chains, used to keep passengers from boarding a particular side of a car platform are down, this constitutes an invitation to enter on that side. *Gaffney v. Brooklyn City R. Co.*, 6 Misc. (N. Y.) 1; s. c. aff'd, 148 N. Y. 725.

It is negligence *per se* for a passenger, on leaving a train, to crawl between cars. *Memphis & C. R. Co. v. Copeland*, 61 Ala. 376.

*Smith v. Chicago & C. R. Co.*, 55 Iowa, 33; *Baltimore & C. R. Co. v. State*, 63 Md. 135.

Stoppage of a train, after name of station is called, is reasonable ground upon which to suppose that the stoppage is for the purpose of allowing passengers to alight; but if it occur in a deep cut two hundred yards from the platform no recovery will be allowed one who is injured while alighting. *Smith v. Georgia & C. R. Co.*, 88 Ala. 538.

Where plaintiff has been induced to board by carrier's immediate invitation, it is not sufficient to hold the train a reasonable time for her to do so; but it must be held till she has actually done so, though her attempt to board was unknown to the conductor. *Alabama Midland R. Co. v. Horn*, (Ala.) 31 South Rep. 481.

Carrier was liable for stopping car for plaintiff to alight in the dark at a place where it had left a pile of lumber in the street during repairs on a bridge. *Montgomery Street R. Co. v. Mason*, (Ala.) 32 South Rep. 261.

A statute, imposing upon railroads the duty to carry passengers on local freight trains to and from all stations, requires carriage to some point within the station yards not unreasonably distant from its platform. *St. Louis & C. R. Co. v. Neal*, 66 Ark. 543.

Passenger may rely on directions of a conductor as to getting off, though addressed to the passengers in general, where she does as they, in the exercise of reasonable prudence, might have done. *St. Louis & C. R. Co. v. Baker*, 67 Ark. 531.

Where station is announced, carrier must warn passengers that a stop before it reaches the station is not the station; especially where the ap-

pearances of the place are deceptive. *St. Louis &c. R. Co. v. Farr*, (Ark.) 68 S. W. Rep. 243.

Getting on a platform car surrounded by a railing on the side opposite the depot by putting a foot on the bumper, when proper facilities and opportunity to board are furnished on the depot side, is negligence. *Wardlaw v. California R. Co.*, (Cal.) 42 Pac. Rep. 1075.

Crossing a track from a depot to board a train on a farther track, without looking to see if other trains are approaching, on the one crossed, held negligence *per se*. *Warner v. Baltimore &c. R. Co.*, 7 App. D. C. 79.

Failure to assist one in alighting was not negligent in the absence of knowledge of his infirmity. *Daniels v. Western &c. R. Co.*, 96 Ga. 786.

The flagman at a flag station was acting within the scope of his employment in attempting to assist a passenger on, where the car stopped at a place so low that she could not get on without it. *Western &c. R. Co. v. Voiles*, 98 Ga. 446; s. c., 35 L. R. A. 655.

Passenger was not negligent *per se* in leaving a street car on the side adjoining the next track without looking for a car thereon. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

Voluntary promise of assistance in alighting, does not require a conductor to go inside to the seat, in the absence of knowledge of facts requiring it. *Western &c. R. Co. v. Earwood*, 104 Ga. 127.

Leaving the caboose of a freight train open and at a place where people had been in the habit of boarding it, constitutes an invitation by the company to enter the same. *Illinois Cent. R. Co. v. Azley*, 47 Ill. App. 307.

But passenger before attempting to get off, should know that the stoppage is for that purpose, or make his intention to get off known. *Chicago &c. R. Co. v. Mills*, 91 Ill. 39.

*Davis v. Oregon &c. R. Co.*, 8 Ore. 172; *Stiles v. Atlanta &c. R. Co.*, 65 Ga. 370; *Frest v. Grand Trunk &c. R. Co.*, 10 Allen, (Mass.) 387.

But where this is done by invitation of the conductor, the question of contributory negligence is for the jury. *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162.

Conduct of employes, inducing one to alight at an unsafe place, is negligence. *Ward v. Chicago &c. R. Co.*, 165 Ill. 462; rev'g s. c., 61 Ill. App. 530.

Where a car stops, though at the nearest crosswalk instead of the furthest as required by ordinance, one may assume that it was done to enable her to alight. *West Chicago Street R. Co. v. Manning*, 170 Ill. 417; aff'g s. c., 70 Ill. App. 239.

Where a train stopped regularly before going over a crossing to receive passengers, it was for the jury to say whether the company had

induced the public to believe that they were invited to board there. *Chicago &c. R. Co. v. Doan*, 195 Ill. 168; *aff'g s. c.*, 93 Ill. App. 247.

Freight train need not proceed to station platforms for passenger's accommodation before it does the necessary switching. *Cleveland &c. R. Co. v. Maxwell*, 59 Ill. App. 673.

It was not negligence to pile gravel along the track in a place where there was no reason to suppose anyone would get off. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

Leaving at the rear entrance, where the brakeman and conductor are at the front is not negligence *per se*. *Pierce v. Gray*, 63 Ill. App. 158.

Passenger is entitled to rely on conductor's advice as to when and where to alight. *Chicago &c. R. Co. v. Winters*, 65 Ill. App. 435.

A passenger was not justified in refusing to alight from caboose of a freight train because it was not drawn up to the platform. *Chicago &c. R. Co. v. Stonecipher*, 90 Ill. App. 511.

It is not *per se* negligence to board a passenger train at a point other than the depot platform. *Stoner v. Penn. R. Co.*, 98 Ind. 384.

Plaintiff was warranted in attempting to step from the ground to car, a distance of 3 feet, relying on assistance of employé promised her. *Illinois C. R. Co. v. Cheek*, 152 Ind. 663.

Where a train does not stop before the platform designed for the reception and discharge of passengers there is no implied invitation to board it. *Cleveland &c. R. Co. v. Wade*, 18 Ind. App. 346.

Brakeman was acting within the scope of his authority in assisting a passenger to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

It was held negligence for plaintiff to walk in the dark within three feet of the train he had just left, knowing it will soon move on. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939.

Where plaintiff, instead of requiring that the train back to the platform, chose to alight where it stopped, she took the risk of the attending dangers. *Louisville &c. R. Co. v. Keith*, (Ky.) 58 S. W. Rep. 468.

The jury should decide the question of a railroad company's negligence, in failing to notify a passenger, about to alight from the wrong side of the train, that his act was dangerous. *McKimble v. Boston &c. R. Co.*, 139 Mass. 542.

See, also, *McLean v. Burbank*, 11 Minn. 277; *Maury v. Talmadge*, 2 McLean, (U. S.) 157; *Laing v. Colder*, 8 Pa. St. 479; *Stokes v. Saltonstall*, 13 Peters (U. S.) 192; *Montgomery &c. R. Co. v. Boring*, 51 Ga. 582; *Penn. R. Co. v. White*, 88 Pa. St. 327.

One is not justified in alighting from a train without using one's senses to see if the station is reached, relying solely on the announcement of the

station by the guard followed by the stopping of the train. *Barry v. Boston &c. R. Co.*, 172 Mass. 109.

Where the street was fairly level and plaintiff in good health, it was not negligence to permit her to alight slightly beyond the crossing. Plaintiff stepped on a rolling stone between the car and side walk and fractured her ankle. *Conway v. Lewiston &c. R. Co.*, 90 Me. 199.

There is no rule of law that passengers shall get off the front platform of cars; therefore, it is not negligence for a woman to alight from a rear platform and if she is injured by reason of the company's failure to provide facilities, she may recover for her injuries. *Cartwright v. Chicago &c. R. Co.*, 52 Mich. 606.

Citing *Penn. R. Co. v. White*, 88 Pa. St. 327; *Baltimore &c. R. Co. v. State*, 60 Md. 449; *Cockle v. London &c. R. Co.*, 27 L. T. R. (Eng.) 320; *Nicholson v. Lancashire &c. R. Co.*, 3 H. & C. 534; *Foy v. London &c. R. Co.*, 18 C. B. (N. S.) 225.

Negligence to permit passenger to alight at unfamiliar place 250 feet from station without warning. *Kral v. Burlington &c. R. Co.*, 71 Minn. 422.

Negligence in getting off when the car stopped at a crossing instead of waiting till it reached the station was for the jury. *Larson v. Minneapolis &c. R. Co.*, 85 Minn. 387.

See, also, *Schilling v. Winona &c. R. Co.*, 66 Minn. 252.

One may assume on the stopping of the train after a reasonable time from the announcement of the station, in the absence of knowledge to the contrary, that the train is there. *Hooks v. Alabama &c. R. Co.*, 73 Miss. 145; *Talbot v. Chicago &c. R. Co.*, 72 Mo. App. 291.

A passenger who was told that a car was not ready to be used, and going out upon the platform of the car alighted, and while standing near it was injured, did not recover. *Henry v. St. Louis &c. R. Co.*, 76 Mo. 288.

Carrier is under no duty to assist passenger in leaving train unless he is sick or infirm to its knowledge. *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152.

Getting off, as the train is on a bridge, in spite of warnings not to do so, is criminal negligence preventing recovery within a statute making carrier liable for injuries unless caused by criminal negligence of plaintiff. *Chicago &c. R. Co. v. Hague*, 48 Neb. 97.

Inviting one to alight in the dark, where step is 26 inches from the ground, was negligent. *Delaware &c. R. Co. v. Perret*, 60 N. J. L. 589.

One who alights on invitation of conductor has the right to rely upon his judgment and is not negligent if he does so rely. *Lambeth v. North Car. &c. R. Co.*, 66 N. C. 499.

St. Louis &c. R. Co. v. Cantrell, 37 Ark. 519; Stewart v. I. & G. &c. R. Co., 53 Tex. 289; see, however, Chicago &c. R. Co. v. Hazzard, 26 Ill. 373; Georgia R. Co. v. McCurdy, 45 Ga. 288.

One who was injured while attempting to get a seat before the train was lighted or ready for occupants, cannot recover. *Hodges v. Transit Co.*, 107 N. C. 576.

A regulation requiring passengers for a car on freight train to mount the same at a place other than the station platform, is reasonable providing safe means of approach are afforded. *Browne v. Raleigh &c. C. Co.*, 108 N. C. 34.

Where the station has been twice announced, and the door open, a passenger was justified in relying on the porter's exclamation "all right." *Hodges v. Southern R. Co.*, 120 N. C. 555.

That one regards the place as dangerous, did not make it negligent *per se* for him to alight at the direction of the conductor. *Hinshaw v. Raleigh &c. R. Co.*, 118 N. C. 1047.

One may assume, in the absence of knowledge to the contrary, that a train has reached the station, when it stops after the announcement of the station. *Pittsburg &c. R. Co. v. Martin*, 3 Oh. Dec. 493.

A shipper in the caboose of a freight train was held negligent in relying on the statement of one having nothing to do with the running of the train, that it has reached its destination, especially when there were no station lights in sight. *Blevins v. Atchison &c. R. Co.*, 3 Okla. 512.

Where plaintiff testified that train stopped 15 seconds and started again before she could get off, she was not, as matter of law, negligent in not alighting within that time. *Smitson v. Southern P. Co.*, 37 Or. 74.

Where a passenger walked out in his sleep, stepped off the unguarded end of a car, and was injured, it was held that his negligence precluded recovery, notwithstanding the company was negligent. *Railroad Co. v. Aspell*, 23 Pa. St. 147.

Passenger was negligent in leaving the station by a space planked across the track for the use of employes instead of by the overhead crossing provided for passengers; especially where the train that struck him was going at moderate speed and could have been seen when 60 feet away. *Flanagan v. Philadelphia &c. R. Co.*, 181 Pa. St. 237.

It was not negligent to get on at the front end of a car where facilities were provided at both ends. *Peterson v. Delaware &c. R. Co.*, 9 Kulp, 552.

Plaintiff was not negligent *per se* in jumping 2½ feet to the ground, upon the conductor's announcement "all off for —," where no other

facilities for alighting were furnished. *Brodie v. Carolina &c. R. Co.*, 46 S. C. 203.

Where defendant failed to assist a woman with heavy bundles, her husband has a right to enter the train to render the service, and defendant, having notice of his intention, is bound to stop to let him off, where he was an old man and had not had an opportunity to leave after giving the required assistance. *Johnson v. Southern R. Co.*, 53 S. C. 203.

The recovery of a penalty for violation of a statutory duty to announce a station, being a *qui tam* action, does not cover injuries from alighting. *Louisville &c. R. Co. v. Collier*, 104 Tenn. 189.

It is not negligence *per se* for a passenger to alight from a train when he had reason to suppose that the stop was made for the purpose of discharging passengers. *Texas &c. R. Co. v. Garcia*, 62 Tex. 285.

*Southern R. Co. v. Kendrick*, 40 Miss. 384; *C. & I. &c. R. Co. v. Farrell*, 31 Ind. 408; *Cockle v. South Eastern &c. R. Co.*, 27 L. T. R. (Eng.) 320; *Robson v. North Eastern R. Co.*, L. R. 10 Q. B. 271; *Curtis v. Detroit &c. R. Co.*, 27 Wis. 158; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441; *Terre Haute &c. R. Co. v. Buck*, 96 id. 346; *Philadelphia &c. R. Co. v. McCormick*, 124 Pa. St. 427.

Plaintiff was not negligent in jumping obliquely, to avoid a ditch in alighting, with valises in each hand, upon the conductor's announcement. "all aboard," others having done so in safety. *Texas &c. R. Co. v. McLane*, (Tex. Civ. App.) 32 S. W. Rep. 776.

A conductor is not authorized to bind the company by an agreement to assist one from the train. *St. Louis &c. R. Co. v. McCullough*, (Tex. Civ. App.) 33 S. W. Rep. 285.

See, also, *International &c. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663.

The highest degree of care which a very cautious, prudent and competent person should exercise is required as to alighting. *Houston &c. R. Co. v. Dotson*, 15 Tex. Civ. App. 73.

Where notice has been given a brakeman of a stranger's intention to board in order to assist a passenger, it was not necessary to notify the conductor, to entitle him to protection in getting off again, where the conductor acted on the brakeman's signal in starting the train. *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

Failure to have a platform on the proper side for boarding did not permit recovery for injury while attempting to board from the opposite side, the ground being level on both. *St. Louis &c. R. Co. v. Casseday*, (Tex. Civ. App.) 40 S. W. Rep. 198.

Whether negligent announcement of station was proximate cause of injury received on alighting in the dark before station was reached, was for the jury. *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643.

Only a reasonably safe place for alighting must be furnished, not one absolutely so. Defendant not responsible for injuries caused by jumping at direction of third person, when train had stopped after passenger was carried past station. *Texas &c. R. Co. v. Woods*, 15 Tex. Civ. App. 612.

Where a train stands at a station ready for passengers, there need be no express invitation to warrant one's attempting to board. *Texas Midland R. Co. v. Brown*, (Tex. Civ. App.) 58 S. W. Rep. 44.

The high degree of care used by a very cautious, prudent and competent person, under similar circumstances, entitles one who has entered a train by mistake to have it stopped and to have an opportunity to alight at a suitable place. *Gary v. Gulf &c. R. Co.*, 17 Tex. Civ. App. 129.

Where defendant had notice that plaintiff only boarded to assist a passenger, it was bound to give him sufficient time to accomplish his purpose and get off; and he was not negligent in attempting to get off after the train had started. *International &c. R. Co. v. Satterwhite*, 19 Tex. Civ. App. 170.

Failure to give proper assistance in alighting, placing the step box, which was too small, too far under the steps and on uneven ground, was negligence. *Missouri &c. R. Co. v. White*, 22 Tex. Civ. App. 424.

It is not sufficient to hold a train long enough to enable one to alight but it must be held till she has actually alighted, where those in charge in fact know that she is in the act of alighting. *Louisville &c. R. Co. v. Harmon*, (Tex. Civ. App.) 64 S. W. Rep. 640.

One, getting aboard to assist passengers notifying conductor of his intentions, was not negligent, where the train started before he had time to get off and he was thrown by a sudden lurch in attempting to do so. *Texas &c. R. Co. v. Funderburk*, (Tex. Civ. App.) 68 S. W. Rep. 1006.

Failure to light, or warn passengers of, a dangerous gang plank, was negligence, though defendant had no control over the wharf. *Scanlan v. Tenney*, 72 Fed. Rep. 225.

It was negligent to go towards a train, which had run past a station before it could be stopped, when it was so dark that it could not be seen which way it was moving, or whether moving at all. *St. Louis &c. R. Co. v. Whittle*, 74 Fed. Rep. 296.

Defendant's duty was not discharged by providing a safe platform on side intended for passengers' use; but, where platform on the other side is dangerous, it must give warning not to alight on that side. *Illinois C. R. Co. v. Davidson*, 76 Fed. Rep. 517.

Where a passenger walked out in his sleep, stepped off the unguarded end of a car. and was injured, it was held that his negligence precluded recovery, notwithstanding the company was negligent. *Richmond &c. R. Co. v. Morris*, 31 Grattan (Va.) 200.

Defendant's duty is not discharged by properly securing the boat to a gang plank, but it must see that it continues so. *Croft v. Northwestern S. Co.*, 20 Wash. 175.

Where it was customary to stop at a certain place, though a few feet from the platform, it was not negligent to alight there. *Carroll v. Burleigh*, 15 Wash. 208.

A passenger by the direction of a watchman walked toward caboose, at some distance from the station, and fell into cattle guard. The company was negligent. *Hartwig v. Chicago &c. R. Co.*, 49 Wis. 358; *Delamatyr v. Milwaukee &c. R. Co.*, 24 id. 578; *Curtis v. Detroit &c. R. Co.*, 27 id. 158.

Brakeman invited plaintiff, a woman of 53, weighing 216 pounds, to alight on frozen ground 26 inches from the step, and in assisting her off, gave her a slight pull, causing her to lose her balance and fall. Company held negligent. *Werner v. Chicago &c. R. Co.*, 105 Wis. 300.

#### (b). INJURIES FROM OTHER CARS.

A carrier should not, while receiving or discharging passengers from a train, allow another train to approach the station, so as to endanger the safety of passengers; but a passenger should not, except within the rule last above stated, alight from or enter the cars on the side of the train away from the station or platform, or in a manner not provided by the carrier.

A person, knowing that the caboose of a freight train was taken at a point one-quarter of a mile from the depot, and familiar with the locality, walked toward it on the main track, where his view was unobstructed, and, stopping on the way for pressing necessity, stepped behind some empty cars on the next track, against the other end of which, some empty cars were propelled, whereby the person was run over and killed. Held, that such person was *per se* negligent and should have been nonsuited. *Van Schaick v. H. R. R. Co.*, 43 N. Y. 527, rev'g judg't for pl'ff.

A passenger train came to the station and stopped; the engineer of a freight train coming in the opposite direction ran between the passenger train and the station, whereby a passenger starting to take the passenger train, was killed. The statutory signals did not relieve the defendant, and the rule as to looking and listening had no application. Contributory negligence was for the jury. *Terry v. Jewett*, 78 N. Y. 338; affirming 17 Hun, 395.

Citing *Klein v. Jewett*, 26 N. J. Eq. 474; affirmed, 27 id. 550, and distinguishing *Warren v. Fitchburg R. Co.*, 8 Allen, 227, where it seemed to be held that something beyond looking might be required of a passenger.



The plaintiff's intestate, a girl of seventeen, with an old lady, alighted from the defendant's train at East Syracuse and started to walk across many tracks, without looking to see if there were any trains and was killed by a train on one of the tracks. The defendant was held liable because a passenger taking or leaving a car may assume, that the carrier will provide a safe passage to and from the train. *Brassell v. N. Y. C. & H. R. R. Co.*, 84 N. Y. 241.

Citing *Terry v. Jewett*, 78 N. Y. 338.

There were two car tracks in the street and the plaintiff stood between the two to enter a car, which he had stopped, when he was hit by a car which he had seen fifty or seventy-five feet away, and to which he then paid no further attention. He was negligent. *Davenport v. Brooklyn City R. Co.*, 100 N. Y. 632.

Where a railway company, by its own conduct and published regulation, has led the public to believe that trains will not be run at specified times, persons having occasion to cross its tracks can rely on doing so safely.

A person who had been a passenger stepped off from the car, and, while going across the track, was killed. It did not appear for what purpose the deceased was going across the westerly track, away from station, but it was stated that he sometimes got off and communicated with relatives and friends, living near by on the west side. He had not ceased to be a passenger. *Parsons v. N. Y. C. & H. R. R. Co.*, 113 N. Y. 355; affirming 37 Hun, 128 and judg't for pl'ff.

The plaintiff alighted at a depot from the defendant's train on the side thereof away from the depot, and, in passing over another track, was struck by another train moving at a speed not exceeding two or three miles per hour and ringing a bell. Neither the engineer nor the fireman saw the plaintiff and he did not see the train because the steam from the other train, starting from the depot, obstructed his view. Defendant was not negligent.

A rule of the defendant, prohibiting trains from approaching stations, when other trains were discharging passengers had no application, as the train from which the plaintiff alighted had discharged its passengers and both trains were moving. *Goldberg v. N. Y. C. & H. R. R. Co.*, 133 N. Y. 561, rev'g judg't for pl'ff.

Plaintiff's intestate was walking between two tracks to take a train standing at the depot, and on the side away from the depot was struck by a gravel train approaching without signal, and was killed. Contributory negligence. *Elwood v. N. Y. C. & H. R. R. R. Co.*, 4 Hun, 808, affirming nonsuit.

Passenger, alighting from defendant's west bound train, was obliged

to cross the east track to reach the depot, and did so without looking on such east track, whereon, without signal, a train approached and killed him. For jury. Although the plaintiff was negligent, yet, as the defendant could with reasonable care have prevented the accident, it was for jury. *Green v. Erie R. Co.*, 11 Hun, 333, reversing nonsuit.

Deceased fourteen years and seven months old, was killed by a pusher in the defendant's depot, when she was about to take a train. One of the defendant's employes thought she was about to go in front of the train and he seized her, and, she, misunderstanding the attention, wheeled around in front of the pusher and was killed. For jury. *Pinco v. N. Y. C. & H. R. R. R. Co.*, 34 Hun, 80, aff'g judg't for pl'ff; s. c. aff'd, 99 N. Y. 644.

Passenger alighted from train at defendant's depot just before its motion ceased, and was struck by a train on the adjoining track, which he might have seen by looking. If the jury found that leaving the train, while moving, contributed nothing to the injury, the same would not preclude recovery. *Van Ostran v. N. Y. C. & H. R. R. R. Co.*, 35 Hun. 590, aff'g judg't for pl'ff.

Citing, on subject of defendant's liability, *Gonzales v. N. Y. & H. R. R. R. Co.*, 39 How. 407; *Terry v. Jewett*, 17 Hun, 395; affirmed, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 241. And on contributory negligence, *Gonzales v. N. Y. C. & H. R. R. R. Co.*, 39 How. 407; *Dickens v. N. Y. C. R. R. Co.*, 1 Keyes, 23; s. c., 1 Abb. Ct. App. Dec. 504; *Green v. Erie Ry. Co.*, 11 Hun, 333; *Terry v. Jewett*, 78 id. 395; affirmed, 78 N. Y. 338; *Brassell v. N. Y. C. & H. R. R. Co.*, 84 id. 241; *Armstrong v. N. Y. C. & H. R. R. R. Co.*, 66 Barb. 437.

**From opinion.**—"In *Mitchell v. Chicago & Grand Trunk Railway Company* (12 Am. & Eng. R. R. Cases 163), the train on which the plaintiff was a passenger stopped, as was usual, at a crossing just before reaching the station (the name of which having been called out), the plaintiff left her seat, went out, and as she was getting off, the train started and she fell and was injured. There was nothing at that spot to indicate a landing place, and the statute, as well as usage, required trains to come to a stop there. The Michigan court held that negligence cannot be presumed where nothing is done out of the usual course of business, unless that course is improper; that the starting of the train after such stoppage was contemplated by the law, "*and that passengers must take the responsibility of informing themselves concerning the every day incidents of railway traveling.*" That case and *Michigan Central Railroad Company v. Coleman* (28 Mich. 440), and *Pennsylvania Railroad Company v. Zebe* (33 Penn. St. 318; id. 37 id. 420) are distinguishable from the one at bar, although they may not be entirely in harmony with some cases in this state. And the same may be said of *Bancroft v. B. & W. Railroad Company* (97 Mass. 275.) There the plaintiff's intestate came into the station of defendant's double track railroad in a train, and was landed on the side of the track required of trains going in that direction, and after the train left he started to go across the tracks at an unusual place, although facilities were furnished by the company for persons to cross, and before he reached the platform he was struck by a train going in the opposite direction on the other track and killed. It appeared that the

habit and place of crossing were known to him. The court held that the defendant, *having provided a convenient and accessible place of egress from the platform on which he stepped upon leaving the train, was not liable, and that when a person unnecessarily goes upon a track, he voluntarily incurs the risk of consequences, etc.*

In *Wheelwright v. Boston & Albany Railroad Company* (135 Mass. 225), the plaintiff resided near and north of the defendant's road, which was a double track with landing platforms on either side, that for the east bound trains was on the south side and she to take such train, about the time it came in, proceeded to cross over the tracks from the north to the south side and was struck by a train going west. She did not go at the crossing provided by planking; but people frequently, without objection, had been in the habit of so crossing. The court held that "she was attempting to cross at a place not designed or adapted for crossing, at which the defendant held out no invitation or inducement for her to cross," and that she could not recover. That case is also distinguishable from this one, in respect to the question under consideration, and apparently so. There may seemingly be some difference in the view of the courts in the different states in respect to the measure and application of duty on the part of railroad companies required to protect persons proceeding to take and depart from the trains as passengers, but that the *relation of passenger is assumed when he gets his ticket and is properly proceeding to take the train, and does not terminate when he leaves the car, but continues until he has reasonable opportunity to leave the train and roadway of the company after the train reaches the station to which he is entitled to be carried, is a generally adopted proposition.* *Warren v. Fitchburg R. R. Co.*, 8 Allen 227.

The case of *Siner v. Great Western Railway Company* (L. R. 3 Exch. 150; s. c., 4 id. 117), has not necessarily any application. There the passenger in alighting from a car at a place beyond the landing platform received an injury, and it was held that it was chargeable to the negligence of the plaintiff. It was daylight, and if it was a safe place to get off the injury was needless, and if she could not do so with safety it was apparent to her, and she was in fault in making the attempt to do so."

Railway excursion train, on which was a regiment of soldiers, with open cars for Creedmoor, stopped at switch, where was a switch house, to let another train pass. Plaintiff got off to get water, and, hearing signal to start hurried back and was hit by the opposite train. For the jury to say whether defendant was negligent, in not giving warning of coming of another train, as soldiers are likely to get off; in running opposite train on intervening track; in using speed of thirty-five to forty miles an hour; in attempting to pass without stopping or whistling; in ringing bell and summoning passengers for waiting train just as opposite train was passing. Jury could say whether placing and leaving train on the switch was negligence. *Wandell v. Corbin, as Receiver*, 38 Hun, 391, reversing nonsuit.

The defendant's trains on its elevated railway were blocked, and after some moment's delay the conductor announced to the passengers, some of whom were laboring men, "all who are afraid of being late for work,

get off." Thereupon over fifty got out upon an adjoining walk thirty inches wide, provided by the company for its employes, and proceeded quietly "laughing and talking" to the station platform. Many of these reached the platform, and some had stepped on the tracks in order to ascend to the platform of the station, when the train they had just left, without notice or warning, was moved towards and upon them; those on the track tried to save themselves by getting on the walk, and others pressed outward and backward and a panic ensued. There were cries and shouts and as a result eleven men, including the plaintiff, fell to the pavement below. The evidence was sufficient to impute negligence to the defendant and lack of contributory negligence on the part of the plaintiff. The proximate cause of the injury was not the leaving of the train by the plaintiff, under the circumstances disclosed. The defendant was bound to exercise ordinary care. *Weiler v. M. R. Co.*, 53 Hun. 372, aff'g judg't for pl'ff, aff'd, 127 N. Y. 669.

Action for personal injuries. The plaintiff, after purchasing a ticket for passage on the defendant's railroad, waited for his train going east, which, at that point, according to schedule time, was past due. While waiting, a fast train, eastward bound, passed the station, which the plaintiff supposed was his train, and he passed from the depot over some of the tracks of the defendant's road for the purpose of boarding it. The fast train passed without stopping, and the plaintiff, to avoid a westward-bound train, which at that time was approaching, stepped back and was hit and injured by a freight car which was in process of being switched, and was moving slowly, either from gravity or its own momentum, detached from any engine. For jury. *Hempenstall v. N. Y. C. & H. R. Co.*, 82 Hun, 285.

Plaintiff was negligent *per se* in starting to walk from a train to a station several hundred feet away along a track shut in on one side by his train and on the other by adjoining buildings; where, to escape an approaching train, which he knew to be about due and which could have been heard, but for the noise in such building, he had to walk a distance of 95 feet, unless he happened to be opposite a three-foot door on one side or the steps of his train on the other. *Mills v. New York & C. R. Co.*, 5 App. Div. 11.

Verdict for plaintiff was not sustained, where he got off one car and crossed an adjoining track in full view of a car approaching thereon, even if defendant had not complied with its rule forbidding one car to pass another while the latter is stopping. *Doyle v. Albany R. Co.*, 5 App. Div. 601; second appeal, 32 id. 87 (judgment for plaintiff reversed as against weight of evidence).

Where, in such a case, plaintiff testified that, after alighting from and

passing around rear of car on up track, he crossed the down track and did not see the car until he stepped upon the track, the conclusion was unavoidable that, had he used the ordinary prudence required in looking, he would have seen it. *Landrigan v. Brooklyn &c. R. Co.*, 23 App. Div. 43.

Where defendant maintains a path along and across its tracks for the convenience of passengers in reaching its station, they are not bound in using it to exercise the same duty to look and listen as travelers are in using a highway crossing. *Warfield v. New York &c. R. Co.*, 8 App. Div. 479.

Plaintiff was negligent *per se* in either standing on the track or attempting to pass through a picket fence separating the different tracks, while a train was in plain sight for 900 feet. *Riester v. New York &c. R. Co.*, 16 App. Div. 216.

Plaintiff, a passenger on an open street car, was allowed recovery where, having lost his hat between the track on which his own car was standing and the adjoining track, he looked, and seeing no car coming on the other track, though his view of that track was partially shut off by standing cars and a curve in the track, started to pick it up, but, before he could get away, a car came along on the adjoining track and injured him. *Thomas v. Union R. Co.*, 18 App. Div. 185.

Defendant was grossly negligent in running its express train between a train in the act of stopping and its station. It was not negligent *per se* for the plaintiff, hearing the announcement of his station, to alight and proceed toward the station without looking across the track he had to cross as he might assume that defendant would afford him safe passage. *Jewell v. New York &c. R. Co.*, 27 App. Div. 500.

See, also, *Beecher v. Long Island R. Co.*, 35 App. Div. 292; s. c. aff'd, 161 N. Y. 222.

Negligence to run a train 30 miles an hour, seven minutes ahead of time, past a local taking on passengers at a station. *Barkley v. New York &c. R. Co.*, 35 App. Div. 228.

A usual speed of 30 miles an hour past a station is not negligence, where the train is on schedule time, the track is straight, and there are no other conditions making it peculiarly dangerous. *St. Louis &c. R. Co. v. Denty*, 63 Ark. 177.

If one train is allowed to pass another while the latter is stopping to receive and discharge passengers, appropriate signals must be given. *Capital Traction Co. v. Lusby*, 12 App. D. C. 295.

The extraordinary diligence for the protection of passengers is due by one street car toward passengers of another alighting dangerously near it on a parallel track. *Atlanta &c. R. Co. v. Bates*, 103 Ga. 333.

Where one is required to cross a track in order to board a train he may assume that the movement of trains thereon will be regulated accordingly. *Chicago &c. R. Co. v. Ryan*, 165 Ill. 88; aff'g s. c., 62 Ill. App. 264.

So, in alighting, he may assume that he will not be exposed to danger by passing trains. Where passengers were accustomed to alight on side opposite the station without hindrance or warning it was not negligence *per se* to do so. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169; aff'g s. c., 68 Ill. App. 635.

Car going north stopped at both street crossings. The running of the car going in the opposite direction at 12 miles an hour past it, was not negligent, or in violation of rules against going fast past a car stopped or about to stop, as it might be assumed that all passengers had alighted at the first crossing. *Ackerstadt v. Chicago &c. R. Co.*, 194 Ill. 616.

It was negligent to run a fast train on a track, over which passengers are going to or coming from another train standing at a depot. *Chicago &c. R. Co. v. Czaja*, 59 Ill. App. 21; *Chicago &c. R. Co. v. Ryan*, 62 Ill. App. 264; *Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490; *Chicago &c. R. Co. v. Kelly*, 182 Ill. 267; aff'g s. c., 80 Ill. App. 675; *Chicago &c. R. Co. v. Jennings*, 89 Ill. App. 335; *Chicago &c. R. Co. v. Chancellor*, 60 Ill. App. 525.

Duty of providing a safe opportunity to alight extends to a stockman accompanying his cattle; it was negligence to induce him to alight just as another train, running at excessive speed, was passing. *Chicago &c. R. Co. v. Winters*, 65 Ill. App. 435.

Otherwise where the width between the tracks is such to allow one to protect himself by the exercise of reasonable care, which he fails to exercise through heedlessness. *Chicago &c. R. Co. v. Weir*, 91 Ill. App. 420.

In absence of statute or ordinance, negligence *per se* cannot be predicated of any rate of speed on depot grounds. *Heiss v. Chicago &c. R. Co.*, 103 Iowa, 590.

Passengers to board a train may assume that the tracks necessary to be crossed will be kept clear. *Weeks v. New Orleans &c. R. Co.*, 40 La. Ann. 800.

A passenger who is obliged to pass over an intervening track to reach his train need neither look nor listen, but may assume the way to be safe. *Baltimore &c. R. Co. v. State*, 60 Md. 449.

*Warren v. Fitchburgh R. Co.*, 8 Allen 227; *Gaynor v. Old Colony &c. R. Co.*, 100 Mass. 208; *Klein v. Jewett*, 26 N. J. Eq. 474; *Weeks v. New Orleans &c. R. Co.*, 40 La. Ann. 800.

A passenger alighting from a train on the track furthest from the

depot has no right to assume that trains would not pass on the other tracks. *Connolly v. N. Y. &c. R. Co.*, 158 Mass. 8.

See *Atchison &c. R. Co. v. Shean*, 18 Colo. 368.

Plaintiff was negligent in crossing tracks to reach a station to wait for a train, where the view was obstructed by a train on the first track, but between it and the second track she had six feet in which the view was unobstructed. *Winslow v. Boston &c. R. Co.*, 165 Mass. 264.

Where one has been invited to enter a train, he is not *per se* negligent in failing to see if other cars are backing towards it. *Moore v. Saginaw &c. R. Co.*, 119 Mich. 613.

It was negligent *per se* to pass through a space of four feet between the rear ends of two trains to gratify curiosity as to cause of delay, especially where there was a safe opening at a street crossing 50 yards away. *Illinois C. R. Co. v. Strauss*, 75 Miss. 367.

Carrier was negligent in backing north-bound cars along a south-bound track, without light or signal at the end thereof. *Fleming v. Kansas City &c. R. Co.*, 89 Mo. App. 129.

Question of plaintiff's negligence was for the jury, where in order to reach his car he was compelled to get off the platform because it was crowded, and was injured by a passing train. *Union Pac. R. Co. v. Sue*, 25 Neb. 772.

Having the right to presume that a rule of the company prohibiting one train passing another while standing to receive or discharge passengers will not be violated, it was not negligence *per se* to fail to look or listen before crossing a track between a train and the station after alighting. *Atlantic City R. Co. v. Goodin*, 62 N. J. L. 394.

Reasonable notice that a passenger, who has just alighted from a street car, must cross an adjoining track, imposes on the car coming in the opposite direction on that track the duty of giving reasonable warnings of its approach. *Cincinnati Street R. Co. v. Snell*, 54 Oh. St. 197; s. c., 32 L. R. A. 276.

But failure of one getting off to look before crossing the other track, is negligence. *Toledo &c. R. Co. v. Lutterbeck*, 11 Oh. C. C. 279.

When about to board a train known to be approaching it was negligent to stand so near as to be hit by locomotive. *Penn. R. Co. v. Bell*, 122 Pa. St. 58.

No recovery was allowed a person injured by the backing of a coal train, when he stood between the tracks instead of on the platform. *McGeehan v. Lehigh Valley R. R. Co.*, 149 Pa. St. 188.

Though one has looked for a car from the opposite direction, his view being obstructed by the car he alighted from, he is negligent in crossing

behind it after hearing a shout of warning. *Gray v. Ft. Pitt Traction Co.*, 198 Pa. St. 184.

Plaintiff was not negligent *per se* in jumping from a stalled car where he sees that there is danger of another colliding with it. *Quinn v. Shamokin &c. R. Co.*, 7 Pa. Super. Ct. 19.

Whether it is negligence to run one train at high speed past a station near the time at which another is discharging passengers, is for the jury. *Girton v. Lehigh Valley R. Co.*, 17 Pa. Super. Ct. 143.

Judgment for plaintiff was sustained, where, in crossing in front of a train at a station, his position prevented his accurately judging the speed of the train and he gauged his distances, on the assumption that it was going at the rate prescribed by ordinance. *Gulf &c. R. Co. v. Wagley*, 15 Tex. Civ. App. 308.

See, also, *St. Louis &c. R. Co. v. Casseday*, 92 Tex. 525.

The conductor of a train on a siding at a depot called out, "all aboard," whereupon plaintiff, unable to see on account of the crowd, stepped in front of a second train approaching on the main track, which, though proceeding at unusual speed, had signalled. Defendant was held negligent. *Gulf &c. R. Co. v. Morgan*, (Tex. Civ. App.) 64 S. W. Rep. 688.

A train passing at a speed of twenty miles an hour, another train which was stopped to let passengers off, is proof of negligence. *Chicago &c. R. Co. v. Lowell*, 151 U. S. 209.

The implied invitation to cross a track and board a train waiting to receive passengers, warrants one in assuming that trains thereon will be so regulated as not to expose him to danger. The rules in regard to pedestrians at crossings do not apply to such a case. *Warner v. Baltimore &c. R. Co.*, 168 U. S. 339; *Alabama &c. R. Co. v. Coggins*, 88 Fed. Rep. 455; *Graven v. McLeod*, 92 id. 846; *Chesapeake &c. R. Co. v. King*, 99 id. 251.

But where one crosses tracks to take a train with a ticket in his pocket, without going to the station or notifying the company's officers of his intention to become a passenger, he is not entitled to extraordinary care at its hands. *Southern R. Co. v. Smith*, 86 Fed. Rep. 292; s. c., 40 L. R. A. 746.

Defendant was not negligent in backing its train, where the night was dark and it did not know that plaintiff, after flagging the train had attempted to follow and board it, after it had run past the station before it could be stopped. *St. Louis &c. R. Co. v. Whittle*, 74 Fed. Rep. 296.

A passenger is not negligent *per se* in attempting to cross an adjoining track immediately behind his own car without stopping to look



or listen. He was struck by a car going in the opposite direction, which was bearing down on the crossing without signaling and at high speed while the first car was discharging passengers. *Smith v. Union Trunk Line*, 18 Wash. 351.

(c). INJURIES FROM ACTS OF THIRD PERSONS.

A carrier should use reasonable and ordinary care, in receiving and discharging passengers, to avoid injuries to them from the acts of third persons, or, in the case of street cars, from the condition of the street within its duty to repair.

A hook and ladder company truck was coming rapidly behind a street car, and a car was on the opposite track. The conductor was warned to go on, but he stopped his car and insisted that the passenger, wishing to stop at that point, should alight. While plaintiff was on the platform for that purpose, she was struck by the hook and ladder. The carrier was liable, as it was bound to carry safely, and know where it was safe to stop. *Maverick v. Eighth Ave. R. Co.*, 36 N. Y. 378, aff'g judg't for pl'ff.

But see *Black v. Brooklyn City R. Co.*, 108 N. Y. 640, where a person attempting to board a car was thrown by a car going in opposite direction on another track.

Plaintiff was injured as a result of a disturbance on the crowded platform of an elevated railroad car caused in part by defendant's guard. The car and the platform were so crowded that the gates could not be entirely closed while the car was in motion as required by statute. It was held that there was evidence of negligence and plaintiff was not guilty of contributory negligence as matter of law in boarding the crowded platform, and it was error to dismiss the complaint. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Express agent moving truck over platform has not paramount right, and his warning of danger is not a protection, if he runs upon and injures some one. He must run it carefully and prudently, so as not to needlessly expose one to danger. Action was against express company. *Palmer v. Platt*, 27 Hun, 534, aff'g judg't for pl'ff; s. c. aff'd, 98 N. Y. 628.

While trucks were going from ferry boat, the door of the ferry house was opened to let the crowd of passengers go on the boat. Plaintiff's intestate was jostled by the crowd, of which he was a part, so as to be killed by a truck passing off. Defendant was negligent and liable. *Tonkins v. N. Y. Ferry Co.*, 47 Hun, 562, aff'g judg't for pl'ff; s. c. aff'd, 113 N. Y. 653.

*Distinguishing Loftus v. Union Ferry Co.*, 84 N. Y. 555.

The mere fact that a postal clerk throws off a mail bag at a certain place, without previous knowledge on the part of the railroad company of his intention to do so, does not constitute negligence on the part of the company.

Action to recover damages for a fall upon the platform of a railroad company's station, through alleged failure to sufficiently light its platform; the court in effect charged that the jury might predicate actionable negligence upon the failure of the defendant to light its depot sufficiently to enable the plaintiff to avoid the obstacle which caused her fall, without reference to the circumstance whether or not an obstacle of that kind had ever been there before.

Defendant's counsel asked and the court refused to charge that, if the jury believed that the platform would have been lighted sufficiently, for the purposes of the passengers getting on and off the cars with safety, if the mail bag (which was the obstruction which caused the plaintiff's fall) had not been thrown where it was, and if it was the first time that the mail bag had been thrown off there, the defendant was not liable. Error.

It was a question of fact, under the evidence, whether the mail bag had ever been thrown off before in the way of passengers, and, if so, whether the defendant, through its proper agents, knew it, or in the exercise of reasonable care, ought to have known it. *Ayers v. The Delaware, Lackawanna & Western Railroad Company*, 77 Hun, 414.

Defendant's negligence in permitting its platform to become so overcrowded that a passenger was forced up against a car and his foot caught between the car and the platform, was properly submitted to the jury; but it was reversible error to submit to them the question of its negligence in starting the car, in spite of plaintiff's order not to start, when it was not aware of his perilous position. *Dawson v. New York & C. Bridge Co.*, 31 App. Div. 537.

A conductor, knowing that several passengers with bundles desired to alight at a place where a conductor is needed to prevent passengers pushing or crowding, is negligent in absenting himself from the car before reaching it. *Baldwin v. Fair Haven & C. R. Co.*, 68 Conn. 567.

A railroad company which permits mail bags to be thrown upon its depot platform from swiftly moving trains, is answerable to one rightly upon such platform, who is injured in consequence of such practice. *Ohio & C. R. Co. v. Simms*, 43 Ill. App. 260.

That a crowd pushed a passenger on the platform over to where there was a defective board, was no defense as defendant was bound to anticipate crowding. *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414.

Plaintiff was negligent in running, without looking, across the

vehicle exit of a ferryboat dangerously close to an approaching team. *Hoboken Ferry Co. v. Feist*, 58 N. J. L. 198.

Negligence in getting on from the wrong side was for the jury, where plaintiff was pushed off the platform by the crowd and the attendant, in parting the crowd for the train, pushed him to the wrong side. *Begly v. Pennsylvania R. Co.*, 201 Pa. St. 84.

Defendant's negligence was for the jury, where it appeared that the platform was crowded as usual, but that there were no guards to prevent accident and that the train came in at a dangerous rate of speed causing plaintiff to be knocked down by a person riding on the platform. *Muhlhouse v. Monongahela Street R. Co.*, 201 Pa. St. 237.

(d). STREET CARS—INJURY FROM THE CONDITION OF THE STREET.

A child thirteen years old was ordered, by some one in authority, on the rear platform of a street railway car, to get on by the front platform, and while going there it slipped on the edge of accumulated snow in the street. For the jury. *Mowery v. Central City R. Co.*, 51 N. Y. 666.\*

The plaintiff sought to enter the rear platform of the defendant's street car, which was moving slowly; the platform being full, he passed towards the front platform and slipped and was thrown under the wheels by snow that had been thrown up by the defendant's snow plow and sweepers, and had become icy. Although the defendant simply used and did not own the track, it had assisted in making the ridge, and it was not excused, and question of negligence was for the jury. *Dixon v. Brooklyn City &c. R. Co.*, 100 N. Y. 170.

The repairing of tracks compelled defendant to land its passengers some distance short of the usual stopping place near a ferry. Plaintiff, to reach the ferry, passed around the rear end of the car and, in crossing the street, stepped on one of a number of loose rails laid in a continuous line along the street. The rail tilted and threw her. Judgment for the plaintiff was affirmed. *Wells v. Steinway R. Co.*, 18 App. Div. 180.

A street car company employed a contractor to dig a trench alongside its tracks. Car was stopped opposite a street corner for plaintiff to alight

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\* NOTE.—Chap, 565, Laws New York, 1894. "Sec. 93, REPAIR OF STREETS; RATE OF SPEED; REMOVAL OF ICE AND SNOW.—Every such corporation so long as it shall continue to use any of its tracks in any street, avenue, or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue, or public place between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation, and such authorities may make such reasonable regulations and ordinances as to the rate of speed, mode of use of tracks, and removal of ice and snow, as the interest or convenience of the public may require. A corporation whose agents or servants will fully or negligently violate such an ordinance or regulation, shall be liable to such city or village for a penalty not exceeding five hundred dollars to be specified in such ordinance or regulation."

on a dark night without warning and she fell into the ditch. The company was held liable for her injuries. *Wolf v. Third Avenue R. Co.*, 67 App. Div. 605.

Defendant was sued for injury due to a hole in the asphalt pavement within the line next its tracks, which it was by law obliged to take care of. The defendant, was entitled to have the jury consider, on the question of its negligence, the fact that the city had contracted with the company that laid the pavement to keep it in repair for five years. *Welch v. Syracuse &c. R. Co.*, 70 App. Div. 362.

Failure to warn a passenger of a dangerous condition of the street at a place at which a car stops for her to alight, is evidence of negligence for the jury. *West Chicago Street R. Co. v. Cahill*, 64 Ill. App. 539; s. c. aff'd, 165 Ill. 496.

Ordinary care required of passengers in alighting does not mean a constant lookout for excavations in the street, especially where they have formerly been guarded. *Lake Street El. R. Co. v. Burgess*, 99 Ill. App. 499.

It was not negligent *per se* to board a car in the proximity of iron poles near the track, while the car is in motion but slowing in response to signal. *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284.

Plaintiff was negligent in getting off and on the rear platform on slippery steps, where he knew that the conductor customarily stood at the front platform to give assistance. *Pittsburg &c. R. Co. v. Aldridge*, 27 Ind. App. 498.

Where a dangerous condition of the street at the place of alighting is known to the carrier and not to the passenger, the former must notify the latter. *Sweet v. Louisville &c. R. Co.*, (Ky.) 67 S. W. Rep. 4.

Failure to see a hole in a cross walk between the tracks which a passenger had the right to assume was safe while looking for a car in the opposite direction upon alighting, was not negligence. *Mahnke v. New Orleans &c. R. Co.*, 104 La. 411.

In the absence of control over the street, a company is not an insurer of the safety of the place at which a person alights. But it is bound to use reasonable care to select a suitable place to stop at. *Conway v. Lewiston*, 87 Me. 283.

Plaintiff stepped on a rolling stone in alighting from a street car. Failure to stop exactly at the street crossing was held not negligence. *Conway v. Lewiston &c. R. Co.*, 90 Me. 199.

Defendant, subject under its charter, to the duty of making repairs, made necessary by its occupation of a highway, stopped to take on plaintiff on a dark night where it had removed a fence and left a ditch. Questions of negligence and contributory negligence were properly submitted to the jury. *Call v. Portsmouth &c. R. Co.*, 69 N. H. 562.

So held also where car was stopped beside a hole in the street into which plaintiff stepped in alighting without looking where she was stepping. *Bass v. Concord Street R.*, 70 N. H. 170.

An instruction to find for plaintiff, if place where she alighted from a street car was dangerous, held error as it did not submit defendant's negligence to the jury. *Foley v. Brunswick Traction Co.*, (N. J. L.) 50 Atl. Rep. 340.

That defendant had never paved the street adjacent to its tracks was no defense for not complying with an ordinance subsequently enacted requiring it to keep it in repair. *Fielders v. North Jersey Street R. Co.*, (N. J. L.) 50 Atl. Rep. 533.

It is not negligence *per se* to jump from the side door of a car instead of leaving by the steps. *Missouri &c. R. Co. v. Hay*, (Tex. Civ. App.) 67 S. W. Rep. 171.

Knowledge that a car had been stopped, a trap door on the platform raised and closed and the journey resumed, did not make it negligent to step thereon in alighting. *Washington v. Spokane Street R. Co.*, 13 Wash. 9.

Passing beyond a crossing without backing to it, was negligence, where the condition of the street where the car stopped was in a dangerous condition. *Vasele v. Grant &c. Electric R. Co.*, 16 Wash. 602.

(e). INJURIES FROM GATES, GUARDS, DOORS, &c.

The same rule of care, as last stated, would apply to gates, guards, doors, etc.

The guard chains on a ferry boat were let down, before the boat was secured, and the foot of an alighting passenger was caught between the boat and the floating bridge. It was held that she was assured that the way was safe by the lowering of the chain, and the defendant was liable. *Ferris v. Union Ferry Co.*, 36 N. Y. 312, aff'g judg't for pl'ff.

The guard not opening the door at a station, the passenger opened it, not shoving it so as to catch it, and stood in the door. The guard signaled the train to start and the door swung to and injured the plaintiff. For jury. *Baker v. M. R. Co.*, 118 N. Y. 533, aff'g 22 J. & S. 394, and judg't for pl'ff.

As the defendant's train approached the station, the trainman opened the door of the car and held it open, whereupon the plaintiff reached the sill of the door just as the train stopped. The stoppage of the car jarred the passenger, who seized the door frame, and the door, released by the brakeman, slammed upon her fingers. There was evidence justifying a verdict for the plaintiff and it was not negligence for the passenger to

leave her seat, and to go towards the door under the circumstances. *Colwell v. M. R. Co.*, 57 Hun, 452, aff'g judg't for pl'ff.

*Wilde v. Northern R. Co.*, 53 N. Y. 156; *Nicholas v. Sixth Ave. R. Co.*, 38 id. 131.

It is negligence for a railroad company to have, suspended above a passageway, a gate which falls very rapidly and cannot be controlled by the operator. The plaintiff testified that he first saw a gate descending upon him when it was about eighteen inches above his head and a little in front of him. He was going fast and continued to advance, but before he could clear the gate it fell upon and injured him. Verdict for plaintiff affirmed. *Keilt v. Staten Island Rapid Transit R. Co.*, 75 Hun, 579.

Where one follows a crowd off ferryboat at night over a gang plank, which she knows has no guard rail and is not lighted, she is negligent *per se* on failing to pay attention to where she is stepping. *Fogassi v. New York & C. R. Co.*, 17 App. Div. 286; aff'g s. c., 19 Misc. 108.

Where defendant's guard allowed the gate of the car to be opened by a passenger without objection before the train had stopped and plaintiff, the night being dark, thought, upon seeing the gate open, that the train had stopped, and stepped off and was injured; it was held error to nonsuit plaintiff. *McAlan v. Trustees &c.*, 43 App. Div. 374.

A passenger, familiar with the adjustments of side bars and steps on an open car at a terminal station in order to reverse its direction, was not allowed to recover for injuries to his knee by the lowering of the step while he was attempting to board. *Clark v. Metropolitan Street R. Co.*, 68 App. Div. 49.

Plaintiff was warranted in relying on the safe mooring of a ferry boat, when invited to go ashore by the opening of the gates, though no gang-plank was provided, and recovered for injuries to her foot caught between the boat and wharf. *Spero v. Long Island R. Co.*, 21 Misc. 683.

Alighting without taking hold of the guard rail to guard against a sudden movement of the car, was not negligence *per se*. *Schaefer v. Central Crosstown R. Co.*, 30 Misc. 114.

Where plaintiff was compelled to stand in defendant's train for want of a seat, and upon the sudden opening of a door, his fingers were caught and crushed, no recovery was allowed. *Murphy v. Atlanta & C. R. Co.*, 89 Ga. 832.

Plaintiff standing near a door of a crowded and dark car, in a tunnel, in the absence of the brakeman, attempted to shut the door to keep out the smoke, and his hand was injured. Plaintiff was not *per se* negligent. *Western & C. R. Co. v. Stanley*, 61 Md. 266.

See, also, *Gee v. Metropolitan R. Co.*, L. R., 8 Q. B. 161.

Nonsuit sustained, where plaintiff fell backward while pulling his foot

loose from the car step where he had caught it in getting off. *Howell v. Union Traction Co.*, (Pa. St.) 51 Atl. Rep. 885.

A man who stands with his hand in the frame of an open door, cannot maintain an action for the brakeman's closing the door, if the brakeman did not see him standing there. *Texas &c. R. Co. v. Ozerall*, 82 Tex. 247.

Where injuries occurred by reason of a large number of people crowding through the only means of exit to a depot, a recovery was allowed. *Taylor v. Penn. R. Co.*, 50 Fed. Rep. 755.

(f.) PREMATURE STARTING AND JERKING CARS—STEAM CARS.

A carrier should allow passengers a reasonable time to enter or alight from its cars, and it is negligent, if it prematurely starts its train, while passenger is entering or alighting, and thereby injure him, or if he has entered it, jerk the train in starting with such unusual, unnecessary and excessive violence as to do him injury; but some disturbance of the equilibrium of persons on cars may be necessary in starting the same, and the passenger, in standing or walking after boarding the car, should use reasonable care to protect himself, and especially is he negligent, if he voluntarily place himself and remain in a position on the train where he is likely to be dangerously affected by such starting or jerking.

It is negligent to suddenly put a train in motion, so as to endanger the safety of passengers, entering or leaving the train. The train was standing still, partly filled with passengers; as plaintiff stepped upon the steps of the car. the train, without any signal or notice, and without any examination by those in charge to ascertain, whether any one was getting on or off, was started with a violent jerk, which threw plaintiff from the car. *Keating v. N. Y. C. R. Co.*, 49 N. Y. 673; affirming 3 Lansing, 469, and judg't for pl'ff.

While a passenger was alighting from a stage, she was thrown and injured by the horse starting up. This fact showed that the horse was not suitable, or the driver incompetent or negligent. *Roberts v. Johnson*, 58 N. Y. 613.

The sudden jerking of a railroad train backward while passengers are rightfully passing out of the cars, is liable to produce accidents, and is negligent. *Sauter v. N. Y. C. R. R. Co.*, 66 N. Y. 50; affirming 6 Hun, 446, and judg't for pl'ff.

The station was called and the train stopped; the plaintiff went on the platform; the car was started backward with a jerk, throwing the plaintiff forward between the cars. The cars then started forward and injured the plaintiff. *Milliman v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 642; affirming 41 Hun, 409, and judg't for pl'ff.

The running of a train beyond the usual stopping place is not *per se*

negligence, nor is delay necessary to reverse the motion, so as to back to the usual place, negligence.

A train ran beyond the station; the brakeman had called the station; the plaintiff was going out when, by a jerk of the train, she was thrown and hurt. Question of negligence was for the jury. *Taber v. D., L. & W. R. R. Co.*, 71 N. Y. 489; affirming 4 Hun, 765, and judg't for pl'ff.

The cars had apparently stopped, and while the plaintiff was on the platform to alight, they were suddenly jerked, and the plaintiff was thereby injured. The train had been either stopped or slowed down so that to her, in the inside of the car, it appeared to have stopped. She was bound to act upon appearances, and after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of passengers, required the train to be so run and managed, as not to endanger their lives, and a sudden jerk, or start, without any warning, when the passengers were upon their feet, moving toward the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to any one in the cars, when the train appeared to have stopped, it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers. *Bartholomew v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 716, aff'g judg't for pl'ff.

The plaintiff was alighting, on a dark night, and placed his foot on the last step, let go the rail, when there was a sudden start of the car, throwing him off. If these facts were true, the defendant was liable, as the passengers must have reasonable time to alight.

The fact that a passenger is proceeding to leave a train at a station where it has stopped, ought, for the purpose of his protection, to be known by the company through its servants, and, therefore, so far as that is essential, it is deemed chargeable with knowledge. *McDonald v. The Long Island R. Co.*, 116 N. Y. 546, aff'g judg't for pl'ff.

Defendant was not negligent in making up a freight train containing a passenger car away from the station so as to cause the cars to come together with force or violence, in the absence of knowledge of plaintiff's presence or of a custom sufficiently established to appraise its servants of the probability of a passenger attempting to enter at that point. Such custom is not established by evidence that, in one instance, the train had been boarded there in sight of the conductor and, in another, upon the invitation of the baggageman and, in few others, without the knowledge or consent of anyone. *Jones v. New York &c. R. Co.*, 156 N. Y. 187; s. c. 41 L. R. A. 490.

Where a train is moving but two miles an hour and there is no peculiar



danger, it is not negligence *per se* to step from the station platform to the train at the invitation of the conductor. Having reached the platform in safety he was thrown off by a sudden jerk of the train; it was for the jury to say whether the accident was not caused by the subsequent mismanagement of the train. *Distler v. Long Island R. Co.*, 151 N. Y. 424; rev'g 78 Hun, 252.

Plaintiff got off the train on the side away from the depot where there was a ditch and near the intersection of the highway; the conductor, not seeing him, signaled the departure of the train, and the plaintiff was thrown. Not unusual for parties to alight from cars on that side of the train, and the negligence was for the jury. *Plopper v. N. Y. C. & H. R. Co.*, 13 Hun, 625; reversing judgment for plaintiff on ground that court charged that it did not constitute contributory negligence to get off side of train opposite from ditch.

An attempt to board or alight from a moving train is negligence *per se*, but the fact that a passenger in a railroad car left his seat and moved towards the door of the car, not, however, attempting to alight therefrom, after the calling out by the conductor of the name of the station which was his destination, is not such negligence as will preclude him from recovering damages from the corporation for injuries sustained by reason of the sudden jerking of the train. *Newton v. Central &c. R. Co.*, 80 Hun, 491.

See *De Soucey v. M. R. Co.*, 41 St. R. 71.

It is for the jury to say whether defendant was negligent in suddenly backing its train from a terminal station after all passengers but plaintiff, who had been asleep, had left and were 80 to 100 feet away. *Daly v. Central R. Co.*, 26 App. Div. 200.

The sudden jerking of a train preparing to stop does not put upon the defendant the burden of explanation. *Denver &c. R. Co. v. Fotheringham*, (Colo. App.) 68 Pac. Rep. 978.

Where sufficient time has been given for alighting, company was not liable to one thrown to the floor by the sudden starting of the train, while getting bundles off the rack above her, when no one knew of her dangerous position. *East Tennessee &c. R. Co. v. Green*, 95 Ga. 736.

See, also, *Suber v. Georgia &c. R. Co.*, 96 Ga. 42.

Encumbrance with baggage must be considered in allotting the time for alighting. *Killian v. Georgia R. &c. Co.*, 97 Ga. 727.

Where the train is composed partly of freight cars, to which some jolting is a natural incident, defendant must give a reasonable opportunity to be seated before starting. *Macon &c. R. Co. v. Moore*, 108 Ga. 84.

It was for the jury to say whether defendant was negligent, where a crowded car was stopped with such violence that several passengers were thrown against plaintiff with great force. *Chicago &c. R. Co. v. Morse*, 197 Ill. 327; aff'd s. c., 98 Ill. App. 662.

Failure to stop long enough to safely discharge all passengers was negligence, though there was an unusual crowd. *Baltimore &c. R. Co. v. Slanker*, 77 Ill. App. 567; s. c. aff'd, 180 Ill. 357.

Where the train was started as plaintiff, an old lady, was in the act of alighting, it could not be said as matter of law that she was negligent in trying to gain the platform to prevent injury instead of remounting the steps. *Chicago &c. R. Co. v. Storment*, 90 Ill. App. 505; s. c. aff'd, 60 N. E. Rep. 104.

Sudden and violent, but not unusual stopping of street car was not negligence. *Chicago &c. R. Co. v. Morse*, 98 Ill. App. 662.

Conductor directed plaintiff to go to the platform before coming to the switches and be ready to alight the moment the train stopped. He went to the platform and remained on the lower step while the train was 1,600 feet from the switches and going 12 to 14 miles an hour, and was thrown by a sudden increase of speed. His contributory negligence prevented his recovery from defendant. *Cincinnati &c. R. Co. v. McLain*, 148 Ind. 188.

That the plaintiff went on the platform when the train had nearly stopped did not prevent recovery where she was thrown while alighting by its sudden starting. *Cincinnati &c. R. Co. v. Revalee*, 17 Ind. App. 657.

Sufficient time must be allowed to enable passengers to alight by the exercise of reasonable diligence. *Luse v. Union P. R. Co.*, 57 Kan. 361.

Sufficient time to enable one to alight "with ease" is not necessary. *Louisville &c. R. Co. v. Eakin*, 103 Ky. 465.

Or to enable him to leave the premises. *Louisville &c. R. Co. v. Ricketts*, (Ky.) 52 S. W. Rep. 939; *Louisville &c. R. Co. v. Ricketts*, (Ky.) 37 S. W. Rep. 952.

Sufficient time to enable one, though encumbered with baby and basket, to obtain a seat in a car need not be allowed before starting. *Middleborough R. Co. v. Webster*, (Ky.) 50 S. W. Rep. 843.

That a woman with an escort is fleshy and is burdened with children is not notice of such an infirmity as requires a conductor to wait until she is seated before starting. *Louisville &c. R. Co. v. Hale*, 102 Ky. 600; s. c., 42 L. R. A. 293.

But defendant was negligent in causing a violent jerk before one has had time to be seated. *Sheffer v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 403.

The utmost care and skill which a prudent man would exercise under the circumstances is required as to the control of a car while one is alighting. *Lutz v. Louisville R. Co.*, (Ky.) 48 S. W. Rep. 1080.

Starting, while an old woman burdened with baskets was in the act of alighting, was negligence. *Boikens v. New Orleans &c. R. Co.*, 48 La. Ann. 831.

Sudden movement of the train while plaintiff was on the platform to alight and before she could do so, was negligence. *Kennon v. Vicksburg &c. R. Co.*, 51 La. Ann. 1599.

Sudden movement of a train while one is alighting, caused by letting off air in the brake was negligence, where it could have been avoided. *Pomcroy v. Boston &c. R. Co.*, 172 Mass. 92.

Plaintiff was not negligent *per se* in not taking the first seat on entering, especially where there were other passengers back of him. *Moore v. Saginaw &c. R. Co.*, 119 Mich. 613.

An elevated railroad must wait a reasonable length of time to allow a passenger to get aboard and to have the gate closed. And while it may start before he is seated, it must use the highest degree of care of cautious persons not to injure him by a sudden jolt or jerk. *Barth v. Kansas City El. R. Co.*, 142 Mo. 535; *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152; *Cullar v. Missouri &c. R. Co.*, 84 Mo. App. 340.

Starting train suddenly with a jerk with knowledge that one who had boarded to assist children had not alighted, was negligence. *Whitley v. Southern R. Co.*, 122 S. C. 987.

Failure to alight during a 16-second stop is not negligence *per se*. *Smitson v. Southern P. R. Co.*, (Or.) 60 Pac. Rep. 907.

Failure to see a boy attempting to get on the front platform without having indicated his intention to board, was not negligence. *Pitcher v. People's &c. R. Co.*, 174 Pa. St. 402.

It was negligence to couple engine to train while passengers were in the act of alighting. *Raughley v. West Jersey &c. R. Co.*, 202 Pa. St. 43.

The time allotted for alighting must be such as is necessary under the circumstances, though one is slow by reason of age or youth. *Southern R. Co. v. Mitchell*, 98 Tenn. 27.

Passenger was allowed to recover for negligence of brakeman in putting on the brakes so hard as to produce a jerk of unusual violence. *Southern R. Co. v. Vandergriff*, (Tenn.) 64 S. W. Rep. 481.

Defendant held liable, where, with notice that plaintiff got aboard only to assist a passenger, it started the train without allowing him reasonable opportunity to alight. *International &c. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102; *id.*, 19 *id.* 170; *Missouri &c. R. Co. v. Miller*, 15 Tex. Civ. App. 428.

In reliance on conductor's mistaken statement that the train had stopped at a station, on a dark night plaintiff went upon the platform to alight and was thrown off by the sudden starting of the train. Judgment for plaintiff was affirmed. *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643.

Sufficient time must be allowed to alight in safety. *Missouri &c. R. Co. v. McElree*, 16 Tex. Civ. App. 182.

Plaintiff started to board a train upon the conductor's call, but, the steps being crowded with people boarding, the train started before he could get on. Judgment for plaintiff was affirmed. *Texas &c. R. Co. v. Mayfield*, 23 Tex. Civ. App. 415.

Time must be allowed to enable one who has taken part of his luggage out to re-enter and remove the rest; if the train cannot wait, he must be warned not to enter. *Texas &c. R. Co. v. Born*, 20 Tex. Civ. App. 351.

Alighting from a train without waiting for assistance was not negligence *per se*. *Martin v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 56 S. W. Rep. 1011.

Plaintiff with a ticket for a flag station went upon the platform to alight while the train was slowing up to exchange mail and was thrown off by a sudden jerk of the car. Defendant's negligence in failing to stop and plaintiff's negligence in attempting to alight from a moving car were properly submitted to the jury. *San Antonio &c. R. Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Where one is informed that the train will remain standing for some time, and is directed to care for his stock during the stop, he is warranted in inferring that he will be protected in assuming such dangerous positions as are necessarily incident to the duties so directed. *Missouri &c. R. Co. v. Jahn*, 18 Tex. Civ. App. 74.

Where it is necessary to carry a passenger, proper care must be used in doing so; defendant was held liable for negligence in carrying her out. *International &c. R. Co. v. Gilmer*, 18 Tex. Civ. App. 680.

It being defendant's duty to stop long enough to enable all to alight who wish to, it was no defense that plaintiff held a ticket to another station and his intention to alight before he arrived there was unknown to the conductor. *Texas &c. R. Co. v. Goldman*, (Tex. Civ. App.) 51 S. W. 275.

Carrier is bound to announce its stations, but personal notice is not required. *Houston &c. R. Co. v. Cohn*, 22 Tex. Civ. App. 11.

Where a train had been started before plaintiff had had time to alight and stopped again, suddenly throwing her against the doorway, defendant was negligent. *Texas &c. R. Co. v. Nunn*, 98 Fed. Rep. 963.

Reasonableness of the length of time for stopping is no defense to neg-

ligent starting of train while one is actually boarding. *Texas &c. R. Co. v. Gardner*, 114 Fed. Rep. 186.

Plaintiff was not negligent in going to the platform to meet a friend where the train had not stopped the full 10 to 15 minutes which it was announced that it would do. *Southern R. Co. v. Smith*, 95 Va. 187.

Defendant must awaken a passenger holding a berth in a sleeping car a sufficient time to enable her to properly prepare herself for leaving the train. *McKeon v. Chicago &c. R. Co.*, 94 Wis. 477; s. c., 35 L. R. A. 252.

It was no excuse that the conductor, from where he stood, was reasonably justified in thinking all the passengers had alighted, when in fact they had not had reasonable time to do so. *Walters v. Chicago &c. R. Co.*, (Wis.) 89 N. W. Rep. 140.

(g). PREMATURE STARTING AND JERKING CARS—STREET CARS.

Evidence that the plaintiff asked the driver of the car to keep on the brake until he had alighted, to which the driver assented, and the driver let off the brake and thereby set the car in motion, while the plaintiff was alighting, was for the jury. It was not negligent to alight from the front platform, there being no notice to the contrary. *Mulhado v. B. C. R. Co.*, 30 N. Y. 370, aff'g judg't for pl'ff.

While a passenger has no right to jump off a car of a horse railroad, while the car is in motion, or attempt it, yet a passenger has authority to prepare to leave a car, when there is any evidence of an intention to stop, or when there is a signal given therefor. When a driver, upon notice, partially stops a car and then starts up without notice, he is negligent. *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131.

A car must not be started until the passengers have had a reasonable time to alight. Defendant was not entitled to a specific charge.

"That a hoop-skirt, such as that worn by the plaintiff on this occasion, is an unnecessary article of female apparel, and that a lady thus attired was bound to exercise more care in entering or alighting from a street car than a man." *Poulin v. Broadway & Seventh Ave. R. Co.*, 61 N. Y. 621.

*Chrissey v. Hestonville &c. R. Co.*, 25 Smith (Pa.) 83; *Wardell v. N. O. City R. Co.*, 35 La. Ann. 202.

A driver of a horse car told a boy of ten years to jump on the front platform; he got on the first step, and, while attempting to gain the second, the driver struck the horses. The car was given a jog and the boy thrown off and hurt. *Maher v. Central Park N. & E. R. Co.*, 67 N. Y. 52, aff'g 7 J. & S. 155, and judg't for pl'ff.

**From opinion.**—"The authorities are numerous, that persons who are traveling on a railroad car, are justified in following the directions or request of the employé in charge, while he is engaged in the direct line of his duty, in assisting passengers in getting off and on a car, or in directing them while so doing. They may very properly assume that such employés are familiar with the operations of the cars, and have knowledge of what is required for safety and protection while giving such directions. *Filler v. N. Y. C. R. R. Co.*, 49 N. Y. 47; s. c., 59 id. 351; *Clark v. Eighth Ave. R. R. Co.*, 36 id. 135; *McIntyre v. N. Y. Cent. R. Co.*, 37 N. Y. 287."

The train started while plaintiff was alighting; the defendant claimed that some persons pulled the rope. There was some evidence impeaching this. For jury. *Ferry v. M. R. Co.*, 118 N. Y. 497; aff'g 22 J. & S. 325, and judg't for pl'ff.\*

A man of seventy years of age, unincumbered, signaled a street car which, upon the application of the brake, slowed up but did not stop, whereupon the plaintiff caught hold of the rail with both hands, but, as he put his foot on the step, the brake was relaxed and the car started with a sudden jerk, whereby his feet were thrown from the step and he was dragged and injured.

The negligence of the plaintiff and defendant was for the jury. The fact that the car was moving slowly when the plaintiff attempted to get on was not *per se* negligence. *Morrison v. Broadway & Seventh Ave. R. Co.*, 130 N. Y. 166, aff'g judg't for pl'ff.

Distinguishing *Hayes v. Forty-second & c. S. & R. Co.*, 97 N. Y. 259.

An infant, in charge of a female of middle years, entered an open car; before they could reach a place of safety and while yet on the top-most step on a level with and part of the floor of the car, upon a signal it started with a jerk and threw the woman on the seat and the boy into the street, injuring him. The question of the defendant's negligence was for the jury as it was the duty of the conductor to see that the passenger was in place of safety before giving the signal to proceed. *Akersloot v. Second Ave. R. Co.*, 131 N. Y. 599.

Plaintiff crossed the horse car track to reach the car, which stopped for him on the further track; he got hold of the handle and had his foot on the step, when the car started and dragged him until he struck a car

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\* NOTE. "SEC 419. MISCONDUCT OF OFFICIALS OR EMPLOYÉS ON ELEVATED RAILROAD. Any conductor, brakeman, or other agent or employé of an elevated railroad, who:

(1). Starts any train or car, of such railroad, or gives any signal or order to any engineer or other person to start any such train or car, before every passenger therein who manifests an intention to depart therefrom by arising, or moving toward the exit thereof, has departed therefrom; or before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train, has actually boarded or entered the same, unless due notice is given by an authorized employé of such railroad that the train is full and that no more passengers can then be received; or

(2). Obstructs the lawful ingress or egress of a passenger to or from any such car; or

(3). Opens a platform gate of any such car while the train is in motion, or starts such train before such gate is firmly closed, is guilty of a misdemeanor." Penal Code, as amended by chap. 602, Laws of 1892.

on the opposite track. For jury. *Dale v. B. C. R. Co.*, 1 Hun, 146, aff'g judg't for pl'ff; s. c. aff'd, 60 N. Y. 638.

A passenger claimed that while alighting from a street car the same was started before she had sufficient time to free herself from it, which was denied by defendant's evidence. For the jury. *Durfee v. Johnstown, Gloversville and Kingsboro Horse R. Co.*, 71 Hun, 279, aff'g judg't for pl'ff.

Plaintiff, thrown from car platform by jerk of car while she was in the act of alighting, was held not negligent in failing to use handles to a car, when it appeared that, to do so, she must get off backwards. *Martin v. Second Ave. R. Co.*, 3 App. Div. 448.

Defendant's negligence in suddenly starting the car before plaintiff had time to enter and throwing her against the door was for the jury. She was not negligent in boarding by the front platform at the invitation of the driver. *De Rozas v. Metropolitan Street R. Co.*, 13 App. Div. 296.

Motorman with knowledge of dangerous position of passenger must use care in running his car on a curve to avoid jolts and jerks. *Lansing v. Coney Island &c. R. Co.*, 16 App. Div. 146.

Where the motorman testified that a violent jerk would be the result of putting on more than one point of power at a time in starting a car, it was proper to leave it to the jury to say whether so doing was the cause of the violent jerk in the present case. It was not negligence for plaintiff to stand in the aisle holding on to a strap on being unable to obtain a seat. *Grötsch v. Steinway R. Co.*, 19 App. Div. 130.

Where a car was started while plaintiff was in act of alighting, she was not negligent in pausing on the step until an approaching truck has changed its position sufficiently to make it safe for her to alight. *Norton v. Third Ave. R. Co.*, 26 App. Div. 60.

Car started before a woman had become seated. It could only be started with a jerk. Negligence was for the jury. *Dochtermann v. Brooklyn &c. R. Co.*, 32 App. Div. 13; s. c. aff'd, 164 N. Y. 586.

Where a car has temporarily stopped on account of a wagon in front of it, the conductor may be held negligent in failing to ascertain whether anyone was attempting to board it, before he signals it to start again. *Dean v. Third Ave. R. Co.*, 34 App. Div. 220.

Motorman was not negligent in failing to see that one might be in the act of boarding, where he was not appraised of anyone's desire to enter and the situation was such that one could not be expected to take the slackening of speed as a preparation for stopping and attempt to get on. *Bachrach v. Nassau Electric R. Co.*, 35 App. Div. 633.

Where plaintiff did not know that his signal to the conductor was

communicated to the gripman, he was not warranted in assuming that a slackening of speed was made to permit him to get off. *Armstrong v. Metropolitan Street R. Co.*, 36 App. Div. 525.

Where two parties have hailed a car it was for the jury to say whether the driver, knowing one had boarded, was negligent in failing to know that the other desired to board also and see that he was safely aboard before starting. *Sexton v. Metropolitan Street R. Co.*, 40 App. Div. 26.

Defendant had not given plaintiff a reasonable time to alight, where she had not time enough to release her skirts from an obstruction on the platform of the car on which they had caught without her fault. It is not negligence *per se* to wear long skirts though they are apt to catch upon such obstructions. *Smith v. Kingston City R. Co.*, 55 App. Div. 143; s. c. aff'd, 169 N. Y. 616.

Of two cars coming toward plaintiff in the same direction on parallel tracks, he signaled the one furthest from him. It slowed down. After the car nearest him had passed he attempted to board the car he had signaled by the rear platform, where the conductor stood looking at him, signal cord in hand, but was thrown to the ground by the sudden starting of the car. It was held error to set aside a verdict for plaintiff. *Kimber v. Metropolitan Street R. Co.*, 69 App. Div. 353.

Street railway company held liable for starting a car while one was in the act of boarding. *Schalscha v. Third Ave. R. Co.*, 19 Misc. 141.

Where it did not appear that plaintiff's dress caught on the car through any defect therein, recovery was denied. *Doyle v. Metropolitan Street R. Co.*, 29 Misc. 331.

Starting while one was alighting was negligence. *Weiss v. Metropolitan Street R. Co.*, 29 Misc. 332.

Especially starting with a jerk. *Brady v. Metropolitan Street R. Co.*, 33 Misc. 793.

Without warning and while the passengers were getting off before her. *Flanagan v. Metropolitan Street R. Co.*, 31 Misc. 820.

Where the evidence was conflicting as to whether the car was started while plaintiff was alighting or she attempted to alight before it had stopped, it was error to refuse to charge that defendant was not liable if she got off while the car was in motion. *Cunningham v. Dry-Dock &c. R. Co.*, 31 Misc. 471; rev'g s. c., 60 N. Y. Supp. 990.

Starting before plaintiff had time to get completely on while hindered by persons ahead of him, with knowledge that a truck stood near the track, with which he was apt to collide, was negligence. *Goldwasser v. Metropolitan Street R. Co.*, 32 Misc. 682; aff'g s. c., 65 N. Y. Supp. 1134.



That a car runs on schedule time and only stops at regular stations is no excuse for not seeing that one is safely off, where it does stop by request. *Birmingham &c. Co. v. Wildman*, 119 Ala. 547.

Ignorance of plaintiff's infirmities which made it difficult for her to board, was no excuse for failure to use reasonable care to see that she was attempting to board before starting. *Post v. Hartford &c. R. Co.*, 72 Conn. 362.

Starting the car while a passenger is on the footboard and before he has an opportunity to enter the car, is negligence *Anacostia &c. R. Co. v. Klein*, 8 App. D. C. 75.

Where a car has stopped and a conductor has notice of one's intention to alight, he is bound to give a reasonable time to do so, though it is at an unusual place. *Washington &c. R. Co. v. Grant*, 11 App. D. C. 107.

After the car stopped a lady passenger rose without delay and went to the platform, but the car was started while she was in the act of getting off with her back to the front of the car and without taking hold of the guard rail. She was permitted to recover. *Rouser v. Washington*, 13 App. D. C. 320.

Whenever a street car stops for any cause near a crossing, it is the duty of those in charge to use reasonable care not to start it again while anyone is boarding or alighting. An instruction requiring passengers to use the highest degree of care in alighting held erroneous. *Chicago Street R. Co. v. Manning*, 170 Ill. 417; aff'g s. c., 70 Ill. App. 239.

Starting car where defendant's servants knew or by the exercise of reasonable care should have known that plaintiff was in the act of alighting, was negligence. *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634; aff'g s. c., 71 Ill. App. 162.

Where a car has stopped after the conductor has called the name of a street, one is warranted in acting on the assumption that it will not start before he has had time sufficient to alight. *North Chicago Street R. Co. v. Brown*, 178 Ill. 187; aff'g s. c., 76 Ill. App. 654.

Responsibility for injuries to a passenger attaches when the train starts up as he is attempting, with the exercise of due care to get on. *Chicago &c. R. Co. v. Drake*, 33 Ill. App. 114.

Failure to stop long enough to enable a boy of five to follow his mother off a car so as to avoid being struck by a passing car, was negligence. *West Chicago Street R. Co. v. Waniata*, 68 Ill. App. 481; s. c. aff'd, 169 Ill. 17.

Where a car has stopped pursuant to a signal defendant could not say that it did not know plaintiff was in the act of getting on. *West Chicago Street R. Co. v. James*, 69 Ill. App. 609.

Conduct indicating a desire to alight in the immediate presence of the

conductor and gripman is equivalent to an express notice thereof. *West Chicago Street R. Co. v. Stiver*, 69 Ill. App. 625.

The greatest care consistent with the practical operation of the cars, is required so as to prevent injury to one in the act of alighting. And when the car has stopped, though in the middle of a block, one may assume that he may alight in safety. *West Chicago Street R. Co. v. Luka*, 72 Ill. App. 60.

Railroad's liability as common carrier has not ceased until it has stopped long enough to permit passengers to alight. *Jeffersonville &c. R. Co. v. Parmelee*, 51 Ind. 42.

*Keller v. Sioux &c. R. Co.*, 27 Minn. 178; see, also, *Straus v. Kansas City &c. R. Co.*, 72 Mo. 414; *Louisville &c. R. Co. v. Mack*, 64 Miss. 738.

A person boarding a moving car that has slowed to take him on, has the right to assume that due care will be exercised not to start with a sudden jerk. *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 284.

Conductor descended and assisted plaintiff off the car and, when he got on again, stepped on the train of her skirts still on the platform, and started the car going. Conductor was negligent. *Citizens' Street R. Co. v. Shepherd*, (Ind. App.) 62 N. E. Rep. 300.

One who voluntarily assumes a dangerous position on a railway car and is injured by the car's jerking cannot recover for such injuries. *Lindsey v. Chicago &c. R. Co.*, 64 Iowa, 407.

*Bon v. R. Co.*, 56 Iowa 664; *Secor v. Toledo &c. R. Co.*, 10 Fed. R. 15; *Illinois Central R. Co. v. Green*, 81 Ill. 19; *Blodgett v. Bartlett*, 50 Ga. 353; *Lewis v. London &c. R. Co.*, L. R. 9 Q. B. 66.

That the signal to start was given by an unauthorized person, did not relieve defendant of seeing that a person was safely alighted before allowing the car to continue thereunder. *Leavenworth Electric R. Co. v. Cusick*, 60 Kan. 590.

Where the circumstances are sufficient to warrant one assuming the street car stopped to enable him to alight, he may do so and defendant is negligent in not allowing sufficient time therefor, though it had not stopped for that purpose. *Bell Electric Line Co. v. Tomlin*, (Ky.) 40 S. W. Rep. 925.

That it was customary for passengers to leave cars while in motion was no excuse for starting while one was in the act of alighting. *Louisville R. Co. v. Rammacker*, (Ky.) 51 S. W. Rep. 175.

A reasonable chance must be given for passengers to alight from a street car, and greater time for a person of known disability. *Wardell v. New Orleans &c. R. Co.*, 35 La. Ann. 202.

*Howell v. St. Charles St. R. Co.*, 22 La. Ann. 603; *Chrissey v. Hestonville &c. R. Co.*, 75 Pa. St. 83; *Toledo &c. R. Co. v. Baddsley*, 54 Ill. 19; *Jeffersonville &c. R.*

Co. v. Hendricks, 26 Ind. 228; Illinois Central R. Co. v. Slatton, 54 Ill. 133; Southern &c. R. Co. v. Kendrick, 40 Miss. 374; Fairmount &c. R. Co. v. Stutler, 54 Pa. St. 375; Dawson v. Louisville &c. R. Co., 11 Am. & E. R. Cas. (Ky.) 134; St. Louis &c. R. Co. v. Person, 49 Ark. 182.

Starting a car while a passenger is on the step about to alight is gross negligence. *Caruth v. Texas &c. R. Co.*, 45 La. Ann. 1228.

A passenger was injured by remounting the front platform of a car which he had assisted in replacing on the track, and it was held, that driver's negligence in starting the car should go to the jury. *Peoples' &c. R. Co. v. Green*, 58 Md. 84.

Failure to see that all persons seeking to embark had entered the car before starting, was negligence. *Davey v. Greenfield &c. R. Co.*, 177 Mass. 106.

Passenger on the rear platform, the conductor being inside collecting fares, rang the signal to start while plaintiff was in the act of alighting. Defendant's negligence was for the jury. *Nichols v. Lynn &c. R. Co.*, 168 Mass. 528.

See, also, *O'Neil v. Lynn &c. R. Co.*, (Mass.) 62 N. E. Rep. 983.

Until it becomes necessary to receive passengers into a train, it is not negligence to move it back and forth for the convenience of the company. *Flint &c. R. Co. v. Stark*, 38 Mich. 714.

So where the injuries are received by reason of jerking of street car. *Brown v. Congress &c. R. Co.*, 49 Mich. 153.

Where a train starts before a passenger has had time to get on or off, the carrier will be liable. *Wood v. Lake Shore &c. R. Co.*, 49 Mich. 370.

*Chicago, West. Div. R. Co. v. Mills*, 105 Ill. 63; *Rathbone v. Union R. Co.*, 13 R. I. 709; *Louisville &c. R. Co. v. Mask*, 64 Miss. 738; *Jeffersonville &c. R. Co. v. Parmelee*, 51 Ind. 42; *Saare v. Union R. Co.*, 20 Mo. App. 211.

Defendant was liable for the consequences of a sudden jerk due to the inexperience of a motorman. *Etson v. Ft. Wayne &c. R. Co.*, 114 Mich. 605.

An instruction apt to convey the idea that a conductor must assist women with children to alight, is erroneous. *Selby v. Detroit R. Co.*, 122 Mich. 311.

Where a street car suddenly started as plaintiff was in the act of getting on with the knowledge of conductor, liability attached. *Sahlgard v. St. Paul &c. R. Co.*, 48 Minn. 232.

No recovery allowed on ground that train was not stopped long enough, when plaintiff knew that premature starting was due to an unauthorized act of passenger in pulling bell rope. *Mississippi &c. R. Co. v. Harrison*, 66 Miss. 419.

A person who signals a train to stop at a point not a stopping place, and is injured while attempting to get on by the sudden starting of the train, cannot recover as a passenger, his purpose to get on being unknown to the trainmen. *Georgia Pac. R. Co. v. Robinson*, 68 Miss. 643.

Carrier was not chargeable with punitive damages, where plaintiff's signal at a flag station was seen by the engineer but not by the conductor, who, however, signalled the engineer to stop to allow a passenger to alight and gave him the signal to start, leaving plaintiff behind. *The Yazoo &c. R. Co. v. Faust*, (Miss.) 32 South. Rep. 9.

If a reasonable time be given, the company is not necessarily liable for starting the train thereafter, while passenger is alighting. *Clotworthy v. Hannibal &c. R. Co.*, 80 Mo. 220.

*Straus v. K. C. &c. R. Co.*, 75 Mo. 185; *Swigert v. Hannibal &c. R. Co.*, 75 id. 475; *Davis v. Chicago &c. R. Co.*, 18 Wis. 175; *Pa. R. Co. v. Lyons*, 129 Pa. St. 113; *Covington v. Western &c. R. Co.*, 81 Ga. 273; *Madden v. Mo. Pac. R. Co.*, 50 Mo. App. 666. See *Chicago &c. R. Co. v. Arnol*, 144 Ill. 261; *Washington &c. R. Co. v. Harmon*, 147 U. S. 571.

When the plaintiff was in the act of alighting, the train suddenly started and he was thrown from the platform of the car; question of plaintiff's negligence is for the jury. *Leslie v. Wabash &c. R. Co.*, 88 Mo. 50.

See, also, *Taylor v. Missouri Pac. R. Co.*, 26 Mo. App. 336; *Nichols v. Dubuque &c. R. Co.*, 68 Iowa 732; *Central R. Co. v. Van Horn*, 9 Vroom (N. J.) 133; *Clotworthy v. Hannibal &c. R. Co.*, 80 Mo. 220.

A street car is required to exercise a very high degree of care as to starting while one is alighting; a passenger is bound to use ordinary care. *Cobb v. Lindell R. Co.*, 149 Mo. 135; *Grace v. St. Louis R. Co.*, 156 Mo. 295.

That car stops at a street corner after an intending passenger has signaled it does not make a street car company liable for injuries while attempting to get on, where the stop was made to discharge passengers only and the conductor warned plaintiff in a voice sufficiently loud to be heard, not to board. *Marey v. Metropolitan Street R. Co.*, (Mo. App.) 68 S. W. Rep. 1063.

Plaintiff was not negligent, where, as she was about to alight, she requested the conductor to wait until a team approaching had passed and the car started as she was alighting after it had passed. *Hutchins v. Macomber*, 68 N. H. 473.

It was for the jury to say whether it was negligent in a boy to get on the wrong side of a car barred by a rail and whether the conductor was negligent in starting the car before the boy was fairly on. *Kelly v. Consolidated T. Co.*, 62 N. J. L. 514.

It was not negligence *per se* to start a car before one has secured a seat. *Herbich v. North Jersey d.c. R. Co.*, 65 N. J. L. 381.

That the car has stopped a reasonable time and plaintiff did not move as quickly as she might, was no excuse for starting the car while she was in the act of alighting. *Morrison v. Charlotte Electric R. &c. Co.*, 123 N. C. 414.

Where defendant was not guilty of any want of due care in starting a car, until plaintiff had gotten off, it was not negligent. *Asbury v. Charlotte Electric R. &c. Co.*, 125 N. C. 568.

A charge that plaintiff was negligent, if, in the exercise of reasonable care, she could have prevented the accident, was misleading, as there might have been many ways of preventing the accident which plaintiff was under no duty to adopt. *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638.

Failure to gather up one's dress was not negligence as matter of law, there being no reason to apprehend danger from not doing so. *Patterson v. Inclined Plane R. Co.*, 12 Oh. C. C. 274.

Where car has stopped at unusual place for the purpose of seeing if the track is clear, it is not negligence to start on without seeing whether anyone is taking advantage of the stop to get on. *Packard v. Toledo Traction Co.*, 22 Oh. C. C. 578.

Where plaintiff attempted to get upon the front platform of a car which had stopped to let another person off, and is injured by the sudden starting of the same no recovery was allowed providing neither driver nor conductor saw him. *Pitcher v. Peoples' St. R. Co.*, 154 Pa. St. 560.

The jury decided street car company's negligence where passenger boarding car by front platform was injured by the sudden starting of the same before she could reach a seat. *Holmes v. Allegheny Traction Co.*, 153 Pa. St. 152.

It was negligence to start a car on information of a passenger. *McCurdy v. United Traction Co.*, 15 Pa. Super. Ct. 29.

What is a reasonable time is for the jury. *McSloop v. Richmond &c. R. Co.*, 59 Fed. Rep. 431.

Although reasonable time was given plaintiff to board defendant's street car, if the same was violently started when the employes knew that he was in the act of boarding, recovery may be had. *Cohen v. West Chicago St. R. Co.*, 60 Fed. R. 698.

Railroad company may be liable for negligence to persons, although its character of common carrier is lost; as where passenger having arrived at her destination was injured by train starting before she had alighted, and recovered for injuries inflicted, although the court said the

liability of company as carrier had ceased. *Imhoff v. Chicago &c. R. Co.*, 22 Wis. 681.

Defendant was not liable for negligence in prematurely starting car, where plaintiff was negligent in attempting to alight. *Kohler v. West Side R. Co.*, 99 Wis. 33.

Failure to see an intending passenger, was no excuse where conductor was inside the car and failed to ascertain that all desiring passage were safely aboard. *Dudley v. Front Street &c. R. Co.*, 73 Fed. Rep. 128.

## VII.—Moving Cars.

A passenger who attempts to board or alight from a moving train, generally is guilty of presumptive negligence, although invited thereto by the servant of the carrier, unless the act or words of the servant are such as would be calculated to, and do disturb and coerce the passenger's judgment, so that he, in good faith, believes and from the standpoint of ordinary prudence and judgment is entitled to believe, that the act is safe, although in fact it is dangerous. This rule does not apply to ordinary street cars moving with moderate speed, unless there be present conditions that would deter a person of ordinary prudence from attempting to alight or enter.

### (a). ENTERING CARS—LIABILITY—STEAM CARS.

It is not negligent *per se* to attempt to board a moving train. *Birmingham R. &c. Co. v. Clay*, 108 Ala. 233.

A person may be exercising due care in mounting the platform of an electric car in motion. *Corlin v. West End &c. R. Co.*, 154 Mass. 197.

It is not negligence *per se* for a passenger to get upon a train after the signal to start has been given, if the train be at rest when he begins his attempt. *Dawson v. Boston &c. R. Co.*, 156 Mass. 127.

Mounting a moving train is not *per se* negligence; speed and circumstances are elements for jury to consider. *Swigert v. Hannibal &c. R. Co.*, 75 Mo. 475.

*Johnson v. West Chester &c. R. Co.*, 70 Pa. St. 357; *Lambeth v. North Carolina &c. R. Co.*, 66 N. C. 494; *Conner v. Citizen R. Co.*, 105 Ind. 62; *Chicago &c. R. Co. v. Mumford*, 97 Ill. 560; *Wyatt v. Citizen R. Co.*, 55 Mo. 485; *Vadderverter v. Chicago City R. Co.*, 26 Fed. Rep. 32.

Not negligence *per se* to attempt to board a train suddenly starting from a station where stop had been made, for refreshments, before the allotted time. *Missouri &c. R. Co. v. Tietken*, 49 Neb. 130.

Passenger was not negligent in failing to take the first seat he reaches, though he knows a coupling is about to be made. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 103.

Jury was justified in finding plaintiff not negligent, where he testifies

that he started to alight as quickly as he could when the car stopped, but that it stopped an unusually short time and that, when he got on the step, the train was moving slow enough, as he thought, to jump in safety. *Johnson v. Atlantic &c. R. Co.*, (N. C.) 41 S. E. Rep. 794.

But one's negligence in boarding a moving car does not excuse pushing him off the step. *Sharrer v. Paxson*, 171 Pa. St. 26.

Not negligence *per se* to attempt to board a moving train. *Houston &c. R. Co. v. Stewert*, 14 Tex. Civ. App. 703.

Or to assist another to do so. *Houston &c. R. Co. v. Stewert*, 14 Tex. Civ. App. 703; *Mills v. Missouri &c. R. Co.*, (Tex.) 59 S. W. Rep. 874; rev'g s. c., 57 S. W. Rep. 291.

And when the attempt was made at the invitation of the conductor, it did not prevent recovery, where, but for the sudden jerk of the car it would have been boarded in safety. *Missouri P. R. Co. v. Foreman*, (Tex. Civ. App.) 46 S. W. Rep. 834.

Rules in regard to boarding passenger trains do not apply to live freight traffic. *Fitchburg R. Co. v. Nichols*, 85 Fed. Rep. 945.

#### (b). ENTERING CAR—LIABILITY—STREET CARS.

It is not always *per se* negligent to get on a street car in motion. *Philips v. R. & Sar. R. R. Co.*, 49 N. Y. 177; *Morrison v. Erie R. Co.*, 56 id. 302; *Mettlestadt v. Ninth Ave. R. R. Co.*, 4 Robt. 377; *Burrows v. Erie R. R. Co.*, 63 id. 556.

Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety. But there may be exceptional cases, when the car is moving rapidly, or when the person is infirm or is clumsy, or is encumbered with children, packages or other hindrances, or when there are other unfavorable conditions, when it would be reckless to do so, and a court might, upon undisputed evidence, hold as matter of law, that there was negligence in doing so. But in most cases it must be a question for a jury.

The plaintiff signalled an open car, the brake was applied and the car was going slowly. The plaintiff put one foot on the step and one hand on the seat; the driver loosed the brake and the car was jerked, and the plaintiff hurt. For the jury. *Eppendorf v. B. C. & N. R. R. Co.*, 69 N. Y. 195, aff'g judg't for pl'ff.

The plaintiff claimed, that the platform of the car was crowded and that one foot was on the lower step; that he could not get hold of the hand rail and that the car started and that he was thrown off and injured by an uptown car going in the opposite direction. For the jury. It was error to charge, that a verdict could be based on negligence in the con-

duct of uptown car. *Black v. B. C. R. Co.*, 108 N. Y. 640, rev'g judg't for pl'ff.

The fact that a person attempted to enter a stage drawn by horses on the streets of a city, while it was in motion, where the driver thereof had nearly stopped the stage, and its motion hardly perceptible, does not *per se* constitute contributory negligence. *Frobisher v. Fifth Ave. Transportation Co.*, 81 Hun, 544; s. c. rev'd on another point, 151 N. Y. 431.

Negligence and contributory negligence were for the jury, where plaintiff started to board a car while it was stopping but nearly at a standstill, and defendant started it with a jerk without notice and while he had but partly entered the car, throwing him to the ground. *Wallace v. Third Ave. R. Co.*, 36 App. Div. 57.

To board a slowly moving street car is not negligence *per se*. *Sexton v. Metropolitan &c. R. Co.*, 40 App. Div. 26.

Plaintiff held not negligent as a matter of law in boarding a slowly moving street car with bundles in one hand and with the other catching the handrail furthest from it. *Birmingham R. &c. Co. v. Brannon*, (Ala.) 31 South. Rep. 523.

It is not negligence *per se* to board the platform of a moving street car which has slackened its speed pursuant to signal. *Finkeldey v. Omnibus Cable Co.*, 114 Cal. 28.

Evidence of customary stoppage of a car at a given point was inadmissible to show that it was moving slowly at that point when plaintiff boarded it. *West Chicago &c. R. Co. v. Thorpe*, 187 Ill. 610; *North Chicago Street R. Co. v. Wiswell*, 168 id. 613; aff'g s. c., 68 Ill. App. 443.

Boarding a moving electric or cable car is not negligent *per se*. *West Chicago &c. R. Co. v. Lups*, 74 Ill. App. 420; *Cicero &c. Street R. Co. v. Meixner*, 160 Ill. 320.

Mounting front platform of moving street car is not *per se* negligent. *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

*Baltimore &c. R. Co. v. Wilkinson*, 30 Md. 224.

It was for the jury to say whether it was, under the circumstances, negligent to board a moving train. *Chicago &c. R. Co. v. Flaherty*, 96 Ill. App. 563.

Plaintiff was not *per se* negligent in getting on a street car in motion. *Posch v. Southern Electric R. Co.*, 76 Mo. App. 601; *Omaha Street R. Co. v. Martin*, 48 Neb. 65.

Where a car slows up or otherwise gives the appearance of complying with a signal, it is negligence to start on until passenger is safely aboard. *Austrian v. United Traction Co.*, 19 Pa. Super. Ct. 329.

But negligence in attempting to board did not excuse increasing speed



with a jerk, while passenger was in the act of doing so with knowledge of those in charge. *Christie v. Galveston City R. Co.*, (Tex. Civ. App.) 39 S. W. Rep. 638.

(c). ENTERING CARS—NO LIABILITY—STEAM CARS.

The plaintiff tried to get on a train which was slowly moving, but the platform was so crowded that he could not get on the steps, and he was carried along and hit by an obstruction. The plaintiff was negligent.

Plaintiff testified that the cars came and slowed down, and he started to get on, they had about stopped; others began to jump on; ahead of him a good many were jumping on. That the brakeman called out West Troy (name of the station). That they were getting on all along the cars. That he got on the step, two men got ahead of him, and he could not get any further up. That the cars were then jerked ahead and *jerked him off the step, but he did not let loose of the handle. That he recovered back, and when they were on pretty good speed, they jerked very powerful.* The handle was the iron rod. That he got on because he saw others getting on, so he recovered back upon the step, but had no more than recovered back, before he was knocked off by the platform, and rolled in between the car and the platform. That the cars were going very slow when he got on, *but the second time were going pretty good speed.* That he did not see or know anything about the platform until he struck it. It was proved that this platform was a structure of the height of the floor of the cars, the front of which was seven inches from the outside of a car upon the track, erected and used only for the purpose of loading and unloading freight. *Phillips v. Rensselaer & Sar. R. R. Co.*, 49 N. Y. 177; reversing 57 Barb. 642, and affirming nonsuit.

When the passenger purchased her ticket the train was at the station. She came on the platform of the station after the departure signal had been given and the engineer was about to apply steam, and the conductor and brakeman had gone in the train, being unaware of her presence. The plaintiff grasped the rail of the car, was thrown down and injured. Defendant was not liable. Where those on station platforms have entered and those in the cars have left, the train may be started. *Paulitsch v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 280.

Boarding or alighting from a moving car is presumably and generally a negligent act *per se*; to rebut this it must appear, that the passenger was put to his election between alternate dangers, or that his free agency or attention was disturbed by those in charge. Acquiescence by those in charge is not enough.

A train on defendant's elevated road, after stopping at a station, had

started again when "S." and two others preceding him, attempted to get on to the rear platform of the first car. The conductor had given the signal to start, and had closed, or attempted to close, the gate to the platform before the first of the three men reached the car. The train was slowly moving, but with a constantly accelerated speed. The two men in advance succeeded in getting on the train safely; the conductor having opened, or they having pushed open, the gate, "S." who was a short distance behind, attempting to get on board, took hold of the stanchions of the car with both hands, and placed one foot upon the car platform, when the conductor closed the gate. "S." was carried along a few feet until he came in contact with a water pipe, receiving fatal injuries. The accident occurred in the evening; the station platform was lighted. "S." had been in the habit of taking the train at this station for more than a year. The train was accustomed to stop "very sharp," and to start "very quick." Trains ran every five minutes. Held, that the plaintiff was properly nonsuited. *Solomon v. Manhattan R. Co.*, 103 N. Y. 437, aff'g 31 Hun, 5, and nonsuit.

Distinguishing *McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287; *Filer v. N. Y. C. R. R. Co.*, 49 id. 47.

After the gate was closed, and the train in motion, an excluded passenger had hold of the stanchions of the platform, clinging to them as the train moved, while the gateman was pushing him away. Three witnesses for the plaintiff saw the accident. The wife and sister observed only the gateman pushing the deceased at a moment, when they were unable to say whether the train had started or not; but the third witness, a passenger in an adjoining car, and apparently wholly disinterested, testifies distinctly, that after the gate was slammed and the train in motion, the deceased was holding on to the iron standard, supporting the roof of the platform, while the gateman was trying to push him away, and that this continued until the deceased disappeared from sight. It was not material whether the act of the deceased should or should not be deemed a *physical effort* to get upon the car. It was an interference with the moving train, obviously dangerous and imprudent, from which the injury resulted, and for which there was no necessity or excuse. Nonsuit was proper. *Card v. Manhattan R. Co.*, 103 N. Y. 670, rev'g judg't for pl'ff.

A person who, in a safe place and under no stress of circumstances, attempts to board a train in motion, while in such proximity to a known and prominent obstruction, as would render the consequences of a misstep serious, no matter what motive or influence induced the act, is negligent.

An adult, acquainted with the station, stood upon the freight platform until the train came in sight, when he descended some steps to the pas-

senger platform and stood three or four feet from the steps waiting for the train, which slowed up to one or two miles per hour but did not stop. The conductor called out, "if you are going, jump on." In attempting to do so the passenger was caught between the moving train and the freight platform. He was negligent.

One *sui juris* in full possession of his faculties, with nothing to disturb his judgment, attempting to board a train moving at the rate of from four to six miles per hour, past a station, is negligent *per se* although the conductor called out "jump on, if you are going." *Hunter v. C. & S. V. R. Co.*, 112 N. Y. 371, rev'g judg't for pl'ff.

Where, in the same case but after a new trial, the train was moving from one to three miles per hour, the court, by a majority of one, arrived at the same result. *Hunter v. C. & S. V. R. Co.*, 126 N. Y. 18, rev'g judg't for pl'ff.

*Distinguishing Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47.

A person who is injured while attempting to board a moving train propelled by steam, is presumptively guilty of contributory negligence. *Myers v. The New York Central and Hudson River Railroad Company*, 82 Hun. 36. (New York Common Pleas.)

The boarding by a person of an elevated railway train while the gate is closing and the train moving, and persisting, against an effort to remove him, in the precarious position thus obtained, is contributory negligence. *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g nonsuit. (N. Y. Com. Pleas.)

Not negligent *per se* to board a slowly moving horse car. *Brown v. Washington &c. R. Co.*, 11 App. D. C. 37.

Not negligence as matter of law to board a moving car. *Chicago &c. R. Co. v. Gore*, 96 Ill. App. 553; *North Chicago Street R. Co. v. Kaspers*, 85 id. 316.

Plaintiff waited until train had started, and, in attempting to board it, was injured. His negligence contributed to the injury and he could not recover. *Chicago &c. R. Co. v. Scates*, 90 Ill. 586.

*Phillips v. Rens. &c. R. Co.*, 49 N. Y. 177; *Michigan Central R. Co. v. Coleman*, 28 Mich. 440.

Negligence *per se* to board a moving train after it left station. *Walthers v. Chicago &c. R. Co.*, 72 Ill. App. 354.

Or before it arrived. *Chicago &c. R. Co. v. Stewart*, 77 Ill. App. 66.

Plaintiff, entitled to ride in a caboose, attempted to climb one of the forward cars, holding in one hand a lantern and a pole, and was injured. He was guilty of contributory negligence. *McCorle v. Chicago &c. R. Co.*, 61 Iowa, 555.

*Bon v. R. Co.*, 56 Iowa 664; *Doggett v. Illinois Central R.*, 34 id. 284; *Player v. Burlington &c. R. Co.*, 62 id. 723.

Violation of a statute in boarding a moving train without permission, was the proximate cause of injury. *Young v. Chicago &c. R. Co.*, 100 Iowa, 357.

One who waits until a train has started before boarding it, cannot recover for injuries received in falling from it. *Bailey v. C. N. &c. R. Co.*, 14 Ky. L. R. 226.

Where deceased ran and in attempting to get on a moving train was killed, no recovery was allowed. *Knight v. Ponchartrain R. Co.*, 23 La. Ann. 462.

*Hubener v. New Orleans &c. R. Co.*, 23 La. Ann. 492; *Denver &c. R. Co. v. Pickard*, 9 Colo. 163; where employes invited person to jump on train.

One mounting a moving train does not become a passenger until after he has reached a place of reasonable safety; and cannot recover if he falls off, before so doing. *Merrill v. Eastern R. Co.*, 139 Mass. 238.

*Knight v. Ponchartrain R. Co.*, 23 La. Ann. 462; *Hubener v. New Orleans &c. R. Co.*, id. 492; *Galveston &c. R. Co. v. LeGierse*, 51 Tex. 189. See, however, *Central R. Co. v. Perry*, 58 Ga. 461.

Plaintiff, who was requested by one of defendant's employes to stop a train, was injured in attempting to board it, and, his act being voluntary, no recovery was allowed. *Blair v. Grand Rapids &c. R. Co.*, 60 Mich. 124.

No liability to an old man who jumped on a moving train, lost his footing so that he held only by his hand, and although told not to hold on, continued to do so until the train attained a rapid speed and he was injured. *McMurtry v. Louisville &c. R. Co.*, 67 Miss. 601.

One who attempts to get on a moving train after being warned by trainmen not to do so, has no right of action. *Fulks v. St. Louis &c. R. Co.*, 111 Mo. 335.

Boy of 14 is not *per se* negligent in attempting to board an electric car with a trailer moving from three to seven miles an hour. *Sly v. Union Depot R. Co.*, 134 Mo. 681.

It was negligent *per se* to board a moving train under an increasing speed of 6 or 7 miles an hour, though by invitation of the conductor. *Heaton v. Kansas City &c. R. Co.*, 65 Mo. App. 479.

A person who attempted to get on a train in motion and falling was killed, was contributorily negligent, notwithstanding his fall was due to a defective platform. *Bacon v. R. Co.*, 143 Pa. St. 14.

A railroad company's invitation to passengers to board its train is withdrawn the moment the train begins to move. *Chaffee v. Old Colony R. Co.*, 17 R. I. 658.

One who attempted to board a freight train, and under circumstances which would have kept back a reasonable man, under no apprehension of danger, cannot recover. *Richmond &c. R. Co. v. Picklesimer*, 17 Va. L. J. 12.

(d). ENTERING CARS—NO LIABILITY—STREET CARS.

Charge that an attempt to get on a moving horse car was negligent, but the jury found the car was not moving when the plaintiff attempted to get on. *Wolfkiel v. Sixth Ave. R. Co.*, 38 N. Y. 49, aff'g judg't for pl'ff.

An able bodied man, unincumbered, waited upon the crosswalk for an open street car and motioned for it to stop, when it had nearly stopped he put his foot on the side of, and near the middle of it, took hold of the stanchion, and, after the car had moved six or seven feet, he was hit by the wheel of a track standing in the street. A refusal to nonsuit was error, as it was the plaintiff's duty to see, before getting on the car, that there was no obstruction outside of the car, which would make it dangerous for him to attempt to board it. *Moylan v. Second Ave. R. Co.*, 128 N. Y. 583, rev'g judg't for pl'ff.

It was error to charge that it is as matter of law negligent to board a moving street car. *Lobsenz v. Metropolitan Street R. Co.*, 72 App. Div. 181.

Where it does not appear that a car slowed in response to a signal, it was negligent to attempt to board it with a box over the shoulder. *Hansen v. Third Ave. R. Co.*, 27 Misc. 524.

Having hailed a street car the plaintiff attempted to mount it in motion; the company was not liable as the driver had the right to suppose plaintiff would wait until car had stopped, and rules forbade it stopping where the injury occurred. *Holohan v. Wash. &c. R. Co.*, 8 Macky (D. C.) 316.

Attempting to board an electric car in motion bars recovery. *Noo Dan v. Seattle Electric &c. R. Co.*, 5 Wash. 466.

Error to charge that it was negligence to suddenly increase speed of street car approaching a stopping place with such slow motion that one might reasonably undertake to board it, where it did not appear that an attempt to board was known to those in charge. *Metropolitan Street R. Co. v. Hudson*, 113 Fed. Rep. 449.

(e). ALIGHTING FROM CARS—LIABILITY—STEAM CARS.

If a passenger on a slowly moving car is put to the choice of leaving the train or being carried to the next station, the defendant is liable for

the result of the choice, provided the choice be not wantonly or unreasonably exercised. The jury must say whether the passenger used reasonable care. *Filer v. N. Y. C. R. R. Co.*, 49 N. Y. 47, rev'g judg't for pl'ff for error in charge as to damages.

The plaintiff was hurt while alighting from a car under somebody's direction to do so. If the direction came from somebody connected with the train, the defendant was liable; otherwise, not. *Filer v. N. Y. C. R. R. Co.*, 59 N. Y. 351, reversing judgment for plaintiff on the ground that court charged that it did not make any difference on question of contributory negligence, whether direction to alight was given by defendant's servant or any other person.

On the next trial all necessary evidence was forthcoming, and it was shown that the train was moving slowly, and the brakeman told her she had better get off, and while doing so the train gave a jerk. *Filer v. N. Y. C. R. R. Co.*, 68 N. Y. 124, aff'g judg't for pl'ff.

The plaintiff knew of the notice forbidding passengers to alight while the car was in motion. The car stopped and started up again and the plaintiff, on the platform of the car, asked a person to help her, which he did, and she was hurt in so alighting. Nonsuit should have been granted. *Burrows v. Erie R. Co.*, 63 N. Y. 556, rev'g judg't for pl'ff.

Distinguishing *Penn. R. Co. v. Kilgore*, 32 Penn. 292; *Filer v. N. Y. C. R. Co.*, 49 N. Y. 47. Citing *Morrison v. Erie R. Co.*, 56 id. 302; *Garett v. M. & L. R. Co.*, 16 Gray, 501; *Lucas v. N. B. & T. R. Co.*, 6 id. 64.

It is negligent not to fully stop a train for a passenger to alight, or to induce one to alight when the train is in motion, and the passenger is not negligent *per se* in alighting, if induced so to do by the train agent.

As the train approached the station, where the plaintiff intended to and had the right to leave the cars, the speed was reduced until the train came nearly to a stop. The plaintiff prepared to leave and, with a little child in his arms, proceeded to the car platform for that purpose. According to his testimony the conductor, who was standing on the platform of the station, called to him and said, "you want to clear off here," and he answered he wanted to get off, and the conductor told him to step off, or get off, or jump off, he didn't know which. The train was then in motion and he got off on the right side of the car, taking hold of the rail on the right side of the car platform with his left hand; he then stepped off with his right foot first and was twisted around; he thought the train had stopped the same minute he stepped off, but was mistaken as he felt it was going and he was jerked around; the conductor took hold of him and they tumbled off the platform of the station together. He testified he did not know the train was going when he got off, or he thought it had stopped, and then he swore that when he

was in the act of getting off he saw it had not stopped, thus contradicting his former evidence. Question of contributory negligence was for the jury. *Bucher v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 128, rev'g nonsuit.

Plaintiff's jumping from a car upon apprehending a collision, though an error of judgment, was not contributory negligence, as, in face of the peril produced by defendant's negligence, she was not called upon to exercise the best judgment. *Heath v. Glens Falls &c. R. Co.*, 90 Hun, 560.

It was for the jury to say whether defendant was negligent in running rapidly over a crossing having an abrupt curve, two open switches and other railroad tracks, knowing a passenger was preparing to alight, and whether the latter was negligent in arising from her seat in preparing to alight with her child, on the assumption that the car would stop as usual at the side of the crossing first reached. *Whitaker v. Staten Island &c. R. Co.*, 72 App. Div. 468.

Guard opened gate of car while it was still in motion and plaintiff stepped off and was injured. Held error to nonsuit plaintiff. *McAlan v. Trustee's &c.*, 43 App. Div. 324.

Under a conflict of evidence as to whether plaintiff got off while the car was moving or the car moved before he could get off, it was held that defendant was entitled to a charge that, if he got off while it was moving, he could not recover. *Kuhlman v. Metropolitan Street R. Co.*, 30 Misc. 417; rev'g s. c., 29 Misc. 773.

Charge, that unnecessarily stepping from moving car barred recovery, held proper. *McDonald v. Montgomery Street R. Co.*, 110 Ala. 161.

Where announcement was made "all out for Huntsville," it was not negligent *per se* to go upon the platform preparatory to alighting while the car was in motion. *Southern R. Co. v. Roebuck*, (Ala.) 31 South. Rep. 611.

Not negligent *per se* to alight from electric car in motion though with a bundle under one arm about a foot long and eight inches wide. *Birmingham Railway &c. Co. v. James*, 121 Ala. 120.

The plaintiff, a woman, was told by the conductor to jump from a slowly moving train and in so doing was injured; recovery was not barred. *St. Louis &c. R. Co. v. Cantrell*, 37 Ark. 519.

Not negligent *per se* to alight from train going 3 miles an hour. *Watkins v. Birmingham &c. R. Co.*, 120 Ala. 147.

It was not negligence for a woman of fifty-six encumbered with a valise, to alight from a slowly moving train. *Little Rock &c. R. Co. v. Atkins*, 46 Ark. 423.

The plaintiff's negligence in jumping from a train which did not stop

long enough, may be so slight as not to defeat recovery. *Illinois Cent. R. Co. v. Able*, 59 Ill. 131.

Woman was told by conductor to jump from slowly moving train. Recovery. *Georgia &c. R. Co. v. McCurdy*, 45 Ga. 288.

Whether stepping from a moving car is negligence depends upon the condition of the passenger and surrounding circumstances. *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215; *Chicago &c. R. Co. v. Clausen*, 70 Ill. App. 550; s. c. aff'd, 173 Ill. 100.

Negligence in alighting while the train was in motion did not prevent recovery where plaintiff was injured by a locomotive on an adjoining track. *Pennsylvania Co. v. McCaffrey*, 68 Ill. App. 635.

Passenger may rely on conductor's advice, unless the circumstances warn him otherwise. *Penn. R. Co. v. Hoagland*, 78 Ind. 203.

*Penn. R. Co. v. McCloakey*, 23 Pa. St. 526; *Chicago &c. R. Co. v. Randolph*, 53 Ill. 510; *Lambeth v. N. C. R. Co.*, 66 N. C. 494; *Southwestern R. Co. v. Singleton*, 67 Ga. 306; Same Case, 66 id. 252.

Plaintiff attempted to leave a train which had not stopped long enough to allow him to alight. His negligence was for the jury. *Illinois C. R. Co. v. Whittaker*, (Ky.) 57 S. W. Ry. 465.

The plaintiff, a woman, was told by the conductor to jump from a slowly moving train and in doing so was injured; recovery was not barred. *Baltimore &c. R. Co. v. Leapley*, 65 Md. 571.

Where train stopped at station one minute, which was not time enough for plaintiff to alight, and she jumped after it had started up again, her recovery was not barred. *Lloyd v. Hannibal &c. R. Co.*, 53 Mo. 509.

It was not negligent to jump from a moving train upon a brakeman's giving warnings of danger of a wreck. *Ephland v. Missouri P. R. Co.*, 137 Mo. 187; s. c., 35 L. R. A. 107; rehearing denied, 137 Mo. 196; s. c., 35 L. R. A. 109.

In determining the character of such act, regard must be had as to what a reasonably prudent person would have done under such circumstances. *Chitty v. St. Louis &c. R. Co.*, 148 Mo. 64.

Not negligence *per se*, where plaintiff had one foot off and one on, when the train started. *Sanderson v. Missouri P. R. Co.*, 64 Mo. App. 655.

It is within the scope of authority of a brakeman to direct a passenger being carried by his station to jump while the train is in motion. *Owens v. Wabash R. Co.*, 84 Mo. App. 143.

It was for the jury to say whether sufficient time had been allowed for alighting, where plaintiff went to platform immediately upon announcement of the station, but the train was in motion before she reached the ground, and the train stopped again to let off other passengers who had



not alighted. *Toler v. Yazoo &c. R. Co.*, (Miss.) 31 South. Rep. 788.

Jumping from a moving train under circumstances of obvious peril bars recovery. *Chicago &c. R. Co. v. Hyatt*, 48 Neb. 161.

It is not negligent *per se* to alight from a moving train at night at the direction of the porter unless done in a negligent manner. *Hodges v. Southern R. Co.*, 122 N. C. 992.

Where plaintiff rode in a box car instead of the caboose, and, while the train was in motion, stood before its open door and was thrown out by a lurch of the car, this negligence barred a recovery. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41.

It was not negligence *per se* for a passenger to alight from a moving train at the conductor's direction, where it had slowed up to let him off but without stopping, and then increased its speed again. *Cooper v. Georgia &c. R. Co.*, 56 S. C. 91.

An employé on a pay car to receive his wages has the company's implied invitation to alight, if the train starts before he is given sufficient opportunity to get off. *Railroad Co. v. Stacker*, 86 Tenn. 344.

A woman, though weighing 200 pounds, and seventy-six years of age, was not negligent in alighting from a slowly moving train to avoid being carried by, where reasonable time was not given to alight. *Southern R. Co. v. Mitchell*, 98 Tenn. 27.

It is not *per se* negligence for a passenger to step from a train before it has quite stopped at a station. *Galveston &c. R. Co. v. Smith*, 59 Tex. 406.

*Treat v. Boston &c. R. Co.*, 131 Mass. 371; *Brooks v. Boston &c. R. Co.*, 135 id. 21; *Shannon v. Boston &c. R. Co.*, 78 Maine 52; *Johnson v. R. Co.*, 70 Pa. St. 365; *Delamatyr v. R. Co.*, 24 Wis. 586; *Fortune v. Missouri R. Co.*, 10 Mo. App. 252; *Doss v. R. Co.*, 59 Mo. 37; *Wyatt v. Citizens' R. Co.*, 55 id. 485; *Karle v. K. C. &c. R. Co.*, id. 476; *Lloyd v. H. & St. J. R. Co.*, 53 id. 509; *Leslie v. Wabash &c. R. Co.*, 88 id. 50; *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *A. T. &c. R. Co. v. McCandless*, 33 Kas. 373.

It is not *per se* negligent to jump off a moving car though the conductor had stated that the train would stop. *Missouri &c. R. Co. v. Meyers*, (Tex. Civ. App.) 35 S. W. Rep. 421.

Not negligent *per se* to leave a moving train. *International &c. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102.

Jumping for fear of a wreck was not negligent where the circumstances reasonably justified the apprehension. *Houston &c. R. Co. v. Norris*, (Tex. Civ. App.) 41 S. W. Rep. 708.

See, also, *Railway Co. v. Neff*, 87 Tex. 303; *Railway Co. v. Watkins*, 88 id. 20.

Where train had slowed so that it was safe to alight, it was negligent to suddenly start it ahead while a passenger was waiting on the car plat-

form to alight. *San Antonio &c. R. Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Plaintiff was not negligent in jumping from a moving train, where, owing to the darkness, he could not see how fast it was going, and two men had already jumped without injury. *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114.

Where boarding a moving train was done at the conductor's invitation, ignorance of plaintiff's position upon starting the train with a jolt was immaterial. *Missouri P. R. Co. v. Foreman*, (Tex. Civ. App.) 46 S. W. Rep. 834.

Plaintiff accustomed to ride on freight trains, having boarded a freight train and tendered his fare was allowed to recover where conductor declined the fare, refused to stop the train and either pushed him off or ordered him to jump. *Texas &c. R. Co. v. Kelley*, (Tex. Civ. App.) 47 S. W. Rep. 809.

Where the danger is not apparent to one of ordinary judgment, he has a right to rely on the conductor's advice to jump. *International &c. R. Co. v. Rhoades*, 21 Tex. Civ. App. 459.

It was held error to instruct that, to relieve defendant from negligence for injury to passenger jumping from moving train, the plaintiff must have been negligent in jumping. *Texas &c. R. Co. v. Atchison*, (Tex. Civ. App.) 54 S. W. Rep. 1075.

Jumping from a moving train is not *per se* negligence. *Jones v. Baltimore &c. R. Co.*, 21 Wash. L. R. 99.

The fact that others remained without injury in a car which collided with a crash did not prevent recovery by plaintiff who was nervous and jumped. *Wanzer v. Chippewa Valley &c. R. Co.*, 108 Wis. 319.

#### (f). ALIGHTING FROM CARS—NO LIABILITY—STEAM CARS.

It is not always a question for a jury whether a passenger was negligent in alighting from a car in motion. If the fact be undisputed, it may be a question of law.

The station was called and the train was stopped. A man and daughter of twelve years, and his wife, went on the platform of the car when the train started. The night was dark; the man took the daughter in his arms and stepped off and the daughter was hurt. The action was by the daughter, of the age of twelve years. Plaintiff was chargeable with negligence. *Morrison v. Erie R. Co.*, 56 N. Y. 302, rev'g judg't for pl'ff.

The defendant's train stopped on a bridge at a proper distance from the intersection of its tracks. The train then began to move slowly on, when a passenger, although no announcement of a station had been

made, stepped off in the darkness and fell through the bridge and was drowned. It was not the duty of the company to warn passengers that they must not leave the car when not at a station, and the deceased was guilty of contributory negligence. *Davis v. Lehigh Valley R. Co.*, 64 Hun, 492; affirming nonsuit.

The plaintiff's intestate boarded a train at Cobleskill, which was a through train from that point to Albany. After the train had left Cobleskill the conductor, in passing through the train collecting fares, was handed by the plaintiff's intestate a mileage book, and at the same time was informed by him that he desired to stop at Quaker street, where the train was not permitted to stop. The conductor informed him that he did not think the train would stop at such station. Returning in a short time, he said, "We will not stop at Quaker street, but will see."

The train slowed up to allow a freight train going in the opposite direction to pass. At this point the conductor said to the plaintiff's intestate: "It is going pretty slow now, and it will be going faster, and you better get off now; that is all I have to say about it." The deceased thereupon stepped between the freight and passenger trains, was hit by the freight train and was killed.

It was not shown whether the deceased was aware of the proximity of the freight train to the passenger car, but there was ample space on the opposite side of the passenger car from the freight train for the deceased to have alighted.

Held, the deceased took the hazard of the consequences of his negligence; that to alight from or to board a moving train is negligence *per se*. *Lewis v. The President, Managers and Company of the Delaware and Hudson Canal Co.*, 80 Hun, 192; rev'd, 145 N. Y. 508.

Citing *Halpin v. Third Ave. R. Co.*, 40 N. Y. Supr. Ct. 8 J. & S. 175; *Morrison v. Erie R. Co.*, 56 N. Y. 302.

Where plaintiff prepares to leave the train after the guard has announced the station, but while the train is in motion, and, after the door of the vestibule is opened, steps upon the platform and down the steps, where it is dark, under the assumption that the train has stopped, but without in fact knowing whether it has or not, he cannot complain on the ground that the guard did not warn him that it was still in motion, as a railroad company is under no duty to expressly warn a passenger of the stopping of its trains. *Mearns v. Central R. Co.*, 163 N. Y. 108; rev'g s. c., 23 App. Div. 298.

A passenger on the defendant's cars, while the same were moving at the rate of speed of from six to ten miles an hour, got down upon the

steps of the caboose on which he was riding and jumped to the ground, and falling, sustained injuries.

At the time of the accident the train had passed the station to which the railroad company had sold the plaintiff a ticket; the conductor of the train stood on the steps at the opposite end of the car, and signalled the engineer to stop and called to the plaintiff not to alight. The plaintiff saw the signal given, but did not hear the conductor's warning to him. He was negligent and could not recover. *Scully v. N. Y., L. E. & W. R. Co.*, 80 Hun, 197.

The fact that the rear door of a combination car could not be opened when the train arrived at plaintiff's station and he was compelled to go forward through the baggage compartment to alight and the conductor directed him to jump out of the side door of the baggage compartment, did not justify his doing so, where the car was moving slightly, the ground covered with snow and ice and, by reason of the darkness, he could not see where he might be jumping; especially where the front car platform was just beyond such compartment and permitted him to alight on a regular station platform. *Geogagn v. New York & C. R. Co.*, 10 App. Div. 454.

As to boarding and alighting from moving cars other than street cars, see 21 L. R. A. 354.

Going out on the platform of a railroad car for the purpose of alighting at the next station while the train is going at high speed, was negligence. Complaint dismissed. *Jonas v. Long Island R. Co.*, 20 Misc. 176; s. c. *aff'd*, 21 id. 306.

When, to avoid being carried off, a person who waited until train had started jumped and injured his arm, the company was not liable. *Central R. Co. v. Letcher*, 68 Ala. 106.

See, also, *H. & I. & C. R. Co. v. Leslie*, 57 Tex. 83.

Passenger's negligence in alighting from a train under dangerous circumstances, is not excused by conductor having advised him to do so. *South. & C. R. Co. v. Schaufler*, 75 Ala. 136.

*Jeffersonville & C. R. Co. v. Swift*, 26 Ind. 459; *Cincinnati & C. R. Co. v. Peters*, 80 id. 168; *Chicago & C. R. Co. v. Hazzard*, 26 Ill. 373; *East Tenn. & C. R. Co. v. Massengill*, 15 Lea, (Tenn.) 328.

After reasonable opportunity for passengers to alight no liability attaches for injuries to one attempting to get off from moving train. *R. Co. v. Tankersley*, 54 Ark. 25.

No recovery was allowed a passenger of sound mind who, in the night time, jumped off a train moving twelve miles an hour. *R. Co. v. Mayes*, 58 Ark. 399.

So, if passenger relies on promise of a conductor to stop at a place

other than a regular station, and jumps from the train, there is no liability; *quaere*, whether she might recover for breach of the promise. *Watson v. Georgia Pac. R. Co.*, 81 Ga. 476.

Where passenger was notified that his train would stop at C, but jumped before it came to a stop, no action lies. *Savannah &c. R. Co. v. Watts*, 82 Ga. 229.

See *Blitch v. Central R.*, 76 Ga. 333; *Hemmington v. Chicago &c. R. Co.*, 72 Wis. 42; where failure of conductor to inform passenger that train would come back to station was material on question of company's negligence.

Plaintiff was negligent in jumping from a train in spite of warnings to avoid being carried by. *Western &c. R. Co. v. Goodwin*, 105 Ga. 237.

Plaintiff's knowledge of the dangerous character of the ground at the place where he attempts to alight from a moving train was an element of consideration in determining his negligence. *Sanders v. Southern R. Co.*, 107 Ga. 132.

Passenger is negligent if he leaps from a train to avoid being carried beyond his stopping place. *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 519.

Passenger went on platform and down the step after car had started, when he was confronted with a telegraph pole, which would strike him if he retraced his step, and jumping was the only alternative. Recovery was denied. *Lindsay v. Southern R. Co.*, (Ga.) 41 S. E. Rep. 46.

Negligence in alighting while car is in motion is for the jury. *Canfield v. North Chicago Street R. Co.*, 98 Ill. App. 1.

Fear of being carried by is no excuse for a woman with bundles in attempting to alight while the train is increasing speed and the step is two feet from the platform. *Toledo &c. R. Co. v. Wingate*, 143 Ind. 125, 134.

See 21 L. R. A. 354.

Passenger jumped when train slowed up at a crossing where brakeman told him to. His negligence was for the jury. *Lennon v. Chicago &c. R. Co.* (Iowa) 75 N. W. Rep. 671.

That the name of the station has been called does not excuse getting off in the dark while the train is moving at 18 to 20 miles an hour. *Louisville &c. R. Co. v. Depp*, (Ky.) 33 S. W. Rep. 417.

Company was not liable to one accompanying passengers in the car and leaving after it started, where no notice had been given those in charge that he did not intend to take passage. *Berry v. Louisville &c. R. Co.*, (Ky.) 60 S. W. Rep. 699.

Conductor told plaintiff that, while the train did not stop at his station, it would slow up to enable him to alight. As they were nearing it the conductor beckoned to him and disappeared. Plaintiff went out on the

steps and swung off in the dark and while the train was going 20 miles an hour over a high trestle. Recovery was denied. *Illinois C. R. Co. v. Hanberry*, (Ky.) 66 S. W. Rep. 417.

Plaintiff was taken aboard a freight train with the understanding that it would stop at his station, and, as it approached was told to get ready. It did not stop and plaintiff was thrown from the car by the motion of the train running by at high speed as he was preparing to alight. He was not allowed to recover. *Peak v. Louisville &c. R. Co.*, (Ky.) 66 S. W. Rep. 995

See, also, *Louisville &c. R. Co. v. Head*, (Ky.) 59 S. W. Rep. 23.

Failure to stop train does not justify passenger in jumping off it. *Walker v. R. Co.*, 41 La. Ann. 795.

Where the next station was but a short distance, fear of being carried by, was no excuse for jumping from a moving train, and direction of conductor to "jump with the train" was not an advice to jump, but an assistance, seeing a determination to do so. *McDonald v. Boston &c. R. Co.*, 87 Me. 466.

No recovery was allowed a woman who tried to get off a train in the night time before it had come to a standstill. *England v. Boston &c. R. Co.*, 153 Mass. 490.

See *Cincinnati &c. R. Co. v. Duffrain*, 36 Ill. App. 352; *Leggett v. Western &c. R. Co.*, 143 Pa. St. 39.

Where no effort is made by passenger to leave the car at his crossing he cannot justify his jump by fear of being carried by. *White v. West End Street R. Co.*, 165 Mass. 522.

Plaintiff, being delayed in getting out of her seat, though she met the brakeman who had come in, shut the door and sat down, nevertheless proceeded to the platform and alighted while car was in motion, in broad daylight. It was held error not to direct for defendant. *La Pointe v. Boston &c. R. Co.*, 179 Mass. 535.

Plaintiff, accustomed to alighting at the place where he was injured, was negligent in alighting after the train had started and where he could have seen that the train was in motion had he looked. *Brown v. New York &c. R. Co.*, (Mass.) 63 N. E. Rep. 941.

Alighting before a car stops, was held negligence. *Defoe v. St. Paul City R. Co.*, 65 Minn. 319.

Plaintiff, a mature man, jumped from defendant's train at a place other than a regular stopping place at night, conductor having slowed up for that purpose; recovery was barred. *Bardwell v. Mobile &c. R. Co.*, 63 Miss. 574.

See *Lindsey v. Chicago &c. R. Co.*, 64 Iowa, 407; *South &c. R. Co. v. Schaeffer* 75 Ala. 136; *Straus v. Kansas City &c. R. Co.*, 86 Mo. 421.

Jumping off while a train is moving eight miles an hour past passenger's station is negligence. Judgment for plaintiff was reversed. *Illinois C. R. Co. v. Trail*, (Miss.) 25 South. Rep. 863.

Passenger alighting from cars under circumstances in which prudence would forbid, as when he jumps to prevent carriage beyond his destination, cannot recover. *Kelly v. Hannibal &c. R. Co.*, 70 Mo. 604.

*Leslie v. Wabash &c. R. Co.*, 88 Mo. 50; *Lake Shore &c. R. Co. v. Bangs*, 47 Mich. 470; *Jewell v. Chicago &c. R. Co.*, 54 Wis. 610; *Davis v. R. Co.*, 18 id. 175; *R. Co. v. Aspell*, 23 Pa. St. 147; *Gavett v. R. Co.*, 16 Gray 501; *Secor v. R. Co.*, 10 Fed. R. 15; *Bon v. R. Co.*, 10 N. W. (Iowa) 225; *Nichols v. R. Co.*, 106 Mass. 463; *I. C. R. Co. v. Able*, 59 Ill. 131; *O. & M. R. Co. v. Schiebe*, 44 id. 460; *Evansville &c. R. Co. v. Duncan*, 28 Ind. 441; *Jeffersonville R. Co. v. Swift*, 26 id. 459; *Jeffersonville R. Co. v. Hendricks*, id. 228; see also same case, 41 id. 48; *C. & A. R. Co. v. Randolph*, 53 Ill. 510; *I. C. R. Co. v. Slatton*, 54 id. 133; *O. & M. R. Co. v. Stratton*, 78 id. 88; *Craven v. Central Pac. R. C. Co.*, 72 Cal. 345; *Central R. Co. v. Letcher*, 69 Ala. 106; *Gr. Sr. R. Co. v. Hawk*, 72 id. 112; *Gothard v. Ala. Gr. Sr. R. Co.*, 67 id. 114; *Damont v. New Orleans &c. R. Co.*, 9 La. Ann. 441; *Frost v. Grand Trunk R. Co.*, 10 Allen 387; *Gonzales v. New York &c. R. Co.*, 50 How. (N. Y.) 126; *Illinois Cent. R. Co. v. Chambers*, 71 Ill. 520.

Alighting from a train in motion when two persons had been thrown in attempting to alight before him, defeats plaintiff's action for injuries. *Brown v. Barnes*, 151 Pa. St. 562.

That one finds himself on the wrong train does not justify leaving it while going 10 to 15 miles an hour, though he is told by a trainman that he may do so. *Rothstein v. Pennsylvania R. Co.*, 171 Pa. St. 620.

Platform gate was opened while train was in motion and plaintiff voluntarily jumped off. He was not allowed to recover. *Agulino v. New York &c. R. Co.*, 21 R. I. 263.

It was error to charge that failure to stop would be negligence, to which contributory negligence in getting off while the train was moving would be no bar. *Louisville &c. R. Co. v. Collier*, 104 Tenn. 189.

The announcement of the station as required by statute did not render defendant liable for plaintiff's going to the platform before the train stopped. *Payne v. Nashville &c. R. Co.*, 106 Tenn. 167.

Negligence in alighting from a slowly moving train is for the jury. *San Antonio &c. R. Co. v. Dykes*, (Tex. Civ. App.) 45 S. W. Rep. 758.

Getting up and standing in the aisle upon approaching the station was not negligence. *Gulf &c. R. Co. v. Bell*, 93 Tex. 632.

Where plaintiff alighted, though she thought the train was moving too fast to do so in safety, verdict was properly directed for defendant. *Williams v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 36 S. W. Rep. 329.

Plaintiff was negligent in alighting between stations while train was moving at its ordinary speed. *High v. International &c. R. Co.*, (Tex. Civ. App.) 55 S. W. Rep. 526.

Carrying a passenger by his station is no excuse for his taking a child of four off the train while in motion. *Texas &c. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153.

See, also, *Texas &c. R. Co. v. Born*, 20 Tex. Civ. App. 351.

It is negligence *per se* in a passenger to attempt to board a moving train contrary to a city ordinance. *Mills v. Missouri &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 291; s. c. rev'd, 59 S. W. Rep. 874 (on the ground, that, so far as it related to passengers, the ordinance was invalid).

Boy was negligent in jumping off moving train in the dark after it had begun to move from the station at which he had been assisting passengers to board. *Ozsher v. Houston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 55.

That a non-vestibule car was put in a train advertised as "solid vestibule" held not a ground of recovery for death of one in daytime thrown from the platform thereof while train was in motion, having gone there to be ready to alight as soon as train stopped. *Sansom v. Southern R. Co.*, 111 Fed. Rep. 887.

That conductor had promised to stop where the train was not scheduled did not justify a boy of 17 in jumping when he saw that it failed to do so. *Schiffler v. Chicago &c. R. Co.*, 96 Wis. 141.

It was held negligent *per se* for one of mature age to step, knowingly and unnecessarily, from a moving train. *Walters v. Chicago &c. R. Co.*, (Wis.) 89 N. W. Rep. 140.

Citing *Brown v. Railway Co.*, 80 Wis. 162.

#### (g). ALIGHTING FROM CARS—NO LIABILITY—STREET CARS.

The defendant's conductor stopped a street car to allow a passenger to alight, which she did, and the conductor rang the bell and the car started. At this time another passenger, the plaintiff, had arisen from her seat and taken three steps toward the rear end of the car, when, by the starting of the car, she was thrown down. She had not signalled the conductor to stop nor attracted his attention in any way. A charge to the effect that, if the plaintiff arose to get off or for some other purpose, it was negligence, as matter of law, for the conductor to start the car without warning her, was error. The question was whether, if the plaintiff was standing, when the conductor started the car, he was negligent in doing so without warning her, and whether the conductor should have seen her in the absence of any signal from her. *Losee v. Waterliet &c. R. Co.*, 63 Hun, 404, rev'g judg't for pl'ff.

Plaintiff was negligent, where, after the car had started on after discharging some passengers, he stepped upon the front platform and alighted with his back to the horses without notifying either the con-



ductor or the driver of his desire to get off. *Steuer v. Metropolitan Street R. Co.*, 46 App. Div. 500.

Plaintiff, supposing a street car would stop at the first cross walk of a cross street, got down on the running board and signaled the conductor, who rang the bell. The motorman, however, did not stop until he reached the further cross walk, and plaintiff was thrown from the car by its motion in crossing intersecting car tracks. Direction of verdict for defendant was sustained. *Nies v. Brooklyn &c. R. Co.*, 68 App. Div. 259.

Plaintiff got down upon the steps preparatory to alighting as the car slowed up at a street crossing as it usually did. He whistled to the conductor to stop, but the car at that instant jerked forward throwing him off. That conductor was at the time collecting fare with his back to the rear of the car so that he could not see signals to him, did not show negligence, on the part of defendant. *Sims v. Metropolitan Street R. Co.*, 65 App. Div. 270.

See, also, *Harris v. Union R. Co.*, 69 App. Div. 385.

Charge that getting off a moving car was negligence *per se* held proper in view of the circumstances. *Kuhlman v. Metropolitan Street R. Co.*, 30 Misc. 417.

Not negligent *per se* to leave an electric car while in motion, where a passenger had told the conductor he wished to alight and the car after passing the station slowed up apparently for the purpose of permitting him to do so. *Birmingham R. &c. Co. v. James*, 121 Ala. 120.

It was not negligence *per se* to get upon the steps to alight while the car is slackening and moving slowly. *Birmingham &c. R. Co. v. James* 121 Ala. 120.

Where plaintiff was warranted in assuming that a car would stop before rounding a curve, it was not negligent to go on the platform to alight with bundles in one hand and attempting to grasp the hand rail with the other. *Babcock v. Los Angeles T. Co.*, 128 Cal. 173.

The motorman had failed to comply with plaintiff's first request to stop at the street crossing, but at a second signal stopped a little beyond; held, latter was negligent in getting off before the car stopped. *Campbell v. Los Angeles R. Co.*, 135 Cal. 137.

It is not negligent *per se* to alight from a slowly moving electric car. But, if passenger's negligence brings him into danger with knowledge of the carrier, the latter is liable for failure to exercise reasonable care to avoid injury to him; plaintiff was in act of alighting from moving car when conductor seized him by the arm which caused him to fall under the car. Nonsuit was held error. *Posten v. Denver &c. T. Co.*, 11 Colo. App. 187.

It was negligence in a boy of 16 to alight from a rapidly moving train.

because its speed was such as to make it appear that it would not stop at his destination. *Jones v. Georgia &c. R. Co.*, 103 Ga. 570.

Standing on the platform with his back against the dashboard while waiting for the car to stop was not negligence *per se*. *North Chicago Street R. Co. v. Baur*, 179 Ill. 126; s. c., 45 L. R. A. 108; aff'g s. c., 79 Ill. App. 121.

Not negligent *per se* to jump from a carriage where the horses start to run away. *Benner Livery &c. Co. v. Busson*, 58 Ill. App. 17.

Not negligent *per se* to get off slowly moving street car. *West Chicago &c. R. Co. v. Dudzik*, 67 Ill. App. 681.

Plaintiff was negligent in going to the footboard of a car after signalling for it to stop and attempting to get off before it stopped without defendant's knowledge. *Chicago City R. Co. v. Gregg*, 69 Ill. App. 77.

Whether it is negligent to alight from a moving street car depends upon the condition of the passenger and the surrounding circumstances. *Chicago City R. Co. v. Meehan*, 77 Ill. App. 215.

Not negligent *per se* after signalling for a stop and then getting down on steps without holding on. *North Chicago Street R. Co. v. Southwick*, 66 Ill. App. 241; s. c. aff'd, 165 Ill. 494.

See, also, *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634.

While riding after dark upon a trolley car that had been switched without his knowledge on to the adjoining track so as to bring the footboard next the poles between the tracks, plaintiff, learning that he was being carried away from his destination, stepped upon the foot board while the car was in motion, to get a transfer ticket and was struck by a pole. He was not negligent *per se*. *Citizens' Street R. Co. v. Hoffbauer*, 23 Ind. App. 614.

Where plaintiff was thrown while stepping from platform to steps for the purpose of alighting between cross walks without notice to those in charge of the car, judgment for defendant was affirmed. *Dressler v. Citizens' Street R. Co.*, 19 Ind. App. 383.

Passenger remained talking on the car till it started. Jury found him negligent in attempting to alight. *Pittsburg &c. R. Co. v. Gray*, (Ind. App.) 64 N. E. Rep. 39.

Negligence in alighting from a street car in motion is for the jury. *Root v. Des Moines &c. R. Co.*, (Iowa) 83 N. W. Rep. 904.

That a street car conductor called a boy of ten to the platform when drawing near to his destination before giving the signal, did not make defendant liable, where, owing to his own imprudence, he fell from the platform. *Cronan v. Crescent City R. Co.*, 49 La. Ann. 65.

It was negligent *per se* for one familiar with the road and the position of the trolley poles to attempt to alight while the car was in rapid motion

with his body beyond the car line and back to the poles, and in spite of a posted warning. *Sharkey v. Lake Roland El. R. Co.*, 84 Md. 163.

If, after a reasonable time for getting off a street car, plaintiff attempts to get off without the knowledge of company's employes, no recovery can be had. *Gilbert v. West End Street R. Co.*, 160 Mass. 403.

An instruction that a street car company is bound by its conductor's promise to stop the car and let a passenger off at a certain place, was rightly refused, although it was a circumstance to be considered in an action for negligence. Plaintiff was jerked or alighted from a moving car. *Robinson v. Northampton St. R. Co.*, 157 Mass. 224.

Where plaintiff went upon the platform and to the steps to alight after signaling conductor and while the car was moving 7 to 12 miles an hour, judgment was ordered for defendant, notwithstanding the verdict. *Saiko v. St. Paul City R. Co.*, 67 Minn. 8.

See, also, *Currie v. Mendenhall*, 77 Minn. 179.

Nonsuit was sustained where, after plaintiff had gotten on the running board, to alight, the conductor gave the signal to start, and plaintiff leaned outward to signal the conductor again, and was struck by an approaching wagon. *Flynn v. Consolidated Traction Co.*, (N. J. L.) 52 Atl. Rep. 369.

Evidence that a street car made very short stops was held competent on the ground that it tended to prove that plaintiff may not have been negligent under the circumstances in leaving his seat and walking to the rear platform of the car, while it was in motion, to be ready to alight when it stopped. *Mt. Adams &c. R. Co. v. Isaacs*, 18 Oh. C. C. 177.

Fact that conductor of street car is inside the car when it slowed up for plaintiff to get on does not charge the company with liability. *Picard v. Ridge Ave. &c. R. Co.*, 147 Pa. St. 195.

Plaintiff was nonsuited, where he fell from a street car, crossing in ordinary motion over railroad track, while standing with one foot on the step and one on the platform crowded between two others, with both hands full of bundles. *Barry v. Union Traction Co.*, 194 Pa. St. 576.

If a passenger on a street car, after having requested the driver to stop, jumps from the same before it comes to a stand, he is guilty of contributory negligence. *Hagan v. Philadelphia &c. R. Co.*, 15 Phila. 278.

One stepping from the front platform of a street car in motion is negligent. *Beattie v. Citizens' &c. R. Co.*, 1 Cent. (Pa.) 633.

*Hagan v. Philadelphia &c. R. Co.*, 15 Phila. 278; see, also, *Chrissey v. Hestonville &c. R. Co.*, 25 P. F. Smith (Pa.) 83; *Cram v. Metropolitan R. Co.*, 112 Mass. 38; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600.

Plaintiff was negligent in going to the platform to alight, notwith-

standing the conductor had not signaled to stop in response to his signal. *Slade v. Union Traction Co.*, 7 Pa. Dist. R. 34.

Plaintiff was negligent in attempting to alight while the car was in motion and without signifying his intention to those in charge. *Blakney v. Seattle Electric Co.*, (Wash.) 68 Pac. Rep. 1037.

See, also, *Brown v. Seattle &c. R. Co.*, 16 Wash. 465.

### VIII. Platforms of Cars.

A carrier's duty requires him to carry passengers inside and not outside of the passenger cars, hence, if the passenger, without the carrier's permission, express or implied, be unnecessarily upon the platform of the car, in the baggage or express car, especially if this be prohibited, and be injured on account of some exposure incident to the position, he cannot recover therefor. But it has not been uniformly held that it is negligent to stand on the platform of a street car, and in some states the question of negligence is for the jury. Permission to occupy such a position may be implied from the crowded condition of the interior of the car, the acceptance of fare without protest while the passenger is in such position, and, not infrequently, from a custom of the carrier to allow passengers to ride there; but mere acquiescence on the part of the carrier does not usually constitute permission to remain in a dangerous position. And, so, if a passenger do any act or take up any position on a car, that he knows or should know to be dangerous, and maintain the same unnecessarily, and injury result to him, in whole or part from such danger, he cannot recover therefor.

(See "Injuries to Passenger from External Causes," *post*, p. 536.)

#### (a). STEAM CARS.

A passenger is not negligent for standing on the platform of a car in motion, if there be no vacant seats inside. It is not part of a passenger's duty to enforce the company's rules, but rather the duty of the company's servants; nor is it the duty of a passenger, while the train is in motion, to go from car to car, seeking a seat, nor to find a safe seat, as all should be safe.

The plaintiff was on platform of car and was injured in a collision. *Willis v. Long Island R. Co.*, 34 N. Y. 670, *aff'g* 32 Barb. 398.

**From opinion.**—"Their position, whether judiciously or injudiciously selected, so far as they were concerned, was lawful under these circumstances as between them and the company; and, in legal contemplation, it neither caused nor contributed to the injury. The law on this subject was settled in the leading case of *Carroll v. The New Haven R. R. Company*, in which the question was directly involved; and the judgment of the Superior Court in that case was subsequently affirmed in this court. (2 Duer 571; 6 id. 415, 416.) It was very properly held in the case of *Colegrove v. The New Haven & Harlem Company*, that it did not necessarily follow that no fault of the plaintiff could excuse the defendants from liability, unless it had the effect to produce the collision that caused the injury:

but in that case, as in the other, the court affirmed the judgment and sustained the plaintiff's recovery, the jury having been instructed that if the company undertake to carry in any one car more than they can accommodate with seats, so that some are of necessity forced to stand upon the platform, and have no opportunity before the train is under way to find seats in other cars, such persons are there by permission of the company, and are lawfully there; and the company can claim no exemption under the statute, no matter how conspicuously their notices may be posted in the interior of the cars. (20 N. Y. 492; 6 Duer 382.) The rule, as settled in the case of *Carroll v. The New Haven R. R. Company*, has recently been affirmed by a unanimous decision of this court. *Halsey v. Earle*, 30 N. Y. 208.

The Supreme Court was also right in holding, that under the statute the defendant was not absolved from liability, if the jury found from the evidence as matter of fact, that the plaintiff had neither time nor opportunity to proceed to the rear cars in search of a seat, without exposure to hazard in passing from platform to platform while the train was in rapid motion; that there was no seat unoccupied in the coach on which he was riding; and that he was guilty of no actual want of care in the selection of a position in which to stand, until he could obtain the accommodation to which he was entitled.

The statute is, 'in case any passenger shall be injured while on the platform of any car in violation of the printed regulations of the company posted up at the time in a conspicuous place, inside of its passenger cars then in the train, such company shall not be liable for the injury, *provided the said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of its passengers.*' Laws of 1850, 234, sec. 46.\*

It is not *per se* negligence for a passenger, by direction of a servant of the company, to go from one car to another, while in motion, to find a seat. *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287.

The stoppage of a train at a station is an invitation to take passage, and if tickets are sold for that train, a safe place to ride must be furnished, otherwise a passenger on a platform, thrown off by a lurch at a curve, may recover. *Werle v. L. I. R. Co.*, 98 N. Y. 650.

The plaintiff, at the suggestion of the conductor, waited just inside of the car to cross into another, when attached. When the car was attached the coupling did not catch and the plaintiff, in trying to cross, fell between the cars. The conductor called, "all aboard," just as the cars touched; this might be considered an invitation to enter cars. *Lent v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 467; affirming 22 J. & S. 317, and judg't for pl'ff.

Plaintiff boarded an elevated train of defendant's at the invitation of

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\* NOTE.—"Sec. 53. RIDING ON PLATFORM; WALKING ALONG TRACK.—No railroad corporation shall be liable for any injury to any passenger while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the corporation posted up at the time in a conspicuous place inside of the passenger cars, then in the train, if there shall be at the time sufficient room for the proper accommodation of the passenger inside such passenger cars; and no person, other than those connected with or employed upon the railroad, shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." (Chap. 565, L. 1890.)

its employé and stood upon the platform for lack of room inside the car. The latter soon after, as the result of a quarrel with an intoxicated passenger, struck at him, causing an unusual movement of the crowd, which forced plaintiff outward. The gates were not entirely closed, and to steady himself, he grasped the iron railing back of him and by reason of the train's rounding a curve at the time became pinned between it and the railing of the next car. It was held not to be negligence *per se* in such case to ride upon the platform and plaintiff did not assume the risk of dangers that were not usual and incidental to such mode of travel and had a right to assume that he would be notified, if there were any. Defendant's negligence in overcrowding the car was for the jury and failure to close the gates was evidence of negligence. *Graham v. Manhattan R. Co.*, 149 N. Y. 336; rev'g s. c., 8 Misc. 305.

Plaintiff started for the closet of a vestibule sleeping car, with the surroundings of which he was familiar. Suddenly the lights went out and, being confident of his location, he opened a door which he supposed to be that of the closet, but which in fact was that of the vestibule, and stepped off the train. It was held that a rule of defendant requiring the vestibule door to be bolted did not warrant the plaintiff's utter heedlessness of where he was going under circumstances obviously calling for the exercise of caution, and that he was negligent as matter of law. *Piper v. New York &c. R. Co.*, 156 N. Y. 224; s. c., 41 L. R. A. 724; rev'g s. c., 89 Hun, 75.

Train broke in two by the draw-head of coupling pulling out. Passenger on platform hurt by parts of train coming together; he said he did not see sign, nor hear the brakeman forbid his standing on the platform. Negligence, and contributory negligence were for the jury. *Goodrich v. P. & N. Y. C. &c. R. Co.*, 29 Hun, 50, aff'g judg't for pl'ff.

Citing *Hadencamp v. Second Ave. R. Co.*, 1 Sweeney, 490; *Ward v. The Central Park, &c. R. Co.*, 11 Abb. (N. S.) 411; *Solomon v. Central Park &c. R. Co.*, 1 Sweeney, 298; *Robertson v. New York &c. R. Co.*, 22 Barb. 91.

A passenger was going from one car to another, while the train was in motion, and while so doing the train parted and the deceased was thrown down and killed. Unless notified not to do so, the passenger in so going from one car to another assumed only the ordinary risks incident to such an action, and had a right to assume that the couplings, etc., were safe. *Costikyan v. R. W. &c. R. Co.*, 58 Hun, 590, aff'g judg't for pl'ff; aff'd. 128 N. Y. 633.

Following *Goodrich v. Penn &c. R. Co.*, 29 Hun, 50.

Plaintiff's intestate was riding on the platform of a car; the train approached the station and the crowd began to come out of the car on the car platform; the intestate stepped back and fell between the cars and

was killed. The defendant might have foreseen this. *Merwin v. M. R. Co.*, 48 Hun, 608, aff'g judg't for pl'ff; s. c. aff'd, 659.

Citing *Werle v. Long Island R. Co.*, 98 N. Y. 650

Negligence and contributory negligence were for the jury, where defendant allowed a tree to stand within five or six inches of the side of passing cars and allowed plaintiff to remain on the front platform without objection, where he was struck by the tree while leaning out beyond the edge of the car in the dark, without necessity. *Sias v. Rochester R. Co.*, 92 Hun, 140.

A boy of ten and a half is only held to the degree of care reasonably to be expected of one of his age and so is not negligent *per se* in following other passengers onto the platform before the train stops, though it might have been negligent in them to do so. *Schreiner v. New York &c. R. Co.*, 12 App. Div. 551.

Plaintiff was negligent in arising before the car stopped, opening the door and placing her hand against the jamb to steady herself. A nonsuit was sustained. *Guthman v. Manhattan R. Co.*, 53 N. Y. Supp. 139.

It is the duty of a passenger on an elevated railroad who finds the platform where he is obliged to stand dangerous from overcrowding, and has reached a place of safety by getting off at a station, to wait for the next train, and where he does not do so, but voluntarily gets upon the car platform, he takes the risk. *Graham v. The Manhattan R. Co.*, 8 Misc. 305.

Plaintiff was not negligent *per se* in leaving his seat as the train was slowing up to stop at a street crossing and going to the steps of the platform to alight, whence he was thrown by a sudden increase of speed. *Watkins v. Birmingham R. &c. Co.*, 120 Ala. 147; s. c., 43 L. R. A. 297.

Plaintiff's negligence in riding on the front platform of the caboose was for the jury, where it appeared to him dangerous to ride inside on account of the heavily loaded freight cars in the rear. *Prescott &c. R. Co. v. Smith*, (Ark.) 67 S. W. Rep. 865.

Plaintiff was not negligent *per se* in going to the platform after the train had stopped, at a regular station platform to speak with a party. He put his hand on the door casement to steady himself from the sudden jerking of the car, which slammed the door and caught his hand. *McCurrie v. Southern P. Co.*, 122 Cal. 558.

The care required of a boy of fifteen in riding on the step of a crowded car is such as should be expected of one of his age. *Georgia &c. R. Co. v. Watkins*, 97 Ga. 381.

That a conductor has promised to stop at a place where the train was not scheduled to stop at and had directed plaintiff to be ready on the platform, did not justify latter in going upon the steps where the train

was going at high speed and gave no indication of stopping. *Hicks v. Georgia &c. R. Co.*, 108 Ga. 304.

Plaintiff's negligence in holding on to the first step of a workingman's train, the platform of which was crowded, with his body projecting so as to strike a car negligently left near the track, was for the jury and a verdict for plaintiff was sustained. *Lake Shore &c. R. Co. v. Kelsey*, 180 Ill. 530; aff'g s. c., 76 Ill. App. 613.

Plaintiff, to allow a lady passenger to pass, without first looking, stepped backward and fell between the platforms of vestibule cars opened by the motion of the train on a reverse curve. It was held error not to instruct for defendant. *Louisville &c. R. Co. v. Stout*, 66 Ill. App. 298.

Where there was standing room within, plaintiff, a boy of 15, was not warranted in standing on the steps of the platform while the car was moving 25 miles an hour, to vomit. *Cleveland &c. R. Co. v. Moneyhun*, 146 Ind. 147; s. c., 34 L. R. A. 141.

Negligence, in going upon the platform of a car to alight before it has stopped, though it is slackening up and moving slowly. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

See, also, "Moving cars," ante, p. 476.

Plaintiff was not negligent *per se* in riding on the platform of a crowded excursion train, though there was standing room inside. *Chesapeake &c. R. Co. v. Lang*, 100 Ky. 221.

The proper accommodations required by Mo. R. S. 1889, sec. 2587, to relieve railroad from injuries caused by riding on the platform, is a seat, and not merely standing room. Not negligence *per se* at common law to ride on the platform. *Choate v. Missouri P. R. Co.*, 67 Mo. App. 105.

Plaintiff was not negligent *per se* in getting up and standing in the doorway waiting for the car to stop. *Consolidated Traction Co. v. Thalheimer*, 59 N. J. L. 474.

It was negligence as matter of law, though one had a ticket to ride on a particular train, to ride on the steps outside the vestibule door upon being unable to get into the coach. *Sanders v. Chicago &c. R. Co.*, 10 Okl. 325.

Standing on platform while car is moving is not negligence *per se*. *Doolittle v. Southern R. Co.*, 62 S. C. 130.

While one assumes the ordinary risks in passing over platforms of moving trains he does not subject himself to more than ordinary dangers. *Sickles v. Missouri &c. R. Co.*, 13 Tex. Civ. App. 434.

Plaintiff was not negligent *per se* in being on the rear platform by which he was directed to enter, the door of which was in fact kept locked



by a rule of the company known to him. *Missouri &c. R. Co. v. Brown*, (Tex. Civ. App.) 39 S. W. Rep. 326.

Failure of defendant to warn plaintiff of danger which was apparent to him in riding on platform while car is going at high rate of speed was not negligence. *Ebert v. Gulf &c. R. Co.*, (Tex. Civ. App.) 49 S. W. Rep. 1105.

It cannot be said that standing on platform of moving train is or is not negligence *per se* it is solely a question for the jury. *St. Louis &c. R. Co. v. Ball*, (Tex. Civ. App.) 66 S. W. Rep. 879.

Negligence in standing on platform, where the interior of the car was crowded, was for the jury. *Williams v. International &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 1085.

Negro was allowed to recover, where he could not enter the negro car by reason of its occupancy by whites and was forced to the platform, whence he was thrown by motion of the car. *Williams v. International R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 1085.

While going through an unlit vestibule on a rapidly moving train on a dark night, plaintiff mistaking the image of a light reflected from a car window for the light itself walked out on the ground through the door of the vestibule which had been left open. Negligence and contributory negligence were for the jury. *Bronson v. Oakes*, 76 Fed. Rep. 734.

It was negligent to go upon the platform of a moving train with both arms full of bundles, to ask the conductor to stop a train which was carrying plaintiff by her station. *Jammison v. Chesapeake &c. R. Co.*, 92 Va. 327.

It was not negligent *per se* to stand on the platform of a crowded car while it was in motion. *Trumbull v. Erickson*, 97 Fed. Rep. 891.

Rule prohibiting standing on platform is waived by admitting more than car can accommodate. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Refusal to go inside upon the conductor's request prevented recovery, and failure to compel passenger to enter was not negligence, where he was not so intoxicated as to lead one to suppose that he could not care for himself. *Fisher v. West Virginia &c. R. Co.*, 42 W. Va. 183; s. c., 33 L. R. A. 69.

Not negligent *per se* to ride on platform when no room inside. *Ward v. Chicago &c. R. Co.*, 102 Wis. 215.

#### (b). STREET CARS.

The deceased, having paid his fare, was seated with a companion of his own age, in the interior of a car. The car began to fill up with passengers, and the conductor ordered the boys to get up and make room for

adult passengers. They went forward in the car and took other seats, and were again ordered up, and, objecting to giving up their seats, were "put out" of their places by the conductor.

The car had by this time become very full, "very crowded." The deceased was crowded and pushed by the passengers in the car out on the front platform, which, as well as the inside of the car, was full of people.

While there, the car being in motion, there was a rush of another passenger to get off, and the deceased was thrown off the car, was run over, and received injuries from which he died.

Ordinary attention is all that is required of a passenger, on a car. *Sheridan v. Brooklyn City & Newtown R. Co.*, 36 N. Y. 39, aff'g judg't for pl'ff.

If the passenger be riding on the platform of the car in a place of danger, negligence is thereby *prima facie* established.

*Memphis & C. R. Co. v. Salinger*, 46 Ark. 528; *Alabama Great Southern R. Co. v. Hawk*, 72 Ala. 112.

But the presumption is rebutted if the car be full and the conductor took the ticket on the platform, as that carries an invitation to ride there and of assurance of safety. *Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135.

*Gustle v. Union Pac. R. Co.*, 23 Mo. App. 361; *Dickinson v. Port Huron & C. R. Co.*, 53 Mich. 43; *Atchison & C. R. Co. v. McCandless*, 33 Kans. 366.

The car was so crowded that a passenger could not enter without discomfort, and the conductor received fare and allowed passengers to ride on the platform, from which the plaintiff was thrown. The defendant's negligence and contributory negligence were for the jury. *Ginna v. Second Ave. R. Co.*, 67 N. Y. 596; affirming 8 Hun, 494, and judg't for pl'ff.

*Passenger R. Co. v. Young*, 21 Oh. St. 518.

Without regard to sec. 46, ch. 140, L. 1850, relieving a carrier from liability from injuries received by one riding on a platform, the warning in the car against riding on the platform and the furnishing of a seat inside does not relieve a company from negligence, where a passenger rides on the platform of a street car and is hurt by the sudden start of the car and the plunge of the horses, when the conductor took full fare, and persons smoking are accustomed to riding on the platforms. *Nolan v. Brooklyn & Newtown R. Co.*, 87 N. Y. 63, aff'g judg't for pl'ff.

See *Baltimore R. Co. v. Wilkinson*, 30 Md. 224; *Wilton v. Middlesex R. Co.*, 107 Mass. 108.

**From opinion.**—"In *Phillips v. Rensselaer & S. R. R. Co.* (49 N. Y. 177), the passenger undertook to get upon the cars while in motion, and was plainly guilty of contributory negligence. In *Clark v. Eighth Ave. R. Co.* (36 N. Y. 135) the

passenger was riding on the steps of the car, a position palpably more dangerous than riding on the platform. In *Ward v. Central Park &c. R. Co.* (11 Abb. N. S. 411) it appeared that the track was in bad condition from accumulations of snow and ice, of which the passenger was fully cognizant, and which the court say was suggestive of the "extreme probability" of a jar or jolt. In *Solomon v. Central Park &c. R. Co.* (1 Sweeney, 298), the boy was sitting on the step of the platform, and was thrown off by a jolt. In all these cases there was some element warranting an inference of negligence beyond and outside of riding on the front platform. These authorities do not establish the doctrine asserted. It is not, even in the case of steam cars, negligence *per se* for a passenger to stand on the front platform of a moving car. *Willis v. Long Island R. R. Co.*, 34 N. Y. 676; *Hadencamp v. Second Ave. R. R. Co.*, 1 Sweeney, 490; *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596. The question is one of fact for the jury, taking into view all the circumstances of the case. *Morrison v. Erie R. Co.*, 56 N. Y. 307; *Maguire v. Middlesex R. R. Co.*, 115 Mass. 239; *Westchester & Phila. R. R. Co. v. McElwee*, 17 P. F. Smith, 311; *Meesel v. L. & B. R. R. Co.*, 8 Allen, 234; *Wharton on Negligence*, sec. 366.

"It is further claimed that no negligence of the defendant was shown. It must be freely confessed that the evidence, taken altogether, is very unsatisfactory; but that is not the question here. It comes up in the form of a motion for a nonsuit which was denied, and that ruling must be sustained, where the evidence is conflicting and the inferences to be drawn are doubtful. *Belton v. Baxter*, 58 N. Y. 415; *Cook v. N. Y. Cent. R. R. Co.*, 3 Keyes, 467; *Ochsenbien v. Shapley*, 85 N. Y. 214.

Although there was plenty of room in the street car, the plaintiff went on the platform, then went on the lower step to allow a passenger to enter, and, as he was stepping up, the car started with a jerk and he was injured. The defendant was not liable.

Does sec. 46 of General Railroad Act apply to street railroads (*Quære*)? *Hayes v. Forty-Second Street &c. R. Co.*, 97 N. Y. 259.

The plaintiff gave his seat in the car to his wife, and went to the platform of a street railway car, which, being crowded, he stood on the car steps, and from thence the movement of the passengers threw him under the car. Contributory negligence of the defendant was for the jury. *Lehr v. S. & H. P. R. R. Co.*, 118 N. Y. 556, aff'g judg't for pl'ff.

A regulation of a company prohibiting smoking except on front platforms was deemed to have modified notice on the car not to ride on platform and did not prevent recovery by one injured while engaged in smoking in that position. The exemption of railroad from liability for injuries received while riding on the platform of cars, where notices have been posted and there are accommodations inside, contained in section 46 of the General Railroad Laws of 1850 (ch. 140), held not to apply to street railroads. *Vail v. Broadway R. Co.*, 147 N. Y. 377; s. c., 30 L. R. A. 626.

A street railroad company, operating by electricity, need not warn passengers of the approach of a motor to a curve in its tracks, in the

absence of proof that the curve in the track is a dangerous and improper one for such railroad, or that there is any defect in the car or track which renders it dangerous.

In order to authorize a jury to find a street railroad company, operated by electricity, guilty of negligence by reason of the running of a motor car at too high a rate of speed, there must be some evidence that the rate of speed is unusual, improper or dangerous, and the jury is not permitted to speculate as to the duty of the railroad company in regard to the rate of speed at which it may run its cars, nor to capriciously fix such rate without evidence.

A person is guilty of contributory negligence who, being an habitual passenger of a street railroad, at the time of an accident is riding on the steps of the front platform of an electric car on such street railroad, when there is ample accommodation for him within the car, and he is riding on such platform by the permission of the conductor of such car, in order that he may smoke. *Francisco v. The Troy & Lansingburgh Railroad Company*, 78 Hun, 13.

Contributory negligence was for the jury, where plaintiff was riding on the running board of a crowded street car while passing a truck, standing between the curb and the car, and was injured by the backing of the truck. *Wood v. Brooklyn City R. Co.*, 5 App. Div. 492.

Plaintiff, riding on front platform, at the conductor's direction, to smoke, and while in the act of paying his fare, was thrown by a sudden jerk of the car, caused by the plunge of the horse under the driver's whip, when it had stopped to walk over a dangerous place. Dismissal of the complaint was error. *Hastings v. Central Crosstown R. Co.*, 7 App. Div. 312.

Plaintiff was not negligent *per se* in riding on the platform of a crowded car when he was injured by the giving way of a gate, which the conductor knew was not fastened, and against which plaintiff was pushed or thrown. *Pendergast v. Union R. Co.*, 10 App. Div. 207.

It is for the jury to say, whether defendant was negligent in driving so rapidly past a turnout on the track as to throw plaintiff, riding on the front platform, from the car, and whether plaintiff was negligent in so riding there to smoke. *Dillon v. Forty-Second Street &c. R. Co.*, 28 App. Div. 404.

It was not error to charge that plaintiff was not negligent in remaining on the front platform after giving up his seat to a lady, where the danger of the position was not obvious. Injury caused by negligent collision with truck. *Still v. Nassau Electric R. Co.*, 32 App. Div. 276.

It was for the jury to say whether plaintiff was negligent in riding on the running board of a car in which there were no unoccupied seats

though there was space within to stand, where the conductor collected his fare without objection to his staying there and he was thrown off by a sudden jerk of the car. *Hassen v. Nassau Electric R. Co.*, 34 App. Div. 71.

See, also, *Elberhardt v. Metropolitan Street R. Co.*, 69 App. Div. 560.

Plaintiff was not negligent *per se* in going on the front platform to smoke, which it was defendant's custom to allow, though it had been snowing and things were slippery and slushy. Plaintiff was thrown over the dashboard by a sudden jerk and killed. *Bradley v. Second Ave. R. Co.*, 34 App. Div. 284.

By permitting one to ride on the front platform of a crowded car, a carrier undertakes the duty of exercising extraordinary care for his safety. Defendant was held negligent in rounding a curve, without notice, with such a violent jerk as to wrench plaintiff's hand off the railing of the car and throw him into the street. *Lucas v. Metropolitan Street R. Co.*, 56 App. Div. 405.

Where plaintiff has no notice that he cannot enter the car through the front platform, he is not necessarily negligent in remaining thereon after finding himself unable to enter, although he could have boarded at the rear platform. *Townsend v. Binghamton R. Co.*, 57 App. Div. 234.

Question was for the jury, where car was stopped for passenger who was on front platform to alight, and started while he was getting off. *Lax v. Forty-second Street &c. R. Co.*, 46 Supr. Ct. (J. & S.) 448.

Defendant was found negligent for allowing so many passengers on platform of car as to break it down. *Norris v. Brooklyn City R. Co.*, 4 Misc. 294, aff'g judg't for pl'ff. (City Court of Brooklyn); s. c. aff'd, 143 N. Y. 666.

In an action for injuries, there was evidence tending to show that, while plaintiff was riding on the front platform of defendant's car, the driver thereof drove the car against a wagon standing across the track and about to enter a stable, whereby plaintiff was thrown off and injured. This justified a finding of negligence on the part of the defendant. *Fox v. The Brooklyn City Railroad Co.*, 7 Misc. 285. (City Court of Brooklyn.)

As a street car was slowing down in pursuance of plaintiff's signal that she wished to alight, she placed herself near the side of the car in readiness to leave it, but the car passed the crossing for some distance, and the conductor then signaled the driver to proceed, and the sudden starting of the car loosened plaintiff's hold and threw her off. Held, that plaintiff was not chargeable with contributory negligence. *Demann v. Eighth Ave. R. Co.*, 10 Misc. 191.

It was not negligence *per se* to ride on the front platform. Plaintiff was thrown by the car jumping a switch while going at high speed. *Taft v. Brooklyn &c. R. Co.*, 14 Misc. 410; *Seelig v. Metropolitan Street R. Co.*, 18 Misc. 383.

It was not negligent *per se* to ride upon the platform of a crowded car. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

One who stands unnecessarily upon the platform of a car must take the risk of the situation. *Chicago &c. R. Co. v. Carroll*, 5 Ill. App. 201.

*Macon &c. R. Co. v. Johnson*, 38 Ga. 409; *Hickey v. Boston &c. R. Co.*, 14 Allen, 429; *Higgins v. N. Y. &c. R. Co.*, 2 Bosw. (N. Y.) 132; *Quinn v. Illinois Central R. Co.*, 51 Ill. 495; *Andrews v. Capitol &c. R. Co.*, 2 Mackey (D. C.) 137; *Alabama &c. R. Co. v. Hawk*, 72 Ala. 112.

It is not necessary that a railroad company should construct a platform so that a person standing on any part of it could not be injured by a passing train. *Chicago &c. R. Co. v. Mahara*, 47 Ill. App. 208.

A railroad company is liable for the injuries sustained by a drunken passenger in falling off the rear platform, if they knew his condition and permitted him to remain there. *St. Louis &c. R. Co. v. Carr*, 47 Ill. App. 353.

The jury are to decide the question of company's negligence in permitting a street car to be crowded, by reason of which plaintiff was pushed off and injured. *Chicago &c. R. Co. v. Considine*, 50 Ill. App. 471.

It is not negligent *per se* in one riding on a platform to fail to hold on to the platform bar. *Kean v. West Chicago Street R. Co.*, 75 Ill. App. 38.

A request by one in authority for gentlemen to vacate seats on a crowded car in favor of ladies is not so unreasonable as to warrant one in not complying therewith; nor is it negligent *per se* to ride on the rear platform of a car with or without the direction of the conductor. *Terre Haute Electric R. Co. v. Lauer*, 21 Ind. App. 466.

One who voluntarily chooses a car platform must take the risks of the situation. *Olivier v. Louisville &c. R. Co.*, 43 La. Ann. 804.

*McCauley v. Tenn. &c. R. Co.*, 93 Ala. 356; *Aikin v. Frankford &c. R. Co.*, 142 Pa. St. 47.

Jolting of cars when they were being coupled was not actionable, where the injury resulted from the falling of a child of two years from the car platform after passengers had been warned by conductor to keep their seats. *Demahy v. R. Co.*, 45 La. Ann. 1329.

It is not negligence *per se* to ride on the platform where there is room inside, though one thereby assumes the risk naturally incident to the situation. *Watson v. Portland &c. R. Co.*, 91 Me. 584.

A boy of fifteen years is guilty of contributory negligence and cannot recover for injuries caused by attempting to mount the front platform of a car notwithstanding the driver prevailed upon him to do so. *Detrich v. Balt. & C. R. Co.*, 58 Md. 347.

*R. Co. v. Jones*, 95 U. S. 439.

If a passenger, knowing the train is in motion, stands on the platform of a car and is injured by the jerking of the train, she cannot recover. *Gavett v. Manchester & C. R. Co.*, 16 Gray, 501.

Question was for the jury, where a passenger in a train, relying on company's agreement to stop at a certain place, made his way to the platform of the car, and either fell or was pushed therefrom. *Treat v. Boston & C. R. Co.*, 131 Mass. 371.

*Barden v. Boston & C. R. Co.*, 121 Mass. 426; *Maguire v. Middlesex R.*, 115 id. 239; *Meesel v. Lynn & C. R. Co.*, 8 Allen, 234; *Cram v. Metropolitan R.*, 112 Mass. 38; *Murphy v. Union R.*, 118 id. 228.

Question of passenger's negligence in standing on a street car platform covered with ice, after having signaled conductor to stop, is for the jury. *Fleck v. Union R. Co.*, 134 Mass. 480.

It was for the jury, when passenger in street car, having signaled conductor to stop, went to rear platform, which was coated with ice, and was thrown off by the jolting of the car. *Fleck v. Union R. Co.*, 134 Mass. 480.

Plaintiff, in an open street car, in which no seats were to be had, stood between two cross seats and was thrown out while turning a curve in the street. Recovery was allowed. *Lapointe v. Middlesex R. Co.*, 144 Mass. 18.

One who stands on car platform, knowing that the train is about to start, and is injured by the mere starting of it, cannot recover. *Torrey v. Boston & C. R. Co.*, 147 Mass. 412.

One who passes from one car to another in search of a seat, and is injured while so doing, can recover. *Dewire v. Boston & C. R. Co.*, 148 Mass. 443.

The question of plaintiff's due care in standing upon the platform of a trolley car was a proper one for the jury. *Beal v. Lowell & C. R. Co.*, 157 Mass. 444.

Negligence in riding on a platform, against rule of the company not strictly enforced, for the jury. *Sweetland v. Lynn & C. R. Co.*, 177 Mass. 574; s. c., 51 L. R. A. 783.

In absence of regulation prohibiting it, riding on car platform may not bar recovery. *Upham v. Detroit & C. R. Co.*, 85 Mich. 12.

It was not negligent to ride on the running board where there was no room inside. *Pomaski v. Grant*, 119 Mich. 675.

It was contributory negligence for a passenger at invitation of driver to sit on driving bar when there was plenty of room inside. *Downey v. Hendrie*, 46 Mich. 498.

It is not negligent *per se* to remain on the platform as the car approaches a curve as one has the right to assume that it will be slackened before reaching it. *Blondel v. St. Paul City R. Co.*, 66 Minn. 284.

Failure to compel a boy of eight, sitting on the rear platform with feet upon the steps, to go inside was evidence of negligence for the jury. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

Boy of 16, riding on platform of crowded car leaned out beyond its side somewhat, through curiosity. He was negligent. *Benedict v. Minneapolis &c. R. Co.*, (Minn.) 90 N. W. Rep. 360.

Passenger riding on platform of street car assumes the risk of the position, but not the risk of the danger created by driving the car at a dangerous rate of speed. *Wilmot v. Corrigan &c. R. Co.*, 106 Mo. 535.

Plaintiff was not negligent in remaining on the running board of a car instead of re-entering the car while it is passing to the next street after having passed the street at which he asked to be left off at. *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385.

Under statute providing that, if passengers get off the front platform, and are injured, no action will lie, it is competent to show that plaintiff could not get off the rear platform because of the crowd, and was injured by the handle of the brake before she attempted to leave the front platform. *Wissen v. Missouri R. Co.*, 19 Mo. App. 662.

Not negligent *per se* to ride on the platform. *East Omaha Street R. Co. v. Godola*, 50 Neb. 906.

Passenger has the right to assume that the position assigned to him by carrier's agent is a safe one. *City R. Co. v. Lee*, 50 N. J. L. 435.

Going upon the platform of a car to await its stopping is not *per se* negligent. *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407.

No liability of company, if plaintiff was injured while voluntarily upon the rear platform, and not supporting himself by holding on to anything. *Douglas v. Railroad*, 106 N. C. 65.

*Louisville &c. R. Co. v. Bisch*, 120 Ind. 549.

Passenger was not allowed to recover for being thrown from a car by its sudden stopping to avoid a collision not brought about by defendant's negligence. *Cleveland City R. Co. v. Osborn*, (Oh. St.) 63 N. E. Rep. 604.

Standing on the rear platform of a moving car was not negligence. *Lake v. Cincinnati &c. R. Co.*, 13 Oh. C. C. 494.

The question of negligence in standing on the front platform of a



crowded car for the jury. *Germantown &c. R. Co. v. Walling*, 97 Pa. St. 55.

*Chicago &c. R. Co. v. Hughes*, 69 Ill. 170; *Zemp v. Wilmington &c. R. Co.*, 9 Rich. L. (S. C.) 84; *Chicago City R. Co. v. Young*, 62 Ill. 238; *Baltimore &c. R. Co. v. Leonhardt*, 66 Md. 70.

Where a child of eight made its way through a crowded car to the platform, and directly upon being discovered by the conductor was injured, no negligence can be fastened on the company. *Sandford v. Railroad Co.*, 136 Pa. St. 84.

Plaintiff took driver's seat on front platform without his invitation, and, while the car was passing over a switch at high speed was thrown and killed. There was room inside. Dismissal of complaint held proper. *Mann v. Philadelphia Traction Co.*, 175 Pa. St. 122.

Plaintiff's intestate who was killed by a rear end collision while riding on the bumper of an electric car without the knowledge of the conductor, was properly nonsuited. *Bard v. Pennsylvania Traction Co.*, 176 Pa. St. 97.

It was not negligent *per se* to ride on the platform of a crowded car at a place designated by the conductor while going around a curve at high speed. *Reber v. Pittsburg &c. Traction Co.*, 179 Pa. St. 339.

But, where there was room inside and there was no reason why a passenger should not go there, he was held negligent *per se* in remaining on the platform. *Thane v. Scranton Traction Co.*, 191 Pa. St. 249.

It is not negligence to ride on front platform of street car, unless forbidden. *Walling v. R. Co.*, 12 Phila. 309.

*Chicago &c. R. Co. v. Klauber*, 9 Ill. App. 613; *Meesel v. Lynn &c. R. Co.*, 8 Allen, 234; *Hardencamp v. Second Ave. R. Co.*, 1 Sweeney, 190; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364. See, also, *Nolan v. Brooklyn R. Co.*, 87 N. Y. 63; *McGuire v. Middlesex R. Co.*, 113 Mass. 239; *Downey v. Hendrick*, 46 Mich. 498; *Augusta R. Co. v. Renz*, 55 Ga. 126.

Plaintiff was one of a crowd of persons who gathered on the back platform of a car to hear a speech, and was injured by the breaking of the same. No liability attached to the company. *Gillis v. Penn. R. Co.*, 9 P. F. Smith (Pa.) 129.

A train, which had been side tracked all night, suddenly parted as a passenger was crossing from one car to another, and passenger was injured. It was negligence not to warn him of his danger. *Andrist v. Union Pac. R. Co.*, 30 Fed. Rep. 354.

Fact that all the seats in a car were occupied and the aisle so crowded that standing there would have been discomfort to plaintiff, does not excuse him for standing on the platform. *Worthington v. Cent. Vt. R. Co.*, 64 Vt. 107.

Riding on the front platform with the implied consent of the con-

ductor, which was customary, was not *per se* negligent, though the morning was foggy and the position occupied was the driver's stool. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48.

Where there was nothing but standing room inside, it was not negligent to stand on the platform outside. *Graham v. McNeill*, 20 Wash. 466; s. c., 43 L. R. A. 300.

Riding on foot board of a street car is not *per se* negligence. *Geitz v. Milwaukee &c. R. Co.*, 72 Wis. 307.

### IX. Passenger in Baggage, Mail or Express Car.

Whether the presence of a passenger in a baggage car at the time of an accident by collision, was contributory negligence, is for the jury. The question was whether his presence in car was in any part the cause of his injury. *Webster v. R., W. & O. R. Co.*, 115 N. Y. 112, aff'g 40 Hun, 112, and judg't for pl'ff.

A rule of carrier prohibiting passengers from riding in express cars precludes recovery for passenger's injuries received while riding in such a car; but, a continued and general abandonment of the rule, by the carrier, will lay it open to an action for injuries to a passenger violating the same. *Florida Southern R. Co. v. Hirst*, 30 Fla. 1.

A one-legged passenger was not negligent *per se* in going into the baggage car, while it was standing at a station, to see the conductor about his safety in alighting at his destination. *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482.

It was not negligence *per se* to leave one's seat to go to and return from the baggage car. Death was caused by failure to have a platform to the baggage car. *Louisville &c. R. Co. v. Berg*, (Ky.) 32 S. W. Rep. 616.

No negligence attaches to a company which has a saloon car at the rear of a train, not intended for use of passengers, but, at the time carrying some passengers, in passing to which in the night time, decedent met his death. *State v. Maine &c. R. Co.*, 81 Me. 84.

Riding in baggage car in the absence of regulations prohibiting it, was not *per se* negligent. *Jacobus v. St. Paul &c. R. Co.*, 20 Minn. 125.

Passenger in baggage car not defeated in an action for injuries, by that fact alone, it appearing that the rule prohibiting it was habitually disregarded. *Jones v. Chicago &c. R. Co.*, 43 Minn. 279.

No recovery for one riding on caboose cupola. *Tuley v. Chicago &c. R. Co.*, 41 Mo. App. 432.

One assumes the risk of injury resulting from going into an express car. *Fremont &c. R. Co. v. Root*, 49 Neb. 900.

That one is intoxicated did not relieve carrier of the duty of protect-

ing him, where it permitted him to ride, dancing about, in the baggage car between unguarded open doors on either side. *Wheeler v. Grand Trunk R. Co.*, 70 N. H. 607; s. c., 54 L. R. A. 955.

Passenger in baggage car for want of a better seat, takes the risks incident to the presence of baggage, but is not therefore defeated in an action for injuries caused by a collision. *N. Y. & R. Co. v. Ball*, 53 N. J. L. 283.

Passenger in baggage car, violating rules of the company in relation to passenger's safety, although by license of the conductor, was *per se* negligent. *Pa. R. Co. v. Langdon*, 92 Pa. St. 21.

See *Sullivan v. Philadelphia R. Co.*, 6 Cas. (Pa.) 234; *Powell v. Penn. R. Co.*, 3 id. 414; *West Chester & C. R. Co. v. Miles*, 5 P. F. Smith (Pa.) 209; *O'Donnell v. Alleghany & C. R. Co.*, 9 id. 239.

See, also, *Robertson v. Erie R. Co.*, 22 Barb. 91; *H. & T. C. R. Co. v. Clemmons*, 55 Tex. 88; *R. Co. v. Jones*, 5 Otto, 439; *R. Co. v. Lane*, 83 Ill. 448; *Hickey v. R. Co.*, 14 Allen, 429.

A baggage car is not, as a matter of law, an improper place for a passenger to ride, and the right of a person to recover for an injury arising from an unsafe track is the same when in the baggage car as in the passenger car. *O'Donnell v. Alleghany & C. R. Co.*, 9 P. F. Smith, (Pa.) 239.

No recovery is allowed if it be shown that no injury would have been received if plaintiff had been in the passenger car. *H. & T. & C. R. Co. v. Clemmons*, 55 Tex. 88.

### X. Passenger Riding in Dangerous Place.

Nonsuit was properly granted, where plaintiff unnecessarily remained on the running board of a car, knowing that the hub of a wagon in the street ahead projects within dangerous proximity. *Caspers v. Dry Dock & C. R. Co.*, 22 App. Div. 156.

It was for the jury to say whether plaintiff was negligent in getting on a car so crowded that he had to ride on the step and hold on to the hand rail. *Schaefer v. Union R. Co.*, 29 App. Div. 261.

Conductor's negligence in forcing himself onto a crowded platform was for the jury. *Gray v. Metropolitan Street R. Co.*, 39 App. Div. 536.

It was not *per se* negligent to decline a seat in a crowded car, in favor of a lady and remain standing on the running board. *Brainard v. Nassau Electric R. Co.*, 44 App. Div. 613.

Defendant's negligence was for the jury, where its conductor testified that he saw the dangerous proximity of a truck while plaintiff was on the running board but thought he had plenty of time to enter the car. That plaintiff saw the danger while getting in is not sufficient to establish

his negligence as matter of law. *Faris v. Brooklyn City &c. R. Co.*, 46 App. Div. 231.

Defendant was negligent where its motorman must have known that a truck, which he attempted to pass, was so close as to strike parties on the running board of the car, which was crowded, unless they leaned inward. That plaintiff was moving along such running board looking for a seat was not sufficient to establish his negligence as matter of law. *Henderson v. Nassau Electric R. Co.*, 46 App. Div. 280.

Plaintiff, standing at the edge of a car while rounding a curve with no more than the usual jerking, without holding on to anything, was thrown off and injured. He was not allowed to recover. *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. 242.

Riding on top of freight car when one could have ridden in the caboose was negligence *per se*. *Beyer v. Louisville &c. R. Co.*, 114 Ala. 424.

Going down a hatchway to the main deck of a steamer to look for baggage, was not *per se* negligent. *Bowman v. California &c. Nav. Co.*, 63 Cal. 181.

Where defendant had not furnished plaintiff with a seat in the inside, he was not negligent in standing on the outside. *Babcock v. Los Angeles Traction Co.*, 128 Cal. 173.

No recovery was allowed a passenger who sat on end board of an open car, when a safe seat could have been had. *Jackson v. Crilly*, 16 Colo. 103.

It was not negligent *per se* to remain for a time on the footboard instead of immediately entering the car. *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60.

Where defendant did not allow plaintiff sufficient time to return to the caboose after feeding and watering his stock, it could not complain that he remained in the freight car instead of in the caboose. *Illinois C. R. Co. v. Beebe*, 174 Ill. 13; *aff'g s. c.*, 69 Ill. App. 363.

Jury was justified in finding that defendant failed to observe the high degree of care required, where it allowed plaintiff to stand in the place usually occupied only by the gripman, without informing him of his peril from the brake lever, and that plaintiff was not negligent in standing there when the car was crowded. *West Chicago Street R. Co. v. Johnson*, 180 Ill. 285; *aff'g s. c.*, 77 Ill. App. 142.

No recovery was allowed one who rode on the footboard of the tender of an engine. *Chicago &c. R. Co. v. Riley*, 40 Ill. App. 416.

It was not negligence *per se* to ride on the running board of a car where there was no room inside, nor in failing to jump, on the instant, out of the way of a passing wagon, though that would have been the safer course. *West Chicago Street R. Co. v. McNulty*, 64 Ill. App. 549.

The court refused to draw a distinction between seats and footboards as relative places of danger in view of the general custom of carriers. *West Chicago Street R. Co. v. Stiver*, 69 Ill. App. 625.

Where plaintiff, after being told that he could secure a transfer from the conductor of the rear car, was injured while passing from one car to the other along the footboard while the train was in motion, a direction for the defendant was sustained. *Eickhof v. Chicago &c. Street R. Co.*, 77 Ill. App. 196.

Remaining on a car to prevent animals from escaping, where one sees another car about to strike, was not negligent, where danger therefrom was not reasonably apparent. *Illinois C. R. Co. v. Anderson*, 81 Ill. App. 137.

It was not negligent *per se* to ride on the footboard of a crowded car across a viaduct, where one is unacquainted with the danger; but defendant was negligent in failing to warn him of the danger of being struck unless he used extra care and inclined his body to the car in passing the posts thereof. *West Chicago Street R. Co. v. Marks*, 82 Ill. App. 185.

It may not be *per se* negligence to occupy a dangerous position on the train. *Lafayette &c. R. Co. v. Sims*, 27 Ind. 59.

Unnecessarily riding in a car with horse and goods, though with permission of trainmen, where a caboose was provided, was negligence. Held error to refuse to sustain demurrer to evidence. *Walker v. Green*, 60 Kan. 289.

Contributory negligence in leaning out of window while approaching a bridge was no excuse for failing to warn plaintiff, where the conductor saw his danger in time. *South Covington &c. Street R. Co. v. McCleave*, (Ky.) 38 S. W. Rep. 1055.

That there was no room inside the car did not relieve a passenger, familiar with the locality, of consequences of his own negligence in leaning back, while riding on the running board of a car, so as to strike a pole 15 inches therefrom. *Sibley v. New Orleans City &c. R. Co.*, 49 La. Ann. 588.

It is not *per se* negligence for a passenger on a street car, who had signaled car to stop, to stand upon the steps so as to be in a position to alight. *Bowie v. Greenville St. R. Co.*, 69 Miss. 196.

Plaintiff was not permitted to recover, where the jerk which threw him off, while he stood on the car step as it was about to stop, was not more than usual. *Philips v. St. Charles Street R. Co.*, 106 La. 592.

Sitting on platform of street car, with feet on step, against the rules of the company and the remonstrance of driver, was negligent. *Mills v. Lynn &c. R. Co.*, 129 Mass. 351.

To sit on a driving bar of a street car even at driver's invitation, was negligent. *Downey v. Hendric*, 46 Mich. 498.

Plaintiff was negligent *per se* in riding on the bumper of the car. Was warned by conductor. *Nieboer v. Detroit Elec. R. Co.*, (Mich.) 87 N. W. Rep. 626.

Contributory negligence in riding on the top of a freight car was no defense to an action for injuries from a collision occasioned by the gross negligence and reckless conduct of defendant in switching a car down grade without brakes in the direction another was bound to take. *Illinois R. Co. v. Brown*, 77 Miss. 338.

Where plaintiff tried to board a train by climbing upon sheet iron covering of the steps of the last platform, no action will lie. *Carroll v. Interstate &c. Co.*, 107 Mo. 653.

A conductor is not bound to go beyond a request that one riding on the top of a car get down; plaintiff is negligent in remaining after being informed of the risk. *Aufdenberg v. St. Louis &c. R. Co.*, 132 Mo. 565.

That plaintiff may have assumed an unsafe position by remaining on the running board of a street car on seeing an approaching wagon, does not relieve defendant of all duty toward him; he may assume that defendant saw the obstruction and will stop in time to prevent collision. *Sweeney v. Kansas City Cable R. Co.*, 150 Mo. 385.

The question of whether one was negligent or not in riding on the running board of a car does not depend on whether one is a passenger or not. *Raming v. Metropolitan Street R. Co.*, 157 Mo. 477.

It was not negligent to follow the custom of riding on the driver's seat with defendant's knowledge. *Sparks v. Citizens' Coach Co.*, 6 N. J. Law J. 365.

It was negligence to allow one to ride on the bumper of an electric car. *Grieve v. North Jersey Street R. Co.*, 65 N. J. L. 409.

An instruction that plaintiff was negligent in assuming a position the danger of which would have been apparent to one exercising reasonable care, was not complete without adding, if she could have by such care avoided assuming it. *Asbury v. Charlotte Electric R. &c. Co.*, 125 N. C. 568.

It was negligent to go into a box car where a caboose was provided. *Atchison &c. R. Co. v. Johnson*, 3 Okla. 41.

Plaintiff was negligent in leaving her seat in spite of warnings, where the car was under control and going at usual speed; though previously it had been proceeding rapidly and had collided with a cart. *Jackson v. Philadelphia Traction Co.*, 182 Pa. St. 104.

It was negligent to mount the running board of a car in front of an

advancing car on an adjoining track before the side bar which permitted entrance had been raised. Nonsuit sustained. *Malpass v. Hestonville &c. R. Co.*, 189 Pa. St. 599.

One, riding on the step of a trolley car with consent of conductor for lack of room inside, is entitled to same degree of care to protect him from danger as other passengers. *Bumbear v. United Traction Co.*, 198 Pa. St. 198.

Passenger was negligent in riding on the side steps of an open street car. *Woodroffe v. Roxborough &c. R. Co.*, 201 Pa. St. 521.

It was negligent *per se* to ride in a car with one's horses and goods in spite of his contract to ride in the caboose and the protest of the conductor. *Humphreys v. Fremont &c. R. Co.*, 8 S. D. 103.

Though shipper believed that he would be unable to reach the caboose in time to board, where his contract provided that he should ride, he was negligent in going into the engine contrary to the company's rules. *Mobile &c. R. Co. v. Bogle*, 101 Tenn. 40.

The high degree of care imposed, requires seats to be furnished so as not to expose passengers to positions of greater danger. Passenger not guilty of contributory negligence in riding on platform though there were seats in other coaches inaccessible to him. *International &c. R. Co. v. Williams*, 20 Tex. Civ. App. 587.

Drover, injured by a sudden jolt while in a stock car when the train was standing still, was not barred of recovery because he had been riding in the stock car while the train was in motion in violation of a provision of his pass. *Texas &c. R. Co. v. Reeder*, 76 Fed. Rep. 550; s. c. aff'd, 170 U. S. 530.

Not negligence *per se* for passenger to ride in a place where he has no right to be. *The Burgundia*, 29 Fed. Rep. 364.

Where a shipper could have reached his poultry car safely by the ground, he was negligent in attempting to walk upon the tops of the cars. *Kimball v. Palmer*, 80 Fed. Rep. 240.

One assumes the risk in leaving a place of safety provided and, unnecessarily, out of curiosity, approaching a burning oil tank. *Chicago &c. R. Co. v. Myers*, 80 Fed. Rep. 361.

Where one was required to take full charge of a fine horse during transportation, he was not negligent in remaining, with defendant's knowledge, in the car with it, as it was customary to do in such cases. Defendant was negligent in rounding a curve at high speed knowing of his position. *Chicago &c. R. Co. v. Lee*, 92 Fed. Rep. 318.

Surrendering a seat to one less able to stand is not negligence which precludes recovery. *Trumbull v. Erickson*, 97 Feb. Rep. 891.

It was negligence to attempt to pass over the tops of cars of unequal

height, while passing through a snow shed, in an unusually severe storm. *Nelson v. Southern P. Co.*, 15 Utah, 325.

One seated unnecessarily near the open door of a caboose, was *per se* negligent. *N. & W. R. Co. v. Ferguson*, 79 Va. 241.

It was negligent to return to a dangerous seat on the chain box on the rear of a tender in spite of a notice and after having left it at the order of a brakeman. *White v. Peninsular R. Co.*, 20 Wash. 132.

Not negligent *per se* to stand in the aisle of a car. *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119.

### XI. Willful and Malicious Acts of Servants.

The carrier should, even on drawing and sleeping cars, protect its passengers from annoyance, insult, willful, or wanton injury, theft or robbery by its servants, and use due care to protect them from similar injuries from other passengers, or third persons, but this does not extend to large sums of money, securities and valuables, not within the knowledge of the carrier and the contract of carriage.\*

There is an apparent holding that if, in the lawful removal of a passenger from a car for failure to exhibit ticket, the conductor used unnecessary force and wantonly injured the passenger, he, but not the corporation, was liable for such malicious excess of force. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 456. This is not the present doctrine.

Where the delay in transportation of the passenger was caused by the willful act of the conductor, the carrier was held liable. *Weed v. Panama R. Co.*, 17 N. Y. 367.

Story on Bailments, secs. 400-406; *Stokes v. Saltonstall*, 13 Peters, (U. S.) 181.

The defendant was liable for injury to passenger, caused, while ejecting him, when the car was in motion, and so the defendant was liable for any circumstances aggravating the wrongful ejection, although wantonly done. *Sandford v. Eighth Ave. R. Co.*, 23 N. Y. 343.

Where the conductor, under mistake of fact or judgment as to the passenger's right to ride, ejected him from the car, the company was liable. The same was said to be the rule where there was justifiable cause for ejection, but excessive force was used not wantonly or recklessly. *Higgins v. Watervliet Turnpike R. Co.*, 46 N. Y. 23, aff'g judg't for pl'ff.

Explaining *Hibbard v. N. Y. &c. R. Co.*, 15 N. Y. 467; citing *Seymour v. Greenwood*, 7 H. & N. 356; *Limpus v. London &c. Co.*, 1 H. & Colt. 526; *Goff v. Great Northern R. Co.*, 30 L. J. Q. B. 148; *Poulton v. London &c. R. Co.*, 2 L. R., 2 Q. B. 534.

\* NOTE.—As to such acts towards trespassers, see "Degree of Care Required," etc., *ante* p. 388.



A passenger upon the defendant's car, desiring to alight, passed out upon the platform, and requested the conductor to stop the car, and refused to get off until the car came to a full stop; whereupon, and while the car was in motion, conductor threw her from the car with great violence. Held, that the act was wanton and willful trespass, not in performance of any duty to, or of any act authorized by the defendant, and that the defendant was not liable. *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, rev'g judg't for pl'ff.

From opinion.—“The rule well established and recognized in all the cases, and to which there are no exceptions, is, that to charge the master for the wrongful acts of the servant, they must have been committed by the express authority of the master, or in his service, and within the scope of the employment and authority of the servant.” \* \* \* “For the willful, wanton, or reckless acts of the servant not committed in the service of the master, and not within the limit of his duty or the scope of his employment, the master is not liable.” \* \* \* “The question of liability does not depend entirely on the quality of the act, but rather upon the other question, whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. *Seymour v. Greenwood*, 7 H. & N. 355; *Limpus v. London Gen. O. Co.*, 1 H. & C. 526; *Goff v. Great Northern R. Co.*, 3 E. & E. 672. When the act of a servant, whether a trespass or otherwise, is without the authority, either expressly conferred upon the servant, or implied from the nature of the employment and character of the duties, causes injuries to others, the master is not answerable. It is said that the implied authority in the servant is limited to those acts, which the master could himself do, if personally present, and if, in the performance of such acts, the servant misconducts himself, the master will be liable for his acts. *Poulton v. L. & S. W. Ry. Co.*, L. R., 2 Q. B. 534.”

The opinion here quotes the remark of Lord Kenyon in *McManus v. Crickett*, 1 East, 106, adopted in *Wright v. Wilcox*, 19 Wend. 343, that “when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him;” and the opinion continues—“The principle is the same whether the wrongful act of the servant is malicious or merely wanton or reckless.” The opinion approves *Hibbard v. N. Y. & C. R. Co.*, 15 N. Y. 455, except as to excess of force.

Where the conductor has been instructed by the company to demand of every passenger a certain fare, and to remove from the car any passenger refusing to pay the same, if the company has not the right to demand the required fare, it is liable for any force used upon the person of a passenger in an attempt to execute such order; if it has the right to the fare, and the conductor, acting in the performance of his duty, exceeds, through zeal or impetuosity of temper, the degree of force necessary and proper to accomplish the removal, the company is liable for resulting injury.

The question whether the act occasioning the injury was willful and malicious, or was mistakenly conceived to be a necessary use of force to

effect the removal, is a question for the jury. *Jackson v. Second Ave. R. Co.*, 47 N. Y. 274.

Citing *Ramsden v. B. & c. R. Co.*, 104 Mass. 117.

An agent placed at the entrance to its cars, instructed to refuse admission to any one, not having a ticket, refused to allow the plaintiff to pass without a ticket, and the agent struck him and pulled him from the car, doing injury. Held (Dwight, Earl, C. C., dissenting), that the cause of action was for assault and battery substantially alleged as having been committed by the defendant, and as no evidence was given tending to prove that the defendant in any way directed or sanctioned the acts of assault and battery, the defendant was not liable. *Priest v. Hudson River R. R. Co.*, 65 N. Y. 589.

Citing *Phila. & c. R. Co. v. Wilt*, 4 Whart. 143, 147; *Percival v. Hickey*, 18 Fed. Rep. 284.

Where conductor, in enforcing a rule setting apart a car for females traveling alone, used unnecessary and excessive force, without malice, to remove a passenger violating the rule, the defendant was liable. *Peck v. N. Y. C. & c. R. Co.*, 70 N. Y. 587, aff'g 8 Hun, 286.

It is immaterial that agent acted in good faith. *Hamilton v. T. A. R. Co.*, 53 N. Y. 25.

The jury found that plaintiff was pushed or thrown from the car, and it was claimed by the defendants that such act was so willful, reckless and malicious, that defendant was not responsible. The court held that the defendant was responsible and affirmed judgment for plaintiff. *Schultz v. Third Ave. R. Co.*, 89 N. Y. 247, aff'g 14 J. & S. 211.

Plaintiff, while a passenger on one of defendant's street cars, was unjustifiably attacked and beaten by the driver, who was also conductor. The defendant was liable.

The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, *does not apply as between a common carrier of passengers and a passenger.*

Such a carrier undertakes to protect the passenger against any injury arising from negligence or willful misconduct of its servants, while engaged in performing a duty which the carrier owes to the passenger. *Stewart v. Brooklyn & Crosstown R. Co.*, 90 N. Y. 588, rev'g nonsuit.

Distinguishing and limiting *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122.

From opinion.—“ In *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202: 2 Am. Rep. 39, it is said that ‘ The carrier's obligation is to carry his passengers safely and properly, and to treat them respectfully, and if he intrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust.’ In *Day v. Owen*, 5 Mich. 520, the duties of common carriers

are said to include everything calculated to render the transportation most comfortable and least annoying to the passengers. In *Nieto v. Clark*, 1 Cliff. 145, the court says: 'In respect to female passengers, the contract proceeds yet further and includes an implied stipulation that it shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach.' A common carrier is bound, so far as practicable, to protect its passengers, while being conveyed, from violence committed by strangers, and co-passengers, and he undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract. *Commonwealth v. Power*, 7 Metc. 596; *P., F. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *Goddard v. Grand Trunk Ry.*, 57 Me. 213; 2 Am. Rep. 39. In *Flint v. N. & N. Y. Transp. Co.*, 34 Conn. 554, the plaintiff was injured by the discharge of a gun dropped by soldiers engaged in a scuffle. The court held that passenger carriers are bound to exercise the utmost vigilance and care, regarding those they transport, from violence from whatever source arising. \* \* \* Judge Story states the rule as follows: "In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." Story on Bailments, secs. 400, 406; *Stokes v. Saltonstall*, 13 Peters (U. S.) 181. "A railway company selects its own agents at its own pleasure, and is bound to employ none except capable, prudent and humane men." *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 365.

If the carrier places lady passengers under the protection of libertines, who insult or assault them, or male passengers under the protection of drunken ruffians, who fall upon and beat them without cause, he should be responsible for the injury. This rule rests upon sound reason, and is abundantly supported by authority.

In *Goddard v. Grand Trunk Railway of Canada*, 57 Me. 202; 2 Am. Rep. 39, it was held that a common carrier of passengers was responsible for the willful misconduct of his servant toward a passenger, and that a passenger who was assaulted and grossly insulted in a railway car by a brakeman employed on the train had a remedy therefor against the company.

In *Craker v. Chicago & N. W. R. Co.*, 36 Wis. 657; 17 Am. 504, it was held that a master is liable for wrong done by his servant, whether through the negligence or the malice of the latter, in the course of an employment in which the servant is engaged, to perform a duty, which the master owes to the person injured; and it was held that a railway company is bound to protect the female passenger on its trains from indecent approach or assault, and where a conductor on the company's train makes such an assault on a female passenger the company is liable for compensatory damages. In *Bryant v. Rich*, 106 Mass. 180; 8 Am. Rep. 311, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant as a common carrier was held liable for injury. In *Sherley v. Billings*, 98 Bush. 147; 8 Am. Rep. 451, where a passenger in defendant's boat was assaulted and injured by an officer of the boat, the defendant was held liable. In *The Chicago & Eastern Illinois R. R. Co. v. Flexman*, where a brakeman assaulted a passenger, the company was held liable. 103 Ill. 546; *Albany Law Journal*, Nov. 25, 1882, p. 434. For violation of their rights passengers have their remedy by action on the contract of carriage. To sustain the judgment in this case the counsel for the appellant cites and relies on the case of *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122; 7 Am. Rep. 418. That case was discussed by counsel and determined by this court upon the assumption, that the rule of the master's liability for the assault

the arm, saying to him that he must not leave without some satisfaction; whereupon the porter struck the plaintiff a violent blow in the face, knocking him down and injuring him. The complaint was dismissed on trial. Held, error; that the question whether the porter was engaged in the performance of his duties as defendant's servant at the time of inflicting the blow, should have been submitted to the jury. *Buffet v. T. & B. R. R. Co.*, 40 N. Y. 168; *Tousey v. Roberts*, 21 J. & S. 446, 447; *Althorf v. Wolfe*, 22 N. Y. 355; *Isaacson v. N. Y. C. R. R. Co.*, 94 id. 278; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 id. 117, rev'g 45 Hun, 139, and nonsuit.

See *Williams v. Pullman & Co.*, 40 La. Ann. 87; id. 417.

To enable a passenger to recover for injuries arising from the negligent or willful misconduct of its servants it must appear that the servant was acting, at the time, in the course of his employment.

The plaintiff purchased tickets of the defendant's ticket agent and gave a five dollar bill therefor. Shortly before, a detective had left with said agent a circular, describing men engaged in passing counterfeit five dollar bills, and told said agent to look out for these men, and, if they appeared, to have them arrested. The agent, supposing the plaintiff to be the guilty party, procured his arrest by a police officer. He was discharged at the police court, as the bill was found to be good. The agent was not acting in the line of his duty, so as to make his master responsible, and it was not in the course of his business as agent to entrap the plaintiff, but to aid the police. The defendant was not liable on any ground. *Mulligan v. N. Y. & Rockaway Beach R. Co.*, 129 N. Y. 507.

Plaintiff purchased a ticket of defendant's agent at one of its stations, and, after some altercation about the amount of change, passed through the gate to take a train. The agent followed her out upon the platform, charged her with having passed upon him a counterfeit twenty-five cent piece, and demanded another in its place. She refused, insisting that her money was genuine, and refused to give back the change received. The agent called her a counterfeiter and a common prostitute, placed his hand upon her and told her not to stir until he had procured a policeman to arrest and search her. He detained her on the platform for awhile, but, not getting an officer, let her go. Held, that an action for damages was maintainable; that, in the acts complained of, the agent was engaged about the defendant's affairs, in endeavoring to protect and recover its property, and so it was responsible for his acts.

Upon plaintiff's cross-examination, an offer by defendant to prove that she was an habitual litigant was excluded. Held, no error. *Palmeri v. The Manhattan Railway Co.*, 133 N. Y. 261, distinguishing *Mulligan v. N. Y. & R. B. R. Co.*, 129 id. 506.

Defendant's guard negligently exposed plaintiff to danger by coming to blows with an intoxicated passenger on an elevated car, causing an unusual jostling among the passengers to his injury, and which in the exercise of reasonable foresight he should have anticipated and taken due care to avoid. *Graham v. Manhattan R. Co.*, 149 N. Y. 336.

Passenger going from defendant's train told the ticket receiver that he had lost his ticket; the gateman refused to let him pass out and had a policeman arrest him for disorderly conduct, and detained him. Defendant had ordered servants to compel passengers to produce tickets. Defendant had no right to detain the passenger, and was liable. *Lynch v. Manhattan E. R. Co.*, 24 Hun, 506, aff'g judg't for pl'ff.

A passenger on platform car, being unable to enter car on account of a locked door, broke the window and, as he was leaving the train, was arrested by person in general employ of company, but not then on duty. This case seems to hold that the company should have secured this window breaker both from the car platform and policeman. *Fisher v. Metropolitan &c. R. Co.*, 34 N. Y. 433.

A dispute arose between driver and passenger, as to whether the latter had paid his fare, and upon latter resisting an attempt of the driver to put him off, a policeman was called who arrested him and took him to the station house, where he was kept until the next morning, and then discharged. The driver testified, that he was disorderly in language and conduct. Held, that the driver in procuring an arrest acted within the scope of his employment, and the defendant was liable for false arrest. Damages for injured feelings and insult was allowable. *Brown v. Christopher & Tenth Sts. R. Co.*, 34 Hun, 471, aff'g judg't for pl'ff.

Where a passenger on a car of a common carrier uses language abusive and insulting, and calculated to bring about a personal encounter, whereby an assault upon such passenger is induced, a carrier is not responsible, as in such case the carrier's servant will not be deemed to have committed the assault within the course of his employment. *Scott v. C. P. &c. R. Co.*, 53 Hun, 414.

The test of a carrier's liability for maliciousness or willfulness in expulsion is, not the quality of the act, but whether or not it is done outside the servant's employment, and to accomplish a purpose of his own foreign to such employment. *Burns v. Glens Falls &c. Street R. Co.*, 4 App. Div. 426.

Defendant is liable for assault by its conductor. *Luhrs v. Brooklyn &c. R. Co.*, 11 App. Div. 173.

Insult and abuse by a passenger while remonstrating with a conductor for his manner of ejecting a drunken man does not justify the passenger's ejection or relieve the company of the consequences of an assault by the conductor. *Weber v. Brooklyn &c. R. Co.*, 47 App. Div. 306.

In an action to recover damages for an alleged assault upon the plaintiff while a passenger on one of defendant's cars by the conductor, the conductor testified that plaintiff used abusive language to him, and struck at him with an iron wrench, and that he then struck plaintiff with his club. This was the only evidence as to provocation for the assault. The court charged that if the plaintiff assaulted or threatened to assault the conductor, the latter was justified in assaulting the plaintiff, and properly refused to charge on request that, "If the plaintiff commenced the altercation, and in the course of it addressed indecent and insulting language to the conductor, and language such as was calculated or likely to produce an assault, the verdict must be for defendant." *Kosters v. The Brooklyn, Bath & West End R. Co.*, 10 Misc. 18. (City Court of Brooklyn); s. c. aff'd, 151 N. Y. 630.

Plaintiff cannot recover as for an assault, where, with slight force he was led by a policeman from the ferry entrance, which he obstructed during an altercation as to his rights under a commutation ticket, and his recovery is confined to the price of the ticket he was compelled to buy. *Henly v. Delaware & C. R. Co.*, 28 Misc. 499; aff'g s. c., 27 Misc. 811.

Plaintiff could not recover for injury as the result of a playful encounter by employes outside of their duties. *Goodloe v. Memphis & C. R. Co.*, 107 Ala. 233.

Carrier is liable for an assault of its conductor otherwise than in the performance of his duty, though it be willful and malicious and not within the scope of his authority; e. g., as a retaliation for personal abuse. *Birmingham & C. R. Co. v. Baird*, 130 Ala. 334; s. c., 54 L. R. A. 752.

Where a conductor's authority only extended to the ejection of delinquent passengers, defendant was not liable for the false imprisonment by the conductor of such a person. *Little Rock Traction & C. Co. v. Walker*, 65 Ark. 144; s. c., 40 L. R. A. 473.

Where a conductor used greater force than is reasonably necessary to repel an assault upon him defendant was liable. *St. Louis & C. R. Co. v. Berger*, 64 Ark. 613; s. c., 39 L. R. A. 784.

Defendant was liable where the efficient cause of the injury was the brakeman's act of pushing a boy down the steps of a moving train, though the immediate cause was the latter's grasping the hand rail to save himself which gave way and threw him under the wheels. *St. Louis & C. R. Co. v. Kilpatrick*, 67 Ark. 47.

Where plaintiff's arrest, ill treatment and ejection was for failure to pay his fare, he may recover, though the acts were willfully committed. *Trabing v. California Nav. & C. Co.*, 121 Cal. 137.

Though one is stealing a ride by fraudulent means, he may recover

for the conductor's act in unnecessarily shooting him to secure his expulsion. *Higgins v. Southern R. Co.*, 98 Ga. 751.

Though plaintiff was not a passenger in returning to a station before train time to see about checking or storing his baggage, he may recover for an unwarranted assault by the station agent, though it would be otherwise if he returned to upbraid the agent for causing him to lose the last train. *Georgia R. &c. Co. v. Richmond*, 98 Ga. 495.

Where an agent's act of killing a patron during the discussion of railroad business was unprovoked, defendant was liable, though it was the result of a private feud entirely disconnected with such business; otherwise if the agent was justified by the patron's provocation. *Columbus &c. R. Co. v. Christian*, 97 Ga. 56.

Defendant was liable for the wanton act of the conductor in shooting a passenger, where the latter has not yet left the premises. *Brunswick &c. R. Co. v. Moore*, 101 Ga. 684.

The use of abusive language such as calling a passenger "dead beat" without provocation, permits recovery. *Cole v. Atlanta &c. R. Co.*, 102 Ga. 474.

Defendant was liable for baggage master's assault with intent to commit rape, while upon train. *Savannah &c. R. Co. v. Quo*, 103 Ga. 125; s. c., 40 L. R. A. 483.

Where one properly ejected from a car persists in the use of insulting language he cannot recover for the assault of the agent under such provocation, though the assault may be excessive. *Georgia R. &c. Co. v. Hopkins*, 108 Ga. 324.

Negligence of a trespasser in riding in a dangerous position does not excuse acts of willfulness in ejecting him. *Illinois C. R. Co. v. King*, 179 Ill. 91; aff'g s. c., 77 Ill. App. 581.

A carrier guarantees its passengers against personal injuries by its servants and so it is immaterial that the assault grew out of a private quarrel. Otherwise where the relationship of passenger had ceased. *Hanson v. Urbana &c. Street R. Co.*, 75 Ill. App. 474.

Passenger may recover where defendant's servant unjustifiably assaults him instead of protecting him as his duty required him to do. *Atchison &c. R. Co. v. Henry*, 55 Kan. 715; s. c., 29 L. R. A. 465.

Where the plaintiff, a passenger on defendant's steamboat, was assaulted by the third clerk of the boat he may recover from the company. *Sherlby v. Billings*, 8 Bush. (Ky.) 147.

Plaintiff cannot complain of a retaliatory assault by an employé where he is himself the aggressor. *Wise v. South Covington &c. R. Co.*, (Ky.) 34 S. W. Rep. 894.

Railroad responsible to one in sleeping car, not a trespasser, for the

assault of the porter. *Williams v. Pullman &c. R. Co.*, 40 La. Ann. 417.

Damages may be awarded for the unjustified conduct of defendant's car driver in subjecting plaintiff to abuse and annoyance. *Lafitte v. R. Co.*, 43 La. Ann. 34.

Where passenger delivered up his ticket to brakeman authorized to receive it, and afterwards the brakeman denied having received the same, and threatened the passenger, with violent words and gestures, the company was liable. *Goddard v. Grand Trunk R. Co.*, 57 Me. 202.

*Brand v. Railroad Co.*, 8 Barb. 368; *Moore v. R. Co.*, 4 Gray, 465; *Seymour v. Greenwood*, 7 Hurl. & Nor. 354; *Railroad v. Finney*, 10 Wis. 388; *Railroad v. Vandiver*, 42 Pa. St. 365; *Landreaux v. Bell*, 5 La. (O. S.) 275.

Defendant was liable for the assault of its agent upon a customer connected with overcharges which the latter had returned to the station to collect and gave a receipt for. *Richberger v. American Exp. Co.*, 73 Miss. 161; s. c., 31 L. R. A. 390.

Carrier is liable for the assault of its conductor upon a passenger though not done within the scope of his authority. *Johnson v. Detroit &c. R. Co.*, (Mich.) 90 N. W. Rep. 274.

Defendant was liable for the malicious assault of its employés upon a passenger. *Haver v. Central R. Co.*, 62 N. J. L. 282; s. c., 43 L. R. A. 84.

Though it is without provocation and without the scope of his authority. *Williams v. Gill*, 122 N. C. 967.

Defendant's conductor took no material part in plaintiff's unauthorized arrest simply by pointing him out as a passenger. *Owens v. Wilmington &c. R. Co.*, 126 N. C. 139.

Burden is on defendant to show that one on a passenger train is not a passenger. *Iseman v. South Carolina &c. R. Co.*, 52 S. C. 566.

Abusive language of conductor in ejecting one who refuses to pay fare does not give a right of action. *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

As the duty of protecting a passenger from injury is within the scope of the authority of every employé, he may recover where he is treated with acts of rudeness and oppression. *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1.

Or remarks of indecency, though the defendant was not negligent in its selection of the servant. *Knoxville Traction Co. v. Lane*, 103 Tenn. 376.

Carrier not liable in exemplary damages for ejecting passenger from its train, unless it ratifies the act. *G. H. & C. R. Co. v. Donahue*, 56 Tex. 162.



Railroad company must protect passengers from the necessity of hearing obscene language or seeing acts of violence. *St. Louis &c. R. Co. v. Mackie*, 71 Tex. 491.

Willful or malicious acts of conductor render company liable. *Dillingham v. Anthony*, 73 Tex. 47.

A depot policeman acted within the scope of his authority in striking an intoxicated person with a billy to keep him from re-entering the waiting room after starting for the train, and the company was held liable for the loss of his eye. *Texas &c. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

Defendant was liable for an indecent assault of its agent on passenger in its waiting room. *St. Louis &c. R. Co. v. Griffith*, 12 Tex. Civ. App. 631.

Defendant was not liable for the acts of a police officer in repelling with no unnecessary force the assault of one trying to prevent his assisting in the lawful ejection of a passenger. *Houston &c. R. Co. v. Ritter*, 16 Tex. Civ. App. 482.

Defendant was liable for the arrest of a passenger, caused by its agent on the ground of passing forged money. Carrier is liable to passenger for injury by servant in whatever capacity he may be employed. The rule as to acting within authority does not apply. *St. Louis &c. R. Co. v. Franklin*, (Tex. Civ. App.) 44 S. W. Rep. 701.

Defendant was liable for passenger's arrest by its conductor for a previous assault by the passenger upon the conductor, though the latter acted contrary to orders in so doing. *Gulf &c. R. Co. v. Conder*, 23 Tex. Civ. App. 488.

Assault by passenger, which had terminated, did not justify retaliation by conductor. *Galveston &c. R. Co. v. La Prelle*, (Tex. Civ. App.) 65 S. W. Rep. 488.

Conductor's statement in the presence of plaintiff's children and other passengers "the idea of a woman trying to board with a child without a ticket!" was insulting and calculated to mortify and humiliate, and ground for recovery. *Texas &c. R. Co. v. Tarkington*, (Tex. Civ. App.) 66 S. W. Rep. 137.

That a passenger's conduct justifies his expulsion does not justify an assault by the conductor. *St. Louis &c. R. Co. v. Johnson*, (Tex. Civ. App.) 68 S. W. Rep. 58.

In an action by a female passenger for assault by servant, the court ruled; "In respect to female passengers the contract proceeds still further and includes an implied stipulation that she shall be protected against obscene conduct, lascivious behavior, and every immodest and libidinous approach. *Nieto v. Clark*, 1 Cliff. (U. S.) 145.

No liability attaches to a railroad company for the shooting of a passenger by its conductor, if conductor had reasonable apprehension that the passenger intended to assault him with a deadly weapon. *New Orleans &c. R. Co. v. Jopes*, 142 U. S. 18.

No negligence is imputable to the railroad company for injuries inflicted upon a passenger by the accidental falling of its brakeman upon her as she was mounting the car platform. *Skinner v. Atchison &c. R. Co.*, 39 Fed. Rep. 188.

Defendant was liable for an assault by the employés of an independent contractor, engaged to take passenger to its ship. *Barrow S. S. Co. v. Kane*, 88 Fed. Rep. 197. \*

Defendant held liable for act of conductor in locking plaintiff out on platform of caboose, where he had gone at his direction to get off and whence he was thrown by the lurch of the car. *Great Northern R. Co. v. Bruyere*, 114 Fed. Rep. 540.

Where the assault by an employé without provocation occurred in defendant's station house and in front of its agent, who failed to make any effort to prevent it, plaintiff may recover though he is not even a prospective passenger. *Krantz v. Rio Grande &c. R. Co.*, 12 Utah, 104; s. c., 30 L. R. A. 297.

Where an arrest of a passenger is for carrying dangerous instruments in violation of law, and is within the jurisdiction of the policeman, defendant is not liable though the latter acted at the instance of its servants. *Clairborne v. Chesapeake &c. R. Co.*, 46 W. Va. 363.

Defendant is liable though the assault and battery by its conductor is willful as it is a breach of its obligation to protect him from injury. *Smith v. Norfolk &c. R. Co.*, 48 W. Va. 69.

Carrier not liable for act of employé in imprisoning passenger for non-payment of fare, as carrier itself had no such right. *Emerson v. Niagara &c. R. R. Co.*, 2 Ont. 528.

*Roe v. Birkenhead &c. R. Co.*, 7 Ex. 36.

## XII. Injuries from Negligence of Other Passengers.

A clothes wringer fell from the rack over the seat and injured the plaintiff. In such a case the defendant would only be liable for lack of ordinary care and *was not here liable*. *Morris v. N. Y. C. & H. R. R. Co.*, 106 N. Y. 678, rev'g judgt for pl'ff. •

It was proved while the plaintiff was riding in one of defendant's cars

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\* NOTE.—Where the relation of carrier and passenger exists, the obligation of safe carriage and protection cannot be delegated. As to liability, where such relation does not exist, of principal for acts of agent, see "Agency," *ante*, p. 1, and for acts of independent contractor, see "Contractors," *post*, p. 631.

a man standing in front of her, also a passenger, and slightly intoxicated, stepped upon her foot. He was able to keep his feet and was not disorderly, although the attention of the defendant's guard had been called to him. Some three years later the plaintiff, while leaving one of defendant's cars, and while on the platform was again injured by a passenger about to enter the car stepping on the same foot. There was no evidence to show that either injury was caused intentionally, nor that in either instance the person causing the injury was so disorderly as to be dangerous, or to interfere with the comfort or safety of, or to annoy the defendant's other passengers. *Thomson v. The Manhattan Ry. Co.*, 75 Hun, 548, affirming nonsuit.

Where plaintiff was in the act of passing from one car to another where there was plenty of seats, he could not recover for being thrown from the train by the unauthorized operation of the air brakes by a fellow passenger. *McDonnell v. New York &c. R. Co.*, 35 App. Div. 147; appeal dismissed, 159 N. Y. 524.

Statute imposing liability for injuries by employes or from running cars unless company shows due care, construed to apply to injuries by a railroad's servants and not to their failure to prevent injuries by fellow passengers. *Davis v. Georgia R. &c. Co.*, 110 Ga. 305.

It was negligent to permit a valise to project in the aisle of a car for two hours in a position liable to trip passengers. *Chicago &c. R. Co. v. Buckmaster*, 74 Ill. App. 575.

Defendant was not liable to passenger on street car in normal condition, for the acts of a crowd in jostling her, especially where the conductor was at the time engaged in assisting her child to alight. *Ferguson v. Citizen's Street R. Co.*, 16 Ind. App. 171.

In the absence of knowledge of the dangerous character of a can carried by a passenger, defendant was not liable for injuries to a fellow passenger caused by its explosion. *Clark v. Louisville &c. R. Co.*, (Ky.) 49 S. W. 1120.

The misconduct of a fellow passenger in giving the signal for the car to start did not excuse defendant's failure to anticipate and guard against such an act, which could easily have been done. *Nichols v. Lynn &c. R. Co.*, 168 Mass. 528.

Where the injury arises through the act of an intoxicated person being jostled against plaintiff, while the conductor was engaged in properly ejecting another, there can be no recovery. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488.

For negligent failure to protect a passenger against the careless discharge of a pistol by a fellow passenger, a carrier is liable. *Illinois C. R. Co. v. Minor*, 69 Miss. 710.

Defendant, was not liable, where it could not have anticipated that one passenger would carelessly throw a match so as to ignite the clothes of another, or have prevented the consequent injury. *Sullivan v. Jefferson Ave. R. Co.*, 133 Mo. 1; s. c., 32 L. R. A. 167.

No recovery lies against a railroad company for the jostling of one passenger against another as he is in the act of getting off the car. *El-linger v. Philadelphia &c. R. Co.*, 153 Pa. St. 213.

Unless catch of window was defective no liability attaches to company for the falling of a window which passenger raised. *Voorhees v. Kings Co. El. R. Co.*, 3 Misc. (N. Y.) 18.

No liability attaches to a carrier for injuries to a passenger caused by the slamming of a door in his face by a fellow passenger. *Graeff v. Philadelphia &c. R. Co.*, 161 Pa. St. 231.

That a passenger's act in having a gun was lawful, did not excuse defendant for failure to protect passengers from its reckless use, where his acts were such as to cause reasonable anticipation of danger. *Ferries Co. v. White*, 99 Tenn. 256; s. c., 38 L. R. A. 427.

Though a deputy sheriff was intoxicated, defendant was not liable for a discharge of his pistol by dropping it or stumbling against baggage, when he had not before displayed it or evinced any other cause for alarm. *Galveston &c. R. Co. v. Long*, 13 Tex. Civ. App. 664.

A railroad cannot recover of a Pullman Palace Car Company for permitting disorderly person to enter its car, as the railway company's own conductor has control over it. *Houston &c. R. Co. v. Perkins*, 21 Tex. Civ. App. 508.

Passenger who stumbles over valise in the aisle of a car sufficiently lighted to have disclosed the obstacle has no right of action against the company. *Stimson v. Milwaukee &c. R. Co.*, 75 Wis. 381.

### XIII. Injuries from Assault of Other Passengers.

A carrier is not liable for the wrongful acts of a passenger, but is bound to use the utmost vigilance in maintaining order and guarding passengers against violence. It may refuse to receive, or may expel, one who endangers the safety or interferes with the reasonable comfort and convenience of the other passengers, and the police power the conductor is bound to exercise with all means at his command. The fact that an individual has drunk to excess will not always warrant his expulsion, but he must be dangerous and annoying to others; but the conductor must be apprised of the circumstances requiring his action, or the facts must be such that he cannot fail to recognize them.

The conductor silenced Foster, who was annoying Putnam, and then

Foster kept abusing Putnam in a low tone. Then Foster struck Putnam with a car-hook and killed him. The defendant was not liable. *Putnam v. B'way & Seventh Ave. R. Co.*, 55 N. Y. 108, rev'g judg't for pl'ff.

Citing *Pittsburg &c. R. Co. v. Hinds*, 53 Penn. St. 512; *Flint v. Norwich &c. Co.*, 34 Conn. 554; 6 Blatch. C. C. R. 158.

The introduction of a manifestly intoxicated and quarrelsome, indecently attired passenger into a street car by the employes of the company is an act of negligence for the consequences of which the company is liable, and the company is liable for personal injuries sustained by the passenger from such person. *Hendricks v. Sixth Ave. R. Co.*, 44 N. Y. Supr. Ct. 8.

Carrier must use ordinary care to protect those waiting for a train in its waiting rooms from annoyance and insults by others. *St. Louis &c. R. Co. v. Wilson*, 70 Ark. 136.

So where passenger is assaulted by fellow passengers or strangers; liability based on implied contract to protect. *Winnegar v. Cent. Pass. R. Co.*, 85 Ky. 547.

Ignorance of intention to do wrong was no defense to an action for injury caused by failure to keep a white person out of a colored person's coach. *Quinn v. Louisville &c. R. Co.*, 98 Ky. 231.

Failure to take any steps to segregate intoxicated and disorderly negroes from a crowded car other than to put them out upon the platform, was negligence, where there was plenty of room in the rear car. *Louisville &c. R. Co. v. McEwan*, (Ky.) 51 S. W. Rep. 619.

Conductor had performed his duty, where, upon an assault by an intoxicated passenger upon another, he quieted the former, remained between the two during a subsequent difficulty and turned the former over to a policeman at the next station. *Kinney v. Louisville &c. R. Co.*, 99 Ky. 59.

A railroad is not an insurer against assault from fellow passengers; it was held to have performed its duty where contending parties were separated apparently for good, but upon the resumption of the difficulty defendant's captain intervened and did his best to prevent injury. *Tall v. Baltimore Steam-Packet Co.*, 90 Md. 248; s. c., 47 L. R. A. 120.

If conductor interferes and does his duty in preventing the assaults no right of action exists. *Mullan v. Wisconsin Cent. Co.*, 46 Minn. 474.

See *Louisville &c. R. Co. v. Logan*, 88 Ky. 232; *Peary v. Georgia R. Co.*, 81 Ga. 485; *Vinton v. Middlesex R. Co.*, 11 Allen, 304.

Where defendant's servants permit insult and abuse by a drunk and disorderly fellow passenger within their presence without interference, it is liable. *Lucy v. Chicago &c. R. Co.*, 64 Minn. 7; s. c., 31 L. R. A. 551.

Liability attaches to a company who permit a passenger, a foreigner,

to be threatened by other passengers, so that in his fear he jumps from the train and is injured. *Spohn v. Missouri Pac. R. Co.*, 101 Mo. 417.

Where a passenger is a lady, defendant must protect her from insult, abuse, obscenity or wanton approach. *Collins v. Texas & C. R. Co.*, 15 Tex. Civ. App. 169.

That defendant's agent regarded an assault by a drunken man upon passenger, in the waiting room, as a joke was no defense. *Houston & C. R. v. Phillio*, (Tex. Civ. App.) 67 S. W. Rep. 915.

Failure to protect passengers against the violence of one who is dangerously insane or at least to give notice thereof so as to enable them to protect themselves is negligence. *St. Louis & C. R. Co. v. Greenthal*, 77 Fed. Rep. 150.

#### XIV. Injuries from Assault of Third Persons.

While a carrier of passengers is bound to exercise the utmost vigilance in protecting his passengers from the violence of strangers, yet, for a neglect to perform this duty, his liability is no more extensive than in cases of negligence by which injury comes to the person or property of the passenger from other causes. *Weeks v. N. Y. & N. H. R. Co.*, 72 N. Y. 50; 9 Hun, 669.

Defendant did not fail to exercise the high degree of care it owes for the protection of passengers where its servants were not present and had no reason to apprehend plaintiff's danger from ejection by a fellow passenger. *Lake Erie & C. R. Co. v. Arnold*, 26 Ind. App. 190.

A conductor must protect passengers from insult and injury from fellow passengers, and for a failure to do so the company is liable; but it must appear that the conductor had knowledge or opportunity of knowing, that injury was threatened, and that he could have averted it by the means at his disposal. *New Orleans & C. R. Co. v. Burke*, 53 Miss. 200.

See, also, *Pittsburg R. Co. v. Hinds*, 53 Pa. St. 512; *Flint v. Norwich Transf. Co.*, 34 Conn. 554.

Carriers should protect passengers from assaults of and annoyance from strangers and fellow passengers. *Duggan v. Baltimore & C. R. Co.*, 159 Pa. St. 248.

#### XV. Injuries to Passengers from Negligence of Third Persons.

Although a carrier may, by its negligence, contribute to a collision with the train of another company, whereby its passenger is hurt, yet, if such other company also contributed to the accident, the plaintiff may recover against it. *Chapman v. New Haven R. Co.*, 19 N. Y. 341, aff'd *judg't for pl'ff*.

A passenger injured by the negligence of two companies may sue them jointly. Both corporations used the same track under an arrangement between them sanctioned by statute, according to which they were to be governed by a common code of regulations in respect to the management of their trains. *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492, aff'g judg't for pl'ff.

It is no defense to a carrier, when a passenger has been injured in a collision with the train of another company, that such latter company also contributed, by its negligence, to the injury. *Webster v. Hudson River R. Co.*, 38 N. Y. 260.

*Sheridan v. Brooklyn & H. R. R. Co.*, 36 N. Y. 39. *Distinguishing Brown v. N. Y. C. R. Co.*, 32 id. 597; *Thoroughgood v. Bryan*, 8 Com. B. 115.

When two cars collided, if the servants of both companies were negligent yet both are liable to a passenger injured on one line. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628, rev'g nonsuit.

*Hill v. N. A. R. Co.*, 109 N. Y. 239.

The plaintiff, riding on the footboard of a sleigh with other passengers, was injured by a collision with another's sleigh. Contributory negligence was for the jury. Negligence of the driver of the second sleigh did not relieve it. *Spooner v. B. C. R. Co.*, 54 N. Y. 230.

A gate suitably closed was lifted out of place by an unauthorized person, and it gave way so that the plaintiff was pushed overboard through the gangway by the crowding of the passengers to that side of the boat. No recovery was allowed. *Cleveland v. N. J. S. Co.*, 68 N. Y. 306; 5 Hun, 523; s. c., 89 N. Y. 627; 125 id. 299.

A passenger alighted from the cars of one company, and while going from the depot, which it used in common with the defendant, was injured by the defendant's train entering the station without signal. *Archer v. N. Y., N. H. & H. R. R. Co.*, 106 N. Y. 589; aff'g judg't for pl'ff.

Standing on the platform of a car is usually a defense in an action against the immediate carrier, but not *when injury is caused by a third person*; and the action is against said person. Contributory negligence was for the jury. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, aff'g judg't for pl'ff.

A wagon containing lumber was proceeding in the opposite direction from the horse car, and when abreast of the car, drove across the track so that the lumber was thrust through the window and struck the plaintiff, who was a passenger in the car. The driver, happening to see in his mirror, the wagon, used every effort to stop the car. It was alleged that the car was traveling at an unusual speed. The evidence failed to show this, and even if it were so, had nothing to do with the accident.

The defendant was not liable. *Alexander v. R. C. & B. R. Co.*, 128 N. Y. 13, rev'g judg't for pl'ff.

*Distinguishing Hill v. N. A. R. Co.*, 109 N. Y. 239.

Plaintiff was riding on one of the cars of a railroad having a traffic arrangement with defendant to run its cars over the latter's tracks. He was struck by a tree growing in close proximity to the track. Defendant was not liable having no contractual relation with him; his agreement for carriage being with a separate and independent company. *Lias v. Rochester R. Co.*, 169 N. Y. 118; aff'g s. c., 51 App. Div. 618.

The plaintiff was injured on defendant's cars, which collided with a team approaching its track at right angles, which could be seen 250 feet away, and the car could have stopped in twelve feet. For the jury. *Watkins v. Atlantic Ave. R. Co.*, 20 Hun, 237; reversing nonsuit.

A coal car was trying to back the load on to a walk to drop it in the coal hole; the horse could not hold it and it went into the street and hit a horse car, that did not stop to avoid the coal cart. A passenger was hurt and sued the car company for not stopping the car, and the owner of the cart for the negligent manner in which he tried to dump the coal. *Seidlinger v. B. C. R. Co.*, 28 Hun, 503, affirming judgment for the plaintiff; s. c. aff'd, 97 N. Y. 642.

Defendant was negligent in permitting the maintenance of a gravity road of stone quarry across its tracks so as to endanger the safety of its passengers; especially where it had notice of the previous escape of cars loaded with stone. *Lynch v. New York &c. R. Co.*, 8 App. Div. 458.

Failure to anticipate natural and probable result of the negligent practice of a postal clerk in the employ of the United States to throw mail bags out upon the platform was negligence. *St. Louis &c. R. Co. v. Waggoner*, 90 Ill. App. 556.

That the act of a third person in driving along the street contributed to the injury did not relieve defendant from the consequences of the part its negligence played therein. *West Chicago Street R. Co. v. Tuerk*, 90 Ill. App. 105.

A passenger, in train of one company, may sue another company for injuries received by reason of the negligence of both. *Fitchburgh &c. R. Co. v. Spencer*, 98 Ind. 186.

*Albion v. Hetrick*, 90 Ind. 545; *Bennett v. N. J. &c. R. Co.*, 7 Vroom. (N. J.) 226; *Danville &c. Co. v. Stewart*, 2 Metc. (Ky.) 119; *Steamer New Philadelphia*, 1 Black, (U. S.) 62.

Improper conduct of third persons, contributing to the injury, will not excuse the negligence of a carrier who permits his boats to be overloaded. *Commonwealth v. Coburn*, 132 Mass. 555.

Passenger injured by a bundle thrown from an express car. The ex-



press agent was not a servant of the railroad company and it was not liable under L. 1894, chap. 469, sec. 3. *Winship v. New York & C. R. Co.*, 170 Mass. 464.

Railroad was not liable for the condition of a station in the hands of a terminal company. Its duty to the passengers was performed when it saw that he safely alighted from a train. *Frazier v. New York & C. R. Co.*, (Mass.) 62 N. E. Rep. 731.

Defendant was liable for the consequences to a passenger of the scuffling of hackmen, which it had permitted in its station, though none of the participants were its employés. *Exton v. Central R. & C.*, 62 N. J. L. 7; s. c. aff'd, 63 id. 356.

A passenger injured by the joint negligence of his carrier and another has a remedy against his carrier alone. *Philadelphia & C. R. Co. v. Boyer*, 1 Out. (Pa.) 91.

*Lockhart v. Lichtenthaler*, 10 Wright (Pa.) 151. See *Carlisle v. Brisbane*, 113 Pa. St. 544.

That an express company had a particular car set apart for it on a train under the railroad's exclusive control, did not bring it within a statute giving a cause of action for death caused by "the negligence or carelessness of the proprietor, owner, or charterer of any railroad" or his agents. *Houston & C. R. Co. v. Liscomb*, (Tex.) 64 S. W. Rep. 923; s. c., 55 L. R. A. 869; modifying s. c., 62 S. W. Rep. 954.

Negligence of a street car driver cannot be imputed to a passenger so that he cannot recover for injuries caused by steam railroad company's failure to close gates. *Whelan v. N. Y. & C. R. Co.*, 38 Fed. R. 15. *R. Co. v. Cooper*, 85 Va. 939; *R. Co. v. Kutac*, 72 Tex. 643.

Where the state had taken out of the defendant's hands the work of elevating its tracks, it was not liable for the acts of those engaged therein, in the absence of negligence in failing to anticipate and avoid dangers arising therefrom. *New York & C. R. Co. v. Baker*, 98 Fed. Rep. 694.

Carrier is liable for the negligence of the servants of the road over which it has an arrangement to run its trains. *Brady v. Chicago & C. R. Co.*, 114 Fed. Rep. 100.

Though a union depot was in the hands of a separate concern, a railroad company using it was liable for failure to keep its approaches in a safe condition. *Herrman v. Great Northern R. Co.*, (Wash.) 68 Pac. Rep. 82.

## XVI. Injuries to Passengers from External Causes.

It is *per se* negligent for a passenger unnecessarily to expose his person, or any part thereof, beyond the exterior line of a moving car, and the question whether he was negligent in so doing is not for the determination of

the jury, unless there be some qualifying circumstances present. If, however, a passenger's arm or elbow so protrude from the window of a street car, or even of a steam car, the question of contributory negligence has not infrequently been held to be a question of fact for a jury.

In an action for negligence, whereby a passenger was hit by something outside of the car, no presumption of negligence arose from the fact of the injury, but the circumstances showed that the external object was on the grounds of the carrier and attached to an adjoining car of defendant, and hence a presumption of negligence arose. If the plaintiff, at the time, had her arm out of the window, she was guilty of contributory negligence. *Holbrook v. Utica & Schenectady R. Co.*, 12 N. Y., 236, aff'g judg't for pl'ff.

The plaintiff left his seat in an open car and started to go on the outside step to another seat, and was hit by an iron column in the street and hurt. If he did this without reasonable cause, the defendant would not be liable. *Clark v. Eighth Ave. R. R. Co.*, 36 N. Y. 135; *Ginna v. Second Ave. R. R. Co.*, 67 id. 596; *Dixon v. Brooklyn City & N. R. R. Co.*, 100 id. 171; *Todd v. O. C. & F. R. R. Co.*, 3 Allen 18; 7 id. 207; *Hickey v. B. & L. R. R. Co.*, 14 id. 429; *Torrey v. B. & A. R. R. Co.*, 147 Mass. 412; *P. & C. R. R. Co. v. McClurg*, 56 Penn. St. 294; *Indiana &c. v. Rutherford*, 29 Ind. 82; *Pittsburgh &c. R. R. Co. v. Andrews*, 39 Md. 329; *Dun v. Seaboard &c. R. R. Co.*, 78 Va. 645. *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609; reversing 41 Hun, 380, and judgment for plaintiff.

Similar accident and nonsuit granted in *Vroman v. Houston &c. R. Co.* (City Ct. N. Y.) 7 Misc. 234.

It is not negligence *per se* for a passenger in a street railroad car to have his arm out of a window; otherwise as to steam road.

Defendant lawfully opened a trench in a city street parallel with the track of a street railroad company. It constructed a passageway or bridge across this trench, with uprights at each end, which supported a handrail on each side. The uprights nearest the track of the railroad were higher than the sills of the windows of the street cars, and were about three or four inches from the side of a passing car. Plaintiff, a passenger, in the summer time, was sitting at an open window of a car and had his arm broken as the car passed the bridge. *Francis v. N. Y. Steam Co.*, 114 N. Y. 380; aff'g 13 Daly 510, and judg't for pl'ff.

**From opinion.**—"In *Dale v. Delaware, Lackawanna & Western Railroad Company* (73 N. Y. 468) the court charged that if the plaintiff negligently, whether consciously or unconsciously, put his arm outside of the window, and thus contributed to the injury, he could not recover; but if his arm, while resting on the sill, was thrown out by a sudden lurch of the car, that fact would not defeat his right to recover. The plaintiff had a verdict, on which a judgment was entered,

which was affirmed at General Term, but was reversed by the Court of Appeals for an error in the admission of evidence, the validity of the instruction not being considered. In *Hallahan v. N. Y., L. E. & W. R. R. Co.* (102 N. Y. 194), and in *Breen v. N. Y. C. & H. R. R. Co.* (109 id. 297), the records show that the jury was instructed that, if they found that the plaintiff was riding with his arm protruding from the open window, it was contributory negligence, and no recovery could be had. The plaintiff recovered a verdict in each case, and the validity of the instructions was not and could not be reviewed.

The courts of Massachusetts and Pennsylvania have held that it is negligent, as matter of law, for a railway passenger to ride with his arm extending through the window, and that no recovery can be had for an injury received by reason of the arm being in this position. (*Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; 7 id. 207; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294.) In other states it has been held that, whether such conduct is contributory negligence, is a question of fact. (See cases cited in *Beach on Contrib. Neg.* sec. 56; 2 *Shear. & Red. on Neg.* (4th ed.) sec. 519; 2 *Wood's R. Law*, 1103, sec. 303; *Bishop's Non-contract Law*, secs. 1106, 1107.) In *Dahlberg v. Minnesota Street Railway Company* (32 Minn. 404) and in *Summers v. Crescent City Railroad Company* (34 La. Ann. 139), it was held that whether a passenger upon a street car was negligent in riding with his arm out of the window was a question of fact."

No contractual relation is involved in this case.

The plaintiff, passing along the steps of an open car, was hit by the body of a closed car going in the opposite direction. The smallest distance from the edge of the steps to the side of the other car was seventeen inches, and the cars were passing each other at every one-half minute, and passengers were accustomed to stand between the tracks, and thousands of passengers had ridden on the steps of open cars for twenty years without accident.

Held, that the defendant was not negligent in failing to make the accident a physical impossibility. *Craighead v. Brooklyn City R. Co.*, 123 N. Y. 391, rev'g judg't for pl'ff.

The plaintiff, a passenger, standing about midway upon a continuous step running along the outside of a crowded car was struck by a car running in the opposite direction. The tracks at this point were nearer to each other than at any other place on the road, and by the sinking of the rail at this point the car was pushed toward the other track. *Gray v. R. & B. R. Co.*, 61 Hun, 212, aff'g judg't for pl'ff.

Distinguishing *Coleman v. Second Ave. R. Co.*, 114 N. Y. 609; *Craighead v. B. C. R. Co.*, 123 id. 391.

Plaintiff was negligent *per se* in unnecessarily leaving a car, after he had been prevented from putting his head out of the window on account of the danger of striking trees along the way, and going upon the platform, where he leaned out and was struck by one of them. *Sias v. Rochester R. Co.*, 18 App. Div. 506; appeal dismissed, 159 N. Y. 567.

Defendant was negligent in attempting to pass a wagon in the street so close to the car that he must have known that parties on the running board, the car being crowded, would have to lean inward in order to protect themselves from it. *Henderson v. Nassau Electric R. Co.*, 46 App. Div. 280.

Defendant was negligent in having its tracks so close together that car could not pass without injury to one whose arm was inadvertently projected but three inches beyond the car window. The jury were warranted in finding plaintiff not negligent. *Tucker v. Buffalo R. Co.*, 53 App. Div. 571; s. c. aff'd, 169 N. Y. 589.

Plaintiff, standing on a step running the length of a horse car, was injured by the driver of another car belonging to the defendant driving his horses against him and knocking him off. The seats were occupied and the rear platform was crowded. Contributory negligence was for the jury. *Bruno v. Brooklyn City R. Co.*, 5 Misc. 327, aff'g judg't for pl'ff. (City Court of Brooklyn.)

Plaintiff, without signaling either conductor or driver, stepped on the foot rail of a street car, when it started and his body came in contact with a truck which he had seen as he approached the car; but there was no evidence that the driver or the conductor saw either the truck or the plaintiff, or perceived the danger. *Littman v. Dry Dock &c. R. Co.*, 6 Misc. 34, aff'g nonsuit. (New York City Court.)

A person passed from the easterly to the westerly side of a car and then along a step at the side, for the purpose of obtaining a seat, when he was struck by a column of the elevated railway structure. Nonsuit should have been granted. *Murphy v. Ninth Ave. R. Co.*, 6 Misc. 298, rev'g judg't for pl'ff. (New York Superior Court.)

Failure to warn plaintiff of the dangerous proximity of poles, which he was in ignorance of, while he was riding on the footboard of a car, was negligence. *West Chicago Street R. Co. v. Marks*, 182 Ill. 15; aff'g s. c., 82 Ill. App. 185.

Where company permitted persons to ride on footboards of cars, who, while so riding, were injured by the running of the train too near the intersection of a switch, the carrier was liable. *Topeka City R. v. Higgs*, 38 Kas. 375.

Defendant was not liable where plaintiff was injured when he put his head out of a window, without the knowledge of its employes, to vomit. *Shelton v. Louisville &c. R. Co.*, (Ky.) 39 S. W. Rep. 842.

Plaintiff was not allowed to recover, where his arm, while resting on the window sill of the car, was struck by a defective mail crane. *Baltimore &c. R. Co. v. Sims*, (Ind. App.) 63 N. E. Rep. 485.

Boy of 10 was negligent in putting his head out of the car window so

as to come in contact with a car on a side track. *Knauss v. Lake Erie &c. R. Co.*, (Ind. App.) 64 N. E. Rep. 95.

Plaintiff was negligent *per se* in putting his elbow out of the window in passing through a tunnel, though but an inch and a half, where the natural oscillation often caused the side of the car to strike adjoining timbers therein. *Clarke v. Louisville &c. R. Co.*, 101 Ky. 34; s. c., 36 L. R. A. 123.

Plaintiff was denied recovery for injury to his eye by cinders coming in at an open window that could not be closed, at which he persisted in sitting, though there were other vacant seats. *O'Donnell v. Louisville &c. R. Co.*, (Ky.) 42 S. W. Rep. 846.

Negligence in projecting arm out of window was for the jury, where the car it struck was placed on a switch dangerously near the main track. *Clerc v. Morgan's &c. R. Co.*, (La.) 31 South. Rep. 886.

Plaintiff on front platform was negligent in putting his head out beyond the car and looking toward the rear, where the post he collided with could have been seen in time to have avoided injury, had he looked forward. *Cummings v. Worcester &c. Street R. Co.*, 166 Mass. 220.

Where coal bins were placed so near the track that they struck a person standing on the running board of a car, he was not *per se* negligent. *Dickinson v. Port Huron &c. R. Co.*, 53 Mich. 43.

Though plaintiff had gotten on the running board after the car had slowed down pursuant to his signal, he was negligent, where, upon its failing to stop, he leaned so far out in endeavoring to signal the conductor that his head struck an adjoining wagon. *Flynn v. Consolidated Traction Co.*, 64 N. J. L. 375.

Where a passenger on a street car was injured by a passing load of hay, he must prove not only negligence in the railroad company, but absence of negligence on his part. *Street R. Co. v. Gibson*, 96 Pa. St. 83.

Sitting with arm resting on the window sill and within the car, was not *per se* negligent. *Germanstown &c. R. Co. v. Brophy*, 105 Pa. St. 38.

See *Dun v. R. Co.*, 78 Va. 645; *Dahlberg v. Minneapolis Street R. Co.*, 32 Minn. 404; *Fordham v. London &c. R. Co.*, L. R. 3 C. P. 368; *Seigle v. Eisen*, 41 Cal. 109; *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Spencer v. Mil. & P. R. Co.*, 17 Wis. 487.

Defendant was not liable, because, by reason of excessive speed, its car was under a tree when it fell. *Barry v. Sugar Notch*, 191 Pa. St. 345.

Negligence of a motorman in failing to take into account the dangerous proximity of an ice wagon near the car, so as to protect, in passing, one compelled to ride on the running board by reason of the

crowd in the car, was for the jury. *Bumbear v. United Traction Co.*, 198 Pa. St. 198.

When elbow extended out of a car window, unnecessarily, and without qualifying circumstances, it was *per se* negligent. *Pittsburg v. McClurg*, 6 P. F. Smith (Pa.) 209.

*Todd v. Old Colony &c. R. Co.*, 3 Allen, 18; s. c., 7 Allen, 207; *Landerbach v. People's R. Co.*, 4 Penn. (Pa.) 406; *Pittsburg &c. R. Co. v. Andrews*, 39 Md. 329. See, however, *Miller v. St. Louis R. Co.*, 5 Mo. App. 471; *Seigel v. Eisen*, 41 Cal. 109; *Chicago &c. R. Co. v. Pondrum*, 51 Ill. 333; *Houston &c. R. Co. v. Hampton*, 64 Tex. 427; *Louisville &c. R. Co. v. Sickings*, 5 Bush. 1; *Denn v. Seaboard &c. R. Co.*, 78 Va. 645; *Favre v. L. & N. R. Co.*, 13 K. L. R. 116; *Georgia Pac. R. Co. v. Vanderwood*, 90 Ala. 49.

One may ride with arm on sill if it does not protrude. *Farlow v. Kelly*, 108 U. S. 288.

When passenger's arm rested on the window and was thrown outside by a collision, the carrier was liable. *Farlow v. Kelly*, 108 U. S. 288.

*Summers v. Crescent City R. Co.*, 34 La. Ann. 139.

It is not negligence *per se* for a passenger on a street car to rest his arm upon the sill of an open window. *Schneider v. New Orleans &c. R. Co.*, 54 Fed. R. 466.

One who lets his arm protrude from the car window cannot maintain an action for injuries. *Richmond &c. R. Co. v. Scott*, 16 Va. L. J. 362.

See, also, *Carrico v. W. Va. &c. R. Co.*, 35 W. Va. 389.

Defendant is not bound to exert physical force to prevent passengers getting within a dangerous proximity to a burning oil tank. *Conroy v. Chicago &c. R. Co.*, 96 Wis. 243; s. c., 38 L. R. A. 419.

## XVII. Collision with Cars of the Same Line.

**Where one car or train of a carrier collides with another of its trains, or with some object under the usual control of the carrier, a presumption of negligence arises and places the burden of explanation upon the carrier.**

*Holbrook v. Utica & Schenectady R. Co.*, 12 N. Y. 236, where the car was struck by a stick protruding from the car on an adjoining track.

*Breen v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 297, where a passenger, while sitting by an open window with his arm upon the sill, was struck on the arm by the swinging door of a passing freight train.

See *Hallihan v. N. Y., L. E. & W. R. Co.*, 102 N. Y. 194, where a passenger, with his elbow on a window sill, was struck by a crane used to deliver mail to passing trains.

See, also, 13 Daly 511; *Webster v. Rome, Watertown & Ogdensburgh R. Co.*, 115 N. Y. 112; *Wynn v. Central Park N. & E. R. R. Co.*, 133 id. 575.

The failure of an employé, confronted by a sudden emergency, to ex-

ercise the best possible judgment does not establish lack of care or skill. Upon a down grade the driver of a street car applied the brake; the chain broke and the car collided with another ahead and the plaintiff was injured. The driver did all that could be done after the chain broke to prevent the accident, and remained at his post until his car was within four feet of the one in front. It was left to the jury to determine whether the defendant employed skillful servants on the car and whether it was managed with proper care and skill. It was held error, inasmuch as if the driver, in handling the brake, did not use more force than was absolutely necessary to check the speed of the car, this did not raise a question of lack of skill or of negligence, nor did the failure of the driver to shout to the driver of the forward car, at least in the absence of the evidence that this would have been of service in securing safety.

The case was properly submitted to the jury on the question as to whether there had been, on the morning in question, a proper inspection of the brake, but not upon the question of the plan and method by which the brake was constructed. The rule would be the same, if the collision was between cars of different companies using the same track. *Wynn v. Central Park, N. & E. R. Co.*, 133 N. Y. 575.

Defendant was not negligent, though its car was running at high speed, where it collided with another car, which had collided with a wagon and was thrown on the track from 150 to 200 feet ahead of it, and while it was but three to five seconds away; everything being done to avoid accident. *Snediker v. Nassau Electric R. Co.*, 41 App. Div. 628.

Failure of a motorman to apply the brakes within 20 or 25 feet of a car which he has seen slow up when 50 feet ahead, where the tracks are slippery, was negligence. *Wynne v. Atlantic Ave. R. Co.*, 14 Misc. 414.

Stopping a car around a curve on a down grade with slippery tracks within two minutes of a following car, which could not see it until within 150 feet, without warning the latter, was held sufficient to sustain a finding of negligence. *Blanchette v. Holyoke Street R. Co.*, 175 Mass. 51.

Slight negligence is sufficient to charge a carrier with liability for a collision injuring a passenger, which could, with ordinary foresight, have been prevented. *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334.

Defendant was liable, where a car, taken out of a car barn to assist another stalled on the track, was negligently allowed to collide with the latter. *Quinn v. Shamokin & Co. Electric R. Co.*, 7 Pa. Super. Ct. 19.

That a brakeman of a train went the usual distance back to flag a following train does not necessarily prevent recovery, where, owing to the darkness, the grade and the slipperiness of the track, he did not go

far enough to prevent a collision. *Gulf &c. R. Co. v. Brown*, 16 Tex. Civ. App. 93.

That cars were driven onto the main track by a severe storm did not prevent recovery, where collision might have been averted except for defendant's negligence in failing to flag the passenger train on the main track. *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579.

Defendant was negligent in arranging its schedule on a single track so that an outgoing car is to turn off on a switch only two minutes before an incoming train crosses on to the main line and without means of telling whether the former has taken the switch. *Bailey v. Tacoma Traction Co.*, 16 Wash. 48.

### XVIII. Collisions with Cars of Other Companies.

A street car came in collision with a steam car at a crossing. Under such circumstances, that the defendant was bound to use the highest degree of care and prudence, the utmost human skill and foresight, is the settled law. (*Ingalls v. Bills*, 9 Metc. 1; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Bowen v. N. Y. C. R. R. Co.*, 18 id. 410; *Deyo v. N. Y. C. R. R. Co.*, 34 id. 9; *Maverick v. Eighth Ave. R. Co.*, 36 id. 378; *Caldwell v. N. J. Steamboat Co.*, 47 id. 282). *Coddington v. The Brooklyn C. R. Co.*, 102 N. Y. 66, aff'g judg't for pl'ff.

The plaintiff, a passenger on one of the defendant's cars, was injured by a collision of that car with a train of another company at the intersection of the tracks. The evidence showed that the defendant's driver, when within sixty-five feet of the crossing, could have seen the train seventy-five feet from the intersection, and when within forty feet he could have seen such approaching train one hundred and forty feet away, and that he was driving at about six miles per hour. The question of the driver's negligence was properly submitted to the jury. *Schneider v. Second Ave. R. Co.* and the *Houston &c. Co.*, 133 N. Y. 583.

A car driven at an unusual rate came in contact with a truck and a passenger was injured. This state of facts put explanation on the company and was for the determination of the jury. *Hill v. Ninth Ave. R. Co.*, 109 N. Y. 239.

See *Passenger R. Co. v. Bondrou*, 92 Pa. St. 475, when a passenger on platform was injured by pole of following car and recovered.

In an action by a passenger, injured in a collision between cars of intersecting lines, against both companies, the accident raised a presumption of negligence against the carrying company, but not against the other. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; rev'g s. c., 16 App. Div. 152.

Carrier must abandon his rights of way at a crossing if required for



v. N. Y. C. R. Co., 121 N. Y. 31, rev'g judg't for pl'ff. Commonwealth v. Powers, 7 Metc. 596; Chicago &c. R. Co. v. Williams, 55 Ill. 185; Bass v. Chicago &c. R. Co., 36 Wis. 450; see, Browning v. L. J. R. Co., 2 Daly (N. Y.) 117; Chicago v. People, 56 Ill. 365.

Whether such regulations are reasonable is a question of law. *Vedder v. Fellows*, 20 N. Y. 126; *Barker v. Central Park &c. R. Co.*, 151 N. Y. 237.

*Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31; *C. & N. W. R. Co. v. Williams*, 55 Ill. 185; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420. See, however, *Morris &c. R. Co. v. Ayres*, 29 N. J. L. 393.

A rule limiting the amount of change which a conductor is required to furnish on tender of a fare, being reasonable, defendant was not bound to give personal notice of the existence thereof. *Barker v. Central Park &c. R. Co.*, 151 N. Y. 237; s. c., 35 L. R. A. 489; aff'g s. c., 3 Misc. 635.

Where a company is required by statute to furnish a mileage book on specified terms, there is no consideration for the imposition of conditions such as that a ticket shall be purchased with coupons from it at the station before entering the train, and such a condition is not binding though printed in the mileage book and signed by the purchaser. *Corcoran v. New York &c. R. Co.*, 25 App. Div. 479; s. c. aff'd, 164 N. Y. 587.

A rule requiring a transfer to be used within ten minutes, regardless of a company's inability to furnish accommodations in its cars within that time, is unreasonable, in view of statute requiring a continuous trip over lines controlled by a company for a single fare. *Jenkins v. Brooklyn &c. R. Co.*, 29 App. Div. 8.

Nor is a company justified in imposing, as a condition to the issuance of such mileage book, that the purchaser shall disclose the names of the members of his family, or sign an agreement as to compliance with the company's rules contained thereon. *Trolan v. New York &c. R. Co.*, 31 App. Div. 320.

Reasonableness of a rule is for the court. Held, error not to charge that a rule providing that passengers shall not carry cumbersome or dangerous package is reasonable and to leave the reasonableness thereof to the jury. *Dowd v. Albany R. Co.*, 47 App. Div. 202.

Rule requiring employ  s, when off duty in uniform, not to sit on the front seat of cars so as to divert the attention of the motorman, is reasonable. *Rowe v. Brooklyn Heights R. Co.*, 75 N. Y. Supp. 893.

A railroad company cannot require a passenger to agree, as a condition of issuing it, that a mileage book shall be forfeited upon presentment by anyone else. *Watson v. New York &c. R. Co.*, 24 Misc. 628.

Shipper traveling with his stock, and returning free of charge, in the absence of specific agreement, is required to take the shorter of two routes. *Milroy v. Chicago &c. R. Co.*, 98 Iowa, 188.

The refusal to comply with a reasonable regulation works a forfeiture of the rights acquired by the purchaser of a ticket, so that return of money paid therefor cannot be demanded. *Gregory v. Chicago &c. R. Co.*, 100 Iowa, 345.

A passenger upon payment of the full fare is not bound to the special limitations of time for its use, of which he had no notice and to which he did not agree. *Boyd v. Spencer*, 103 Ga. 828.

In the absence of fraud, plaintiff was bound by stipulations in ticket purchased and signed for by her, though she could not read. *Southern R. Co. v. White*, 108 Ga. 201.

Where the rate of a round trip ticket was reduced in consideration of complying with certain conditions as to identification and stamping, non-compliance justified expulsion. *Wenz v. Savannah &c. R. Co.*, 108 Ga. 290.

By accepting a ticket containing a time limit for its use, one assents to such terms. *Hanlon v. Illinois C. R. Co.*, 109 Iowa, 136.

Requirement of a higher fare where it is paid on the train than where a ticket is purchased at the station is reasonable. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Carriers have the right to require of passengers the observance of all such reasonable rules as tend to promote the comfort and convenience of passengers. *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420.

*Chicago &c. R. Co. v. Parks*, 18 Ill. 460; *Hillard v. Gould*, 34 N. H. 230; *Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580; *Cheny v. Boston &c. R. Co.*, 11 Metc. 121; *Marquette v. Chicago &c. R. Co.*, 33 Iowa 562; *DeLucas v. New Orleans &c. R. Co.*, 38 La. Ann. 930.

Though a ticket contains terms including a time limit a purchaser is not bound, where there is a place for a signature thereto which has not been filled out and he purchased it for use without limitation as to time. *Walker v. Price*, 9 Kan. App. 720.

Defendant cannot enforce a regulation that night passengers to a certain point should be carried to another and returned in the morning, in the absence of notice to the public thereof. *Louisville &c. R. Co. v. Cayce*, (Ky.) 34 S. W. Rep. 896.

Rule forbidding passengers to ride on the front platform of a street car does not prevent recovery by one so riding, if he reasonably believes from the company's conduct that it is not in force. *Sweetland v. Lynn &c. R. Co.*, 177 Mass. 574; s. c., 51 L. R. A. 783.

In an action for refusal to carry, where the holder of a ticket, sold as

good on any train, was excluded from a train not stopping at his destination, defendant was held entitled to a peremptory instruction. *Yazoo &c. R. Co. v. Rogers*, (Miss.) 31 South. Rep. 581.

A passenger should have an opportunity to become acquainted with rules and regulations, or they should be brought to his notice or knowledge. *B. & M. R. Co. v. Rose*, 11 Neb. 177.

*Lake Shore &c. R. Co. v. Greenwood*, 29 Smith (Pa.) 373; *Maroney v. Old Colony R. Co.*, 106 Mass. 153.

Where passengers have been allowed to change cars without a transfer ticket, defendant could not change the custom without notice. *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1; s. c. aff'd, 58 N. J. L. 408.

See, also, *Runyan v. Central R. Co.*, 61 N. J. L. 542.

Forbidding a train to enter Cherokee outlet for six hours before it was opened by settlement and that no one should enter such train for thirty minutes therefore, was reasonable, being adopted to carry out a similar order of the Secretary of the Interior. *Decker v. Atchison &c. R. Co.*, 3 Okla. 553.

Requirement in a mileage ticket that holder must procure an exchange ticket is reasonable, and failure to comply justifies an expulsion, on refusal to pay fare, though plaintiff was unable to procure one through station agent's negligence. *Robb v. Pittsburg &c. R. Co.*, 14 Pa. Super. Ct. 282.

Tender of five dollar bill in payment of five cent fare held unreasonable as matter of law. *Muldowney v. Pittsburg &c. Traction Co.*, 8 Pa. Super. Ct. 335.

Requirement that claim for damages should be presented in writing within 60 days held reasonable. *Kirby v. Western &c. Teleg. Co.*, 7 S. D. 623; s. c., 30 L. R. A. 621; *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213.

See, also, "Common Carriers of Goods, Limitation of Liability," ante p. 237.

Time limit or other conditions merely stamped on the back of a general ticket does not bind a passenger unless his attention is called thereto and his assent obtained and it is based on some consideration. *Louisville &c. R. Co. v. Turner*, 100 Tenn. 213.

Conditions on a general ticket, though referred to on the face thereof, are not binding unless they are reasonable. One that a passenger shall go through an elaborate process to see that its servant had made no mistake is not reasonable; nor is one requiring the purchaser to apply, within three days, to the company's office to get his money refunded in

case of a double charge as a result of a dispute. *O'Rourke v. Street R. Co.*, 103 Tenn. 124; s. c., 46 L. R. A. 614.

Requirement that rear door on the rear car be locked is reasonable and is not negligence as against one getting on rear platform with knowledge thereof. *Missouri &c. R. Co. v. Brown*, (Tex. Civ. App.) 39 S. W. Rep. 326.

(a). PASSENGER MUST PAY FARE OR SHOW TICKET.

Payment of fare, or presentation and showing of ticket when required is a prerequisite to passenger's right to ride on the train of a common carrier. *Hibbard v. N. Y. & E. R. Co.*, 15 N. Y. 455.

*Lucas v. Michigan Cent. R. Co.*, 98 Mich. 1; *Magee v. Oregon R. Co.*, 46 Fed. R. 734.

A regulation requiring the procuring and exhibition, upon reasonable demand, of a ticket as evidence of one's right to ride, is reasonable. *Wiggins v. King*, 91 Hun, 340.

Failure to repay fare when one has changed from one car to another, without evidence of having already paid it, warranted ejection. *Lasker v. Third Ave. R. Co.*, 27 Misc. 824.

Forbidding freight conductor to allow passengers to ride from ticket stations without tickets was reasonable. *McCook v. Northrup*, 65 Ark. 225.

Where a conductor permits a trespasser to remain on the car and treats him as a passenger by demanding fare, which the latter offers to pay, he cannot eject him for non-payment of fare. *Kansas City &c. R. Co. v. Holden*, 66 Ark. 602.

Plaintiff cannot recover for an ejection, where, upon refusal to carry her sister without fare, she receives back her own and voluntarily leaves at the next station. An offer by a third person to pay the fare was not available to passenger, where no tender was made. *Cox v. Los Angeles &c. R. Co.*, 109 Cal. 100.

Commutation ticket conditioned good only on presentation on demand by conductor will not avail passenger if left at home by mistake, he must pay fare or submit to removal from the train. *Downs v. N. Y. &c. R. Co.*, 36 Conn. 287.

Retention of a void ticket by the conductor does not permit recovery for failure to transport. *Comer v. Foley*, 98 Ga. 678.

Rule requiring extra fare from passengers failing to obtain tickets is reasonable. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Though a passenger on reaching a given place holds a ticket from thereon, he may be ejected upon refusing to pay his fare thereto. *Chicago &c. R. Co. v. Adams*, 60 Ill. App. 571.

Failure to exhibit a rebate ticket through forgetfulness did not prevent recovery, where, upon demand for a second fare, plaintiff stated that he had already paid it. *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123.

Refusal to pay fare beyond one's destination, at which the train did not stop, did not warrant expulsion, where another volunteered to pay to the first stopping place. *Baltimore &c. R. Co. v. Norris*, 17 Ind. App. 189.

Failure to procure a ticket or pay fare in the train renders one a trespasser, subject to ejection. *Atchison &c. R. Co. v. Brown*, 2 Kan. App. 604.

A statute permitting ejection from "street railway cars" for refusal to pay fare, construed to apply to electric cars. *Hudson v. Lynn &c. R. Co.*, 178 Mass. 64.

Failure to produce one's mileage book as evidence that his fare was paid after having changed his seat, prevented recovery for an ejection; especially, where he is recognized thereafter and invited to return. *White v. Grand Rapids &c. R. Co.*, 107 Mich. 681.

A passenger was held entitled to use a ticket between two points on the line, where he paid his fare on the cars to the first point, though the fare from the point where he boarded the train to the second point exceeded the fare paid plus the price of the ticket. *Kissane v. Detroit &c. R. Co.*, 121 Mich. 175.

In a crowded suburban train, where two employes start at the ends of the train toward each other to collect fares, it was reasonable to permit no one to pass either without giving evidence that he had paid his fare. *Faber v. Chicago &c. R. Co.*, 62 Minn. 433; s. c., 36 L. R. A. 789.

Where a parent refuses to pay the fare of his child, the former may be expelled with the latter, though the parent tenders his own fare; though, where the latter has paid his own fare, it must be returned as a condition of expelling either. *Braun v. Northern P. R. Co.*, 79 Minn. 404; s. c., 49 L. R. A. 319.

Payment of fare, or presentation and showing of ticket when requested is a prerequisite to passenger's right to ride. *Woods v. Metropolitan Street R. Co.*, 48 Mo. App. 125.

A commuter who loses his ticket must pay his fare, where the contract stipulated that the ticket should be shown to conductor when required, and no duplicate would be issued. *Ripley v. New Jersey &c. R. Co.*, 2 Vroom (N. J.) 388.

*Crawford v. Cincinnati &c. R. Co.*, 26 Ohio St. 580.

Parent and child may be expelled for non-payment of child's fare, on return of parents' fare, or so much thereof as is in excess of the fares for the distance traveled, or, if a stop-over ticket, a stop-over check from

the point of expulsion. *Lake Shore &c. R. Co. v. Orndoff*, 55 Oh. St. 589; s. c., 38 L. R. A. 140.

A passenger is entitled to a reasonable time to comply with a demand for a ticket or a fare, and has the right to change his mind after a refusal; but tender after the engineer has been signaled to stop for the purpose, will not authorize recovery for ejection. *Guy v. Pittsburg &c. R. Co.*, 6 Oh. N. P. 3.

A person on a train must show ticket or pay fare, and for failure to do so may be ejected. *Peabody v. O. R. &c. R. Co.*, 21 Ore. 121.

Where a child of seven in the charge and custody of her aunt of 15, were both ejected for the latter's refusal to pay sufficient fare for the former, no recovery was allowed. *Warfield v. Louisville &c. R. Co.*, 104 Tenn. 74.

A regulation that a passenger embarking outside the limits of a transfer station must pay again, though he had paid once, was reasonable. *Nashville Street Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

Failure to tender the proper fare, or a proper ticket, did not prevent recovery for a threatened ejection upon refusal to pay an improper demand. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

Proof that plaintiff had not the money to pay a fare was competent on the question of justification for ejection. *Atchison &c. R. Co. v. Cuniffe*, (Tex. Civ. App.) 57 S. W. Rep. 692.

It was error to charge that defendant must keep its ticket office open for half an hour before "arrival" of trains, the statute specifying half hour before "departure." *Missouri &c. R. Co. v. Mills*, (Tex. Civ. App.) 65 S. W. Rep. 74.

When passenger lost conductor's check given him in lieu of ticket, he must either pay fare or submit to being ejected. *Jerome v. Smith*, 48 Vt. 230.\*

See, also, *State v. Delaware &c. R. Co.*, 19 Vroom (N. J.) 55, where mandamus was allowed for failure to issue commutation ticket to relator.

Plaintiff could not complain of an ejection for refusal to pay his fare where he did not exhibit his ticket or conductor's check upon request. *Price v. Chesapeake &c. R. Co.*, 46 W. Va. 538.

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\*NOTE.—Chap. 565, L. N. Y. 1890, sec. 43. CONDUCTORS AND EMPLOYÉS MUST WEAR BADGES.—Every conductor and employé of a railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge, which shall indicate his office or employment, and the initial letters of the corporation employing him, and without such badge he shall not demand or receive from any passenger, any fare or ticket or meddle or interfere with any passenger, his baggage or property, or exercise any of the powers of his employment.

**(b). RULE REQUIRING PASSENGERS TO PURCHASE TICKET BEFORE ENTERING CARS OR PAY EXTRA FARE ON TRAIN IS REASONABLE.\***

When common carriers require the purchase of tickets, as a condition of entrance into the train-house, and forbid that entrance until a reasonable time before the departure of trains, they consult the public interests, and when they require the checking of trunks and articles committed to their care, they simply adopt reasonable measures with respect to their liability, as common carriers; which in no sense can be said to conflict with any right of the public, and in this particular case, invades no interest of the plaintiff. It is the duty of such corporations, and they have the right, to make rules and regulations, as to the management of the railroad business of conveying passengers and their baggage. *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 31, rev'g judgt for pl'ff.

Where the regulation limiting the time for the use of a ticket also provides for refunding money where it is not so used, it is reasonable as matter of law. *Southern R. Co. v. Watson*, 110 Ga. 681.

A higher rate may be charged passenger on a train than he would have paid for ticket. *Chicago &c. R. Co. v. Graham*, 3 Ind. App. 28.

Where the conductor accepted the ticket rate upon the statement of passenger that he had lost his ticket, he could not thereafter demand the additional train rate. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Expulsion after tender of the legal fare, because of refusal to pay the excess usually charged, gave right of recovery. *Chamberlain v. Lake Shore &c. R. Co.*, 110 Mich. 614.

For refusal to pay train rate for passage, passenger may be ejected. *Wardell v. Chicago &c. R. Co.*, 46 Minn. 514.

*Louisville &c. R. Co. v. Johnson*, 92 Ala. 204.

For failure to pay the extra fare in such a case, the passenger may be ejected at the first stopping beyond his destination. *Logan v. Hannibal &c. R. Co.*, 77 Mo. 663.

Rule requiring passengers on train without tickets to pay a higher rate is reasonable. *Poole v. Northern Pac. R. Co.*, 16 Or. 261.

*Pullman Palace Car Co. v. Reed*, 75 Ill. 125.

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\*NOTE.—Chap. 88, L. of N. Y. 1899, provides as follows: "Section 1. It shall be lawful for any company owning or operating a steam railroad in this state, to demand and collect an excess charge of ten cents over the regular or established rate of fare, from any passenger who pays fare in the car in which he or she may have taken passage, except where such passage is wholly within the limits of any incorporated city in this state, provided, however, that it shall be the duty of such company to give to any passenger paying such excess, a receipt or other evidence of such payment, and which shall legally state that it entitles the holder thereof to have such excess charge refunded, upon the delivery of the same at any ticket office of said company, upon the line of their railroad, and said company shall refund the same upon demand; and provided further that this act shall not apply to any passenger taking passage from a station or stopping place when tickets cannot be purchased during half an hour previous to the schedule time for the departure of said train, on which such passenger takes passage."

Rule of company charging higher rates on a train than when ticket is purchased at the office is reasonable, provided suitable opportunity was afforded passenger to purchase at the office. *Reese v. Penn. R. Co.*, 131 Pa. St. 422.

*McGowen v. Morgan's Steamship Co.*, 41 La. Ann. 732; *State v. Hungerford*, 39 Minn. 6; *Chicago &c. R. Co. v. Brisbane*, 24 Ill. App. 463; *Atchison &c. R. Co. v. Dwell*, 44 Kans. 394; *Hall v. R. Co.*, 25 S. C. 564.

Rule requiring extra fare if passenger neglects to purchase ticket is reasonable; and for refusal to show ticket or pay fare, such an one may be ejected at any place where the train may be stopped. *Moore v. Columbia &c. R. Co.*, 38 S. C. 1.

(c). PASSENGER MUST HAVE AN OPPORTUNITY TO PURCHASE TICKET BEFORE HE IS REQUIRED TO PAY EXTRA TRAIN RATE.

Plaintiff recovered, where he was told by the station agent to leave his permit to ride on the freight train with him for delivery to the conductor and was ejected for failure to present it to the conductor. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Where a passenger is unable to procure a ticket because of the absence of the ticket agent, he has a right to be carried on paying the price of a ticket. *Georgia Southern &c. R. Co. v. Asmore*, 88 Ga. 529.

Offer to purchase a ticket after the ticket office was properly closed was no excuse for refusal to pay the train rate. *Coyle v. Southern R. Co.*, 112 Ga. 121.

Carrier must afford passenger a reasonable opportunity for purchasing a ticket before it can charge a higher rate. *Phillips v. Southern R. Co.*, 114 Ga. 284.

Company required to keep its ticket office open only until advertised departure of trains. *St. Louis &c. R. Co. v. South*, 43 Ill. 176.

Failure to obtain a ticket, after the time for the train to leave and before it actually leaves, by reason of the agent's preoccupation, was no excuse for refusal to pay the train rate. *Illinois C. R. Co. v. Bauer*, 66 Ill. App. 124.

Refusal of an agent upon proper application to furnish the proper exchange ticket, upon presentment of a mileage book, rendered the company liable for the consequences of such refusal, but not for expulsion for failure to present it or pay fare. *Pittsburg &c. R. Co. v. Daniels*, 90 Ill. App. 154.

Opening a station for business in a village of less than fifty inhabitants, only from 7 A. M. to 7 P. M., was reasonable. *Louisville &c. R. Co. v. Wright*, 18 Ind. App. 125.

Plaintiff, who has been refused a ticket at the ticket office has the



right to be carried on the train upon the payment of the price of a ticket at the office. *Indianapolis &c. R. Co. v. Rinard*, 46 Ind. 293.

When statute requires ticket office to have been open thirty minutes prior to train starting, conductors cannot charge train rates of passengers without tickets, if it has not been complied with. *Atchison &c. R. Co. v. Hoque*, 50 Kas. 40.

Failure to keep the office open as required by statute authorizes recovery for expulsion for refusal to pay more than the ordinary fare on the train. *Atchison &c. R. Co. v. Dickerson*, 4 Kan. App. 345.

Passenger entered station after advertised time of train to leave, and finding ticket office shut, got on train and offered the price of a ticket to the conductor, who, in accordance with the rules of the company, demanded a sum larger than that asked at the office. On refusal to pay the sum demanded, passenger was ejected and court held the rule of the company to be reasonable and not violating statute prescribing that fare for all persons between the same points should be the same. *Swan v. Manchester &c. R. Co.*, 132 Mass. 116.

*State v. Goold*, 53 Maine 279.

A reasonable opportunity should be afforded passengers to purchase tickets; what is a reasonable opportunity is a question for the jury. *Du Laurens v. St. Paul &c. R. Co.*, 15 Minn. 49.

*Illinois Cent. R. Co. v. Johnson*, 67 Ill. 312; *St. Louis &c. R. Co. v. Myrtle*, 51 Ind. 566.

Whether an ejection for failure to produce a permit to ride on freight trains, notwithstanding offer to pay fare, was justifiable, depended upon whether plaintiff had a reasonable opportunity to procure one. *Reed v. Great Northern R. Co.*, 76 Minn. 163.

If reasonable opportunity is not given passenger to purchase a ticket before entering cars, it is unlawful for the railroad company to eject him from the train upon refusal to pay the car rate. *Forsee v. Alabama &c. R. Co.*, 63 Miss. 66.

See, also, *Evans v. M. & C. R. Co.*, 56 Ala. 246; *St. Louis &c. R. Co. v. Dalby*, 19 Ill. 353; *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1; *Jeffersonville R. Co. v. Rogers*, 38 id. 116; *State v. Goold*, 53 Me. 279; *Swan v. Manchester &c. R. Co.*, 132 Mass. 116; *Smith v. Pittsburg &c. R. Co.*, 23 Oh. St. 10; *White v. R. Co.* 26 W. Va. 800.

Rule that no baggage shall be checked until a ticket is procured is valid; but one that no baggage shall be received in the baggage room until a ticket is procured is void. *Coffee v. Louisville &c. R. Co.*, 76 Miss. 569.

Rule for keeping a waiting room closed except within 30 minutes of the time of the arrival of the train, was reasonable, as applied to one who

came from the place in which the station was situated; though *quaere*, as to through passengers. *Phillips v. Southern R. Co.*, 124 N. C. 123.

Where failure to procure a ticket is due to the absence of defendant's agent, one is not required to pay the train rate to avoid ejection. *Gulf &c. R. Co. v. Sparger*, (Tex. Civ. App.) 39 S. W. Rep. 1001.

(d). PASSENGER IS ENTITLED TO A SEAT.

Inability to enter a car by reason of a crowd is no justification for riding on the platform contrary to a city ordinance; although expulsion is justified, the passenger may recover, where his fare had been collected, and had not been returned to him. *Hanna v. Nassau Electric R. Co.*, 18 App. Div. 137.

Passenger is entitled to a seat and may sue for failure to provide him with one; but he must pay his fare in any case, and if ejected from train for failure to do so, no action lies. *St. L. &c. R. Co. v. Leigh*, 45 Ark. 368.

*Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

Passenger need not pay his fare if he is not provided with a seat. *Hardenbergh v. St. Paul &c. R. Co.*, 39 Minn. 3.

A carrier is liable in tort for the refusal of a conductor to provide, without sufficient excuse, for the seating of ticket holders, accompanying his refusal with insulting language. *Louisville &c. R. Co. v. Patterson*, 69 Miss 421.

A passenger who exhibits his ticket and demands a seat need not surrender his ticket until the seat is furnished. *Davis v. Kansas &c. R. Co.*, 53 Mo. 317.

A carrier is bound to use a high degree of care to provide seats. *Galveston &c. R. Co. v. Morris*, (Tex. Civ. App.) 60 S. W. Rep. 813; s. c. *aff'd*, 61 S. W. Rep. 709.

(e). REQUIREMENT THAT TICKET BE STAMPED IS REASONABLE.

If stipulations of a round trip ticket are performed, mistake of agent in stamping it does not invalidate it. *Head v. Georgia Pac. R. Co.*, 79 Ga. 358.

Arbitrary refusal by station agent to date and stamp a return ticket upon sufficient identification, and consequent ejection of plaintiff upon the conductor's refusal to honor it without such marks. Nonsuit set aside. *Morse v. Southern R. Co.*, 102 Ga. 302.

See, also, *Southern R. Co. v. McKenzie*, 102 id. 313; *Southern R. Co. v. Barlow*, 104 id. 213.

Refusal to pay one's fare justified an ejection, where one knows that

the conditions necessary to the validity of a return trip have not been complied with, though due to the fault of the station agent; plaintiff's remedy being to sue for a breach of contract. *Western R. Co. v. Stockdales*, 83 Md. 245.

A stipulation on a thousand mile ticket requiring to be signed and stamped is waived if, without such formalities, conductors permit the passenger to use the ticket. *Kent v. R. Co.*, 45 Oh. St. 284.

A regulation requiring round trip ticket to be stamped before it will be accepted on return trip is reasonable. *Bowers v. Pittsburg & C. R. Co.*, 158 Pa. St. 302.

Though an unstamped return ticket, which by its terms is required to be stamped, confers no rights, plaintiff was allowed to recover, where the conductor received and punched it and told him that it was all right but subsequently ejected him. *Louisville & C. R. Co. v. Blair*, 104 Tenn. 212.

Where the condition, as to having a return ticket stamped before returning, was printed on the ticket and was made in consideration of a reduced fare, it was reasonable and binding, though plaintiff could not read it, and was not informed of its contents, and it is no excuse that others had violated such a condition; especially where he did not know it at the time. *Watson v. Louisville & C. R. Co.*, 104 Tenn. 194; s. C., 49 L. R. A. 454.

To stamp a return ticket was unjustifiable. Plaintiff was not allowed to recover for expulsion. *Russell v. Missouri & C. R. Co.*, 12 Tex. Civ. App. 627.

Holder of a round trip ticket with a condition that it be stamped upon identification at destination before returning showed it to the ticket agent and was told that it was all right, but he did not request the agent to stamp it. The conductor refused the ticket and the passenger was expelled for refusal to pay his fare. Verdict for plaintiff was set aside and judgment rendered for defendant. *Houston & C. R. Co. v. Arey*, 18 Tex. Civ. App. 457.

Condition of round trip ticket that it be stamped must be complied with, and agent of the company cannot waive it. *Mosher v. St. Louis & C. R. Co.*, 127 U. S. 390.

Requirement that ticket be stamped by agent to make it good for return passage must be complied with. *Boylan v. Hot Springs R. Co.*, 132 U. S. 146.

See *Bethen v. R. Co.*, 26 S. C. 91; *Edwards v. Lake Shore & C. R. Co.*, 81 Mich. 304.

The lack of the stamp did not justify ejection, where plaintiff had presented it to the agent and received it back under circumstances leading

him to infer that it had been properly stamped. *Northern P. R. Co. v. Pauson*, 70 Fed. Rep. 585; s. c., 30 L. R. A. 730.

A carrier cannot repudiate a traffic arrangement with another road so as to invalidate a ticket in the hands of an innocent purchaser. *Winters v. Cowen*, 90 Fed. Rep. 99.

(f). REQUIREMENT OF IDENTIFICATION BY SIGNING IS REASONABLE

Special contract, requiring passenger to sign his name before company's agent at terminal point, must be complied with before his return ticket can be used. *Moses v. East Tennessee &c. R. Co.*, 73 Ga. 356.

*Rawitz v. Louisville &c. R. Co.*, 4 La. Ann. 47; *Mosher v. St. Louis &c. R. Co.*, 23 Fed. R. 326.

The requirement in a special return ticket that the purchaser sign it before an agent who is to witness and officially execute it, reasonably includes proper identification. *Southern R. Co. v. Barlow*, 104 Ga. 213.

Plaintiff could not complain of an agent's refusal to be satisfied as to his identity, where he printed his name instead of writing it as he was cautioned to do. Agent was justified in requiring other means of identification than handwriting. *Central &c. R. Co. v. Cannon*, 106 Ga. 828.

Where the return portion of a ticket is required to be signed by purchaser and stamped by company's agent before it is good, the company must furnish an agent at the time and place for the purpose a reasonable time before train time. *Southern R. Co. v. Wood*, 114 Ga. 140; s. c., 55 L. R. A. 536.

Plaintiff could not complain of ejection for failure to comply with the conditions of a return ticket in having it signed in the presence of the agent, where he failed to present himself for that purpose within the reasonable hours during which the station was open. *Louisville &c. R. Co. v. Wright*, 18 Ind. App. 125.

The condition of a round trip ticket requiring identification at the point of return is not unreasonable. *Dangerfield v. Atchison &c. R. Co.*, 62 Kan. 85.

Plaintiff was not entitled to ride on the mileage book of another to whose use it was restricted, by the fact that the latter's signature thereto had not been obtained as assumed in the wording of the conditions thereof, and the conductor being authorized therein to take it up if presented by another than the original holder "whose signature is hereon." its return was not a condition precedent to the right to eject for non-payment of fare. *Rahilly v. St. Paul &c. R. Co.*, 66 Minn. 153.

Requirement that round trip ticket be stamped by agent at destination held not binding unless signed by purchaser. Mere acceptance of the ticket with such a stipulation was insufficient even though ticket is issued

at reduced rate, which was usual in holiday season. *Lake Shore &c. R. Co. v. Mortal*, 8 Oh. C. D. 134.

Plaintiff could not complain of an agent's refusal to validate a return ticket upon his only signing his initial to his Christian name and his middle name without affixing his surname, though that was the way the ticket was originally signed. *Sinnott v. Louisville &c. R. Co.*, 104 Tenn. 233.

Regulation requiring identification of holder of an excursion ticket is reasonable. *Abram v. Gulf &c. R. Co.*, 83 Tex. 61.

Refusal to sign a ticket when called upon to do so by conductor, pursuant to its printed condition, justified ejection without refunding the money, though ticket agent sold the ticket after a refusal so to sign. *Ketcheson v. Southern P. R. Co.*, 19 Tex. Civ. App. 288.

Requirement that return ticket be stamped by agent at destination is reasonable and failure to comply justifies an ejection. *Reed v. Texas &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 432.

A commutation ticket required identification of holder by signing or otherwise; upon refusal of conductor to accept offer of identification by signing, passenger may refuse to make identification by other means, and if ejected, may recover. *Norfolk &c. R. Co. v. Anderson*, 17 Va. L. J. 377.

**(g). CARRIER IS BOUND BY THE DIRECTION OR MISTAKE OF ITS CONDUCTOR RESPECTING TICKETS AND TRAINS.**

A passenger with a ticket good for train No. 59, leaving Weehawken on January 15th, on the evening of the 14th presented his ticket to the company's doorkeeper at Weehawken and was shown the train which his ticket called for, which he took. The conductor put him off at Haverstraw and informed him that the ticket called for the first train coming behind the train which he had taken. On January 15th, train No. 59 came along, stopped at Haverstraw and the passenger entered it and was again ejected on the ground that, by the condition of his ticket, the passage must begin at Weehawken. In an action brought by the passenger to recover damages by the refusal of the company to carry him, it was held that the company was bound to receive the passenger on board the train No. 59 at Haverstraw and was liable for damages resulting from his removal. *Elliott v. N. Y. C. & H. R. R. Co.*, 53 Hun, 78; affirming judgment for plaintiff.

If, in violation of the rights of a passenger, a railroad company, by its conductor, proceeds to forcibly eject him from the car in which he is rightfully seated as a passenger, notwithstanding the fact that the conductor personally may be justified by his instructions in doing so,

by reason of the passenger, because of the mistake of another conductor, not having proper evidence of his right to ride on the car, yet the railroad company is no more justified in the attempted act of ejection than it would be if such passenger had at the time held and presented the evidence of his right to remain as a passenger in the car without further payment. *Muckle v. Rochester Ry. Co.*, 79 Hun, 32.

**From opinion.**—"There is a reason for limiting the time within which a transfer ticket may be effectually used for the purpose of a continuous passage in the fact that otherwise the opportunity might be taken to use, or permit it to be used, for other than the contemplated continuous passage to the prejudice of the company. Regulations are essential to the proper conduct and management of the business of any railroad corporation. And upon a given state of facts the question whether or not they are reasonable is one of law to be determined by the court. (*Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 435; *Vedder v. Fellows*, 20 id. 126; *Northern R. R. Co. v. Page*, 22 Barb. 130; *Illinois Central R. R. Co. v. Whittemore*, 43 Ill. 420; 92 Am. Dec. 138; *South Florida R. R. Co. v. Rhodes*, 25 Fla. 40; 23 Am. St. Rep. 506; *Pittsburg C. & St. L. Ry. Co. v. Lyon*, 123 Penn. St. 140; 10 Am. St. Rep. 517.)

In some of the states it is held to be a question of fact, or a mixed question of law and fact, to be submitted to the jury with proper instructions. It is so held in *State v. Overton*, 4 Zab. 435; 61 Am. Dec. 671; *Day v. Owen*, 5 Mich. 520; 72 Am. Dec. 62; *Bass v. Chicago & N. W. Ry. Co.*, 36 Wis. 450; 17 Am. R. 495.

There may be cases where the disposition of the controversy about the reasonableness of certain regulations is dependent upon the determination of controverted questions of fact. It may be seen that then such facts are for the jury. But then the view of the facts which will render the regulations reasonable is a question of law for the court.

It appears that the system adopted by the defendant for the practical operation of its road is such as to give the requisite frequency to the running of its cars on all parts of its lines for the supply to its patrons of continuous passage for single fares by the observance and execution of the regulations in question. And, in view of the facts as they appear by the record, the conclusion is required that such regulations of the defendant are reasonable. *The failure of the plaintiff to obtain the continuous passage to which he was entitled, on the payment of his fare, did not arise from any defect in those regulations, but solely from the mistake of the conductor in the execution of them.* The question is, therefore, presented whether the defendant is liable in tort for the act of the conductor of the West Avenue car, who was justified by such regulations in refusing to permit the plaintiff to ride in the car without payment of his fare. The question has seemingly been one where diverse views have been held by judicial writers.

In *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295, the plaintiff, having a ticket for passage from Sing Sing to Rhinebeck, took a train which went no further than Poughkeepsie. Before the train reached there the ticket was taken up by the conductor, and no evidence of his right to proceed further on the defendant's road was given to him. He took passage on the next train to complete his trip to Rhinebeck, and, on his refusal to pay fare, for the reasons before mentioned, and which he stated to the conductor, the latter forcibly ejected him from the train.

The views of Judge Grover, expressed in his opinion, were to the effect that the defendant was not liable in tort for the consequences of the wrongful act of the first conductor in taking up the plaintiff's ticket. The court did not, however, necessarily determine that question, as there was another ground for the reversal of the court below.

The plaintiff recovered on the retrial, and the recovery was sustained by the General Term. (6 T. & C. 495.) And Mr. Justice Learned cites in support of his conclusion *Hamilton v. Third Ave. R. R. Co.*, 53 N. Y. 25, in which the opinion was also delivered by Judge Grover, who in the later case refers to the *Hamilton* case for the purpose of distinguishing the questions presented in the two cases. Our attention is called to no other case in this state necessarily bearing upon the question. There are elsewhere, however, cases having some relation to it. Amongst those in which the actions founded upon principle similar to that of the plaintiff's proposition in the present action have been sustained are the following cases: *Palmer v. R. R. Co.*, 3 S. C. 580; 16 Am. Rep. 750; *Burnham v. G. T. Ry. Co.*, 63 Maine 298; 18 Am. Rep. 220; *L. E. & W. Ry. Co. v. Fix*, 88 Ind. 381; 45 Am. Rep. 464; *Murdock v. B. & A. R. R. Co.*, 137 Mass. 293; 50 Am. Rep. 307; *Head v. Georgia P. Ry. Co.*, 79 Ga. 358; 11 Am. St. Rep. 434; *Kansas City M. & B. R. R. Co. v. Riley*, 68 Miss. 765; 24 Am. St. Rep. 309.

And of those tending to the contrary are *Yorton v. Milwaukee, Lake Shore & W. Ry. Co.*, 54 Wis. 234; 41 Am. Rep. 23; *Frederick v. M., H. & O. R. R. Co.*, 37 Mich. 342; 26 Am. Rep. 531; *Bradshaw v. S. B. R. R. Co.*, 135 Mass. 407; 46 Am. Rep. 481. \* \* \* \* \*

The plaintiff was given by the statute the right to a continuous passage to his place of destination on payment of the single fare, and it cannot be said that it was by any fault or neglect on his part that the right was denied to him. It is a general rule that a carrier of passengers is answerable for all the consequences to a passenger of the willful conduct or negligence of the persons employed by it in the execution of the duty it has assumed towards him.

The defendant had, by its contract with the plaintiff, undertaken, for a consideration paid, to carry him to his place of destination, and pursuant to it he had the right of passage, and as between him and the defendant, he was at liberty to refuse to repay his fare and to insist upon having his continuous passage. In violation of that right, the defendant, by its conductor, proceeded to forcibly eject him from the car in which he was rightfully seated as a passenger. Although the conductor personally may have been justified by his instructions to do so, the defendant was put in the wrong by the act of the other conductor, and was no more justified in the attempted act of ejection than it would have been if the plaintiff had at the time had and presented the evidence of his right to remain as a passenger in the car without further payment.

It follows, if these views are correct, that the defendant is liable to the plaintiff for the consequences of such violence upon his person as was used by the conductor for the purpose of ejecting him from the car."

Conductor's statement to passenger that he may get off the train and resume his journey by next train on same ticket estops the company. *Tarbell v. N. C. R. Co.*, 24 Hun, 51; affirming judgment for plaintiff.

Citing *Story's Agency*, sec. 452; *Penn. R. Co. v. McCloskey*, 23 Pa. St. 526; and distinguishing *Denny v. N. Y. Cent. R. Co.*, 5 Daly, 50; *Dietrich v. Penn. R. Co.*, 71 Pa. St. 432; *Oil Creek &c. R. Co. v. Clark*, 72 id. 231.

Where a conductor makes a mistake in taking up the wrong coupon of a return ticket, the passenger may recover therefor; but, unless the mistake is undiscoverable by ordinary care, he may be ejected for refusal to pay fare on the return trip. *Wiggins v. King*, 91 Hun, 340.

Passenger was allowed to recover for an ejection upon presentation of tickets purporting to give stop-over privileges issued by a conductor of the same line in violation of rules of the company, which, however, were not brought home to the passenger. It was held that the conductor had apparent authority to issue such tickets. *Ray v. Cortland &c. T. Co.*, 19 App. Div. 530.

So passenger was not bound to look for and discover the mistake of conductor in punching time on a transfer. *Eddy v. Syracuse &c. R. Co.*, 50 App. Div. 109.

Where a passenger enters a car in reliance on the conductor's statement that the fare to a given point is only six cents, the company is bound thereby and the conductor cannot thereafter exact a higher fare. *Wright v. Glens Falls &c. Street R. Co.*, 24 App. Div. 617.

Failure to dispute a conductor's right to take up a ticket does not prevent recovery for wrongful ejection. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668.

A through ticket, which was surrendered to first of two conductors, should have carried passenger the entire distance, providing the conductor following the first one is satisfied of the facts, and notwithstanding the company regulations requiring second conductor to demand ticket or payment of fare. *East Tennessee &c. R. Co. v. King*, 88 Ga. 443.

Passenger who was told by conductor that the next stopping place was her destination, and got off when train stopped several miles from her station, may recover. *Penn. R. Co. v. Hoagland*, 78 Ind. 203.

See, also, *Atkinson v. Southern R. Co.*, 114 Ga. 146; s. c., 55 L. R. A. 223.

If it be proven that passenger offering conductor the going instead of the returning coupon of a round trip ticket, explained to him that the return coupon had been taken on the former trip by mistake, he may recover for being ejected on refusal to pay fare. *Penn. R. Co. v. Bray*, 125 Ind. 229.

See, also, *Georgia R. Co. v. Dougherty*, 86 Ga. 744.

Plaintiff bought a ticket over defendant's road, made of two parts, one of which was detached by the first conductor and the remainder offered the second conductor. By mistake the first conductor had detached the wrong part, and on passenger's refusal to pay fare, the second conductor ejected him. *Rouser v. North Part &c. R. Co.*, 97 Mich. 565.

That an employé, unconnected with the running of the car, informed plaintiff that it passed her door, does not justify her boarding, where the



conductor in charge tells her that it does not. *Dillon v. Lindell R. Co.*, 71 Mo. App. 631.

Defendant can not avoid the consequences of the negligence of its conductor, by repudiating his act after he has treated plaintiff as passenger by receiving her ticket. *Case v. Delaware &c. R. Co.*, 191 Pa. St. 450.

Plaintiff can not complain of an ejection, where he has resumed his journey after stopping over, contrary to the express provisions of his ticket, which he has signed. *International &c. R. Co. v. Best*, (Tex. Civ. App.) 55 S. W. Rep. 315.

An action will lie if a conductor ejects a passenger who, relying on another conductor's statement that his ticket was good, took passage on the first conductor's train. *N. Y. &c. R. Co. v. Winter*, 143 U. S. 60.

Passenger must use ordinary care to ascertain that the train he boards is the one he wishes to take. *St. Louis &c. R. Co. v. Campbell*, (Tex. Civ. App.) 69 S. W. Rep. 451.

#### (h). CONNECTING LINES.

A statute requiring transfers on leased lines to be given "any passenger desiring to make one continuous trip between such points for a single fare" does not embrace parties who ride to the point of transfer simply to demand a transfer with no intention of going further, and they cannot recover the penalty of the act for a refusal of the transfer. *Meyers v. Brooklyn &c. R. Co.*, 10 App. Div. 335.

Where two roads are separate and only agree between themselves to carry passengers on transfers, the second is not liable for ejecting a passenger whose transfer was not acceptable under its reasonable rules, owing to a mistake of the conductor of the first. *Jacobs v. Third Ave. R. Co.*, 69 N. Y. Supp. 981; rev'g s. c., 68 N. Y. Supp. 623.

Defendant was liable for expulsion of a passenger for failure to show her ticket, which had been taken up by a previous conductor, who had directed her to change cars. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668; s. c., 32 L. R. A. 193.

Conductor's unfulfilled promise to awaken a passenger does not make carrier liable. *Nunn v. Georgia R. Co.*, 71 Ga. 710.

That a passenger boarded with an apprehension that his ticket would not be accepted, was no defense to an unlawful expulsion. *Southern R. Co. v. Barlow*, 104 Ga. 213.

While defendant was liable for giving plaintiff a wrong transfer, subjecting her to ejection from a connecting line, she could not complain of injuries received by reason of her attempting to enforce her rights by resisting ejection, instead of seeking redress in the courts. *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384.

Where defendant, a member of an association of roads which issued an interchangeable mileage ticket, was unable to furnish the exchange ticket when requested, it was liable for plaintiff's ejection upon presentation of the mileage ticket without exchange ticket to the conductor and refusal to pay fare. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

The conductor of a connecting line was not warranted in ejecting a passenger, though the other conductor had taken the wrong coupon, where the part still held entitled plaintiff to ride beyond the point at which he was ejected. *Vining v. Detroit &c. R. Co.*, 122 Mich. 248.

First conductor tore off wrong coupon of a ticket, the last conductor refused to accept that remaining and ejected plaintiff. He could only recover the extra fare he had to pay on the next train. *Brown v. Rapid R. Co.*, (Mich.) 90 N. W. Rep. 290.

Plaintiff riding upon defendant's road from "B." to "D." changed to the cars of another company at an intermediate station, "W.," and was ejected on the latter line because he refused to pay the fare from "W." to "D.," supposing he had paid at "B." for the through trip to "D." It appearing that conductors on road from "B." to "W." had no authority to collect fare on road from "W." to "D.," no recovery was allowed. *Haggerty v. Flint &c. R. Co.*, 59 Mich. 366.

No duty rests on company's employes to awaken a passenger who is asleep when his station is called. *Nichols v. Chicago &c. R. Co.*, 90 Mich. 203.

Plaintiff did not recover for the ejection itself, where he entered the car of a line, for which the privileges of transfers had been withdrawn, with a transfer on its face not good on that line. *Keen v. Detroit Electric R. Co.*, 123 Mich. 247.

Failure to present for passage and surrender a monthly commutation ticket, on the last trip, as required by its terms, because it had been lost, justified ejection. *Rogers v. Atlantic City R. Co.*, 57 N. J. L. 703.

Though transfers, issued without authority but under the assurance that they are valid, have actually been accepted, they are not sufficient to found rights upon. *Anderson v. Union Traction Co.*, 7 Pa. Dist. 41.

Plaintiff was allowed to recover for an ejection, where he showed that the mistake as to the transfer was due to the negligence of the first conductor. *O'Rourke v. Citizens' Street R. Co.*, 103 Tenn. 124; s. c., 46 L. R. A. 614.

Where two companies use the same track and have a joint ticket agent, either is liable for his mistake in selling ticket of wrong road, resulting in purchaser's ejection. *Texas &c. R. Co. v. Dye*, (Tex. Civ. App.) 33 S. W. Rep. 551.

Where plaintiff, at an intermediate point, asked a ticket agent to telegraph for "through" tickets from one point to another, and the agent, without doing so, gave him tickets officially stamped as surrendered at such point by others passing on, the plaintiff was not chargeable with notice of the agent's fraud on the company so as to preclude recovery for ejection. *Mexican &c. R. Co. v. Goodman*, (Tex. Civ. App.) 55 S. W. Rep. 372.

Misinformation as to connections, held not proximate cause of injuries to woman in delicate health from rough ride in bad weather to make the connection. *Fowlks v. Southern R. Co.*, 96 Va. 742.

Company using a union depot was bound by the representation concerning the running of its trains made by a ticket agent therein in charge of the sale of its tickets. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

Plaintiff may recover for an ejection by reason of failure to produce a ticket which a former conductor had negligently taken up. *Lovings v. Norfolk &c. R. Co.*, 47 W. Va. 582.

(i). CARRIER IS LIABLE FOR MISTAKES OF TICKET AGENT.

That the conductor was not at fault in one's expulsion was no defense where the ticket agent improperly made out the ticket. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177.

Error in making a non-transferable ticket to the husband, although intended for the wife, does not permit wife to ride. *Chicago &c. R. Co. v. Bannerman*, 15 Bradw. 100.

A ticket is the only evidence of passenger's contract. but his failure to receive the one he paid for is not his fault, and he cannot be ejected on that ground. *Georgia R. Co. v. Olds*, 77 Ga. 673.

One has no right to rely on the statement of a ticket agent that a train was an hour late. *Ohio &c. R. Co. v. Allender*, 59 Ill. App. 620.

Where a passenger, unable to understand the ciphers as to date on the back of a ticket, is told that it is still good and allowed to pass through the gate to the train, he cannot thereafter be ejected. *Pennington v. Illinois C. R. Co.*, 69 Ill. App. 628.

One who knowingly retains a wrong ticket will be held to its terms. *Godfrey v. Ohio &c. R. Co.*, 116 Ind. 30.

The mistake of a union ticket agent in giving the wrong ticket is not that of the company whose ticket was given but that of the one whose ticket was desired. *Scott v. Cleveland &c. R. Co.*, 144 Ind. 125; s. c., 32 L. R. A. 154.

Information by a ticket agent upon presentation of an interchangeable mileage ticket, that his supply of exchange tickets was exhausted but that the holder would be allowed to ride without one, was within the scope

of his authority so as to render the company liable for an ejection. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

Company was liable for an ejection, where a mistake as to the ticket, made by the agent, was explained to the conductor by plaintiff. *Evansville &c. R. Co. v. Cates*, 14 Ind. App. 172.

Passenger purchasing a ticket was justified in relying on the statement of the agent, telling him that it was all right, where he was unable, owing to the poor light, to see that its date limitation had passed. Recovery for expulsion was allowed. *Callaway v. Mellett*, 15 Ind. App. 366.

It is a matter of fact whether company's agent was justified in supposing plaintiff understood the instructions given her; as where she was directed to enter a caboose, but mistaking directions was injured in consequence. *Allender v. C., R. I. &c. R. Co.*, 43 Iowa 276.

Representations as to the validity of a ticket beyond the time limit mentioned thereon made subsequent to the sale thereof, were not binding, where none at all were made at the time of the sale. *Hanlon v. Illinois C. R. Co.*, 109 Iowa, 136.

Where, by mistake of ticket agent passenger was supplied with a limited ticket good only for the day of its purchase, he was allowed to recover for expulsion for insisting on using it the next day, which was after the time limit. *Louisville &c. R. Co. v. Gaines*, 99 Ky. 411.

Passenger cannot recover for ejection for non-payment of additional fare, where the ticket agent gave him a ticket to a point short of his destination, as his remedy is to sue for the breach of contract. *Spink v. Louisville &c. R. Co.*, (Ky.) 52 S. W. Rep. 1067.

The purchase of a punched ticket on assurance by agent that it was valid, does not justify expulsion. *Murdock v. Boston &c. R. Co.*, 137 Mass. 293.

By mistake the company's ticket agent issued and plaintiff accepted a ticket covering a shorter distance than that bargained for; if, on refusing to pay for the space beyond, the plaintiff is ejected from the train no recovery lies, on the theory that the printed ticket and not his statement was obligatory upon the conductor. *Frederick v. M. H. &c. R. Co.*, 37 Mich. 342.

*Downs v. N. Y. &c. R. Co.*, 36 Conn. 287; *Chicago &c. R. Co. v. Griffin*, 68 Ill. 499; *Shelton v. Lake Shore &c. R. Co.*, 29 Oh. St. 214.

A female passenger relying on the directions of a ticket agent took an express train which did not stop at the place of her destination. In an action against the company for being carried beyond her station she should count on the negligence of the agent, not on the conduct of the conductor in failing to stop the train. *Marshall v. St. Louis &c. R. Co.*, 78 Mo. 610.

See *Pittsburg &c. R. Co. v. Nuzum*, 50 Ind. 141; *South. &c. R. Co. v. Huffman*, *quære* as to whether failure to give information before taking up the ticket would have given right of action. *I. & G. N. R. Co. v. Hassel*, 62 Tex. 256.

Misinformation by station agent as to trains stopping at a given place did not permit recovery for arrest for non-payment of fare to the next stopping place, where passenger's information was corrected by the conductor and he received an opportunity of changing cars at the first stopping place short of his destination. *Stricker v. Pennsylvania R. Co.*, 60 N. J. L. 230.

Where the ticket entitled one to passage only on trains stopping at his destination, but the holder boarded the wrong train through misinformation of the agent, he recovered for an ejection. *Pittsburg &c. R. Co. v. Reynolds*, 55 Oh. St. 370.

Recovery may be had for selling passenger second, instead of first rate tickets. *St. Louis B. &c. R. Co. v. Mackee*, 71 Tex. 491.

One may assume that a ticket embodies the terms of the contract. *Gulf &c. R. Co. v. Copeland*, 17 Tex. Civ. App. 55.

Where a purchaser states that the ticket is to be used by his wife and is told that it is all right for him to sign it, the defendant can not object that the condition requires her to sign it. *Mexican C. R. Co. v. Goodman*, (Tex. Civ. App.) 43 S. W. Rep. 580.

It was not the duty of defendant to volunteer information as to the departure and places of stopping of its trains, where it may be had upon application. *Missouri &c. R. Co. v. Walden*, (Tex. Civ. App.) 46 S. W. Rep. 87.

One may rely on the authority of one, other than the ticket agent, to sell tickets with the understanding that a train will stop at a certain place, where he had been permitted to do so with defendant's knowledge. *Gulf &c. R. Co. v. Moorman*, (Tex. Civ. App.) 46 S. W. Rep. 662.

Evidence as to subsequent violation of a rule forbidding passengers in freight trains was inadmissible on the question of plaintiff's excuse for acting upon the conductor's apparent authority to permit him to ride. And prior violations are not sufficient excuse where the company was making all reasonable effort to enforce the rule. *San Antonio &c. P. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

It was for the jury to say whether the depot master of a connecting carrier was negligent in putting plaintiff's wife and children into a wrong car after they had waited some time to make connections; the test to be applied in such a case was ordinary care, as the relation of carrier and passenger had ceased, while they were at the depot. *Davis v. Houston &c. R. Co.*, (Tex. Civ. App.) 59 S. W. Rep. 844.

The passenger's ticket and not his statement, is the conductor's guide;

passenger's remedy in case wrong ticket is sold him, is for negligent mistake of ticket agent. *Poulin v. Canadian Pac. R. Co.*, 6 U. S. App. 298.

Under regulation requiring conductor to demand fare of persons without tickets, no liability attaches if passenger, riding on special agreement, which conductor cannot recognize, is removed from the train on refusal to pay fare. *Hall v. Memphis &c. R. Co.*, 9 Fed. Rep. 585.

That a ticket agent at a union station acts for other companies also, does not prevent his representations as to running of trains from binding defendant. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

One may rely on the information of a carrier concerning the feasibility of a trip which it is its duty to be posted upon. *Smith v. North American Transp. &c. Co.*, 20 Wash. 580; s. c., 44 L. R. A. 557.

(j). MISTAKE OF BRAKEMAN.

An agent pointed to a train that would take the plaintiff to Lyons; the passenger took it but did not make the necessary change. The defendant was not liable for the miscarriage, if it used means to inform the passenger suited to a person of ordinary intelligence. After passing the junction the conductor offered to send the passenger back to it, in time to make his way to Lyons. Upon the passenger's refusal, the defendant had the right to eject him. *Barker v. N. Y. C. R. Co.*, 24 N. Y. 599, aff'g judg't for def't.

See *Tarbell v. North Cent. R. Co.*, 24 Hun, 50.

Direction to cross the track to get a train in connection with information as to time of its arrival gave no warranty of safety in doing so. *Roberts v. New York &c. R. Co.*, 175 Mass. 296.

A brakeman is authorized, though not directed by the conductor, to give notice of a deviation as to route. *Rosted v. Great Northern R. Co.*, 76 Minn. 123.

Plaintiff on defendant's train by mistake, and put off at a flag station on the road she wished to go on, could recover if it were proven that upon entering defendant's train she showed her ticket to the brakeman. *Patry v. Chicago &c. R. Co.*, 77 Wis. 218.

One who showed her ticket to brakeman or conductor, and was helped on the train by him is not a trespasser, and may have an action for removal from the train at an inconvenient place, although the ticket was over a different road. *Patry v. Chicago &c. R. Co.*, 82 Wis. 408.

(k). TICKETS FOR STATION WHERE TRAIN DOES NOT STOP.

The conductor of an express train may lawfully stop the train and expel a passenger, who holds a ticket to a station between the place

where fare is demanded and the first stations at which the train, by the published time tables, is to stop, if such passenger refuses to pay the fare which, in addition to the sum paid for his ticket, would entitle him to ride to such latter station. And this is so, notwithstanding the train may occasionally stop at the station for which the passenger has a ticket, if at the time the fare is demanded, facts do not exist which call for its stoppage there.

When the company acts in good faith it is only liable for actual damages. *Fink v. Albany & S. R. Co.*, 4 Lansing, 147, granting new trial after verdict for plaintiff.

Where the roads are separate though operated under one management, a passenger is entitled in the absence of express contract, to stop over at the end of each road, so long as he comes within the general time limit. *Spencer v. Lovejoy*, 96 Ga. 657.

Tender by a friend of fare to next stopping place beyond plaintiff's destination, makes ejection for non-payment actionable and defendant cannot justify it on the ground that plaintiff started an altercation with the conductor. *Baltimore & C. R. Co. v. Norris*, 17 Ind. App. 189.

A complaint alleging wrongful ejection after tender of fare to a certain point, without showing that said point is a scheduled stopping place for the train, held defective. *Lake Erie & C. R. Co. v. Lucas*, 18 Ind. App. 239.

A train is not bound to stop contrary to its schedule. An intending passenger must inform himself before getting aboard. *Louisville & C. R. Co. v. Miles*, 100 Ky. 84.

Regulations limiting the stoppage of certain trains to certain stations is reasonable, where adequate provision is made for the others, and a passenger himself is bound to seek the information where it may be had upon application. *Evansville & C. R. Co. v. Wilson*, 20 Ind. App. 5.

A passenger, who, on mistaken information of a ticket agent, boards a train not scheduled to stop at his destination, must alight and change cars when correctly informed by the conductor. If he refuses and is ejected he can recover for the misdirection of the ticket agent only and not for his expulsion. *Turner v. McCook*, 77 Mo. App. 196.

If plaintiff's destination is not one at which his train is scheduled to stop, he has no right of action for the failure to stop there. *Wells v. Alabama & C. R. Co.*, 67 Miss. 24.

See, however, *Florida & C. R. Co. v. Katz*, 23 Fla. 139; where passenger traveled on mileage book and train failed to make his station.

Where plaintiffs on a train, scheduled to stop at their destination, were directed to go into a rear car, which was shifted to a through train, they

were allowed to recover for an expulsion. *Chicago &c. R. Co. v. Spirk*, 51 Neb. 167.

It was negligence to board a train, which one knows does not stop at his station, in reliance upon the statement of conductor of another train, that, if he did so, the train would be obliged to stop for him. *Allen v. Wilmington &c. R. Co.*, 119 N. C. 710.

Refusal to pay fare to the station beyond, justifies ejection at the first station short of plaintiff's destination, where the regulation prohibiting the stopping of such train at his destination is proper. To establish a special contract with a ticket agent contrary to the company's general regulations requires clear evidence of intention on both sides. *Noble v. Atchison &c. R. Co.*, 4 Okla. 534.

A passenger with a ticket to Whitesburg, Tenn., on a mail train that did not stop at Whitesburg, but at a junction some miles beyond, must pay fare from Whitesburg to the junction and cannot recover for being put off the train at the junction. *Trottinger v. R. Co.*, 11 Lea, (Tenn.) 533.

One who takes passage on a train, under a regulation that it will not stop at a certain place, must get off at a regular stopping place, and cannot recover if the conductor puts him off at such a place. *I. & G. &c. R. Co. v. Hassel*, 62 Tex. 256.

Where a conductor has frequently made agreements as to stopping at certain stations pursuant to an apparent authority to do so, though against the company's rule, plaintiff was warranted in relying thereon. *Texas &c. R. Co. v. Elliott*, 22 Tex. Civ. App. 31.

Where a ticket is purchased for a certain train, purchaser may recover for being ejected from it and compelled to ride on another. *Alley v. Gulf &c. R. Co.*, (Tex. Civ. App.) 35 S. W. Rep. 735.

A person who has a ticket on a train which does not stop at his destination cannot recover for removal at the station next before his stopping place. *Texas &c. R. Co. v. Ludlaw*, 57 Fed. R. 481.

Conductor held to have no apparent authority to change schedule and bind the company by promise to stop, though he had accepted fare. *Schiffler v. Chicago &c. R. Co.*, 96 Wis. 141.

(1). TICKET TAKEN UP OR CANCELLED ON TRAIN FOR POINT SHORT OF PASSENGER'S DESTINATION GIVES NO RIGHT TO RIDE ON SUBSEQUENT TRAIN.

A regulation of a carrier required the passenger, either to present evidence to the conductor of a right to a seat or to pay fare. This was reasonable and for non-compliance a passenger might be lawfully put off the train, although the conductor of a previous train had unlawfully taken up the ticket.



Passenger's ticket was taken upon one train, that did not go as far as his destination, passenger took next train, explained to conductor how his ticket had been taken up, but was expelled for non-payment of fare. *Townsend v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 295, rev'g judg't for pl'ff.

See *Shelton v. Lake Shore &c. R. Co.*, 29 Oh. St. 214. But see in opposition to this doctrine, *Pittsburg &c. R. Co. v. Hennigh*, 39 Ind. 509; *Jerome v. Smith*, 48 Vt. 230; *Palmer v. Charlotte &c. R. Co.*, 3 S. C. 580.

A ticket from "St. Paul to Anoka," is not good, if having been punched on one of defendant's trains running to Minneapolis only, it is offered on another which plaintiff boarded at Minneapolis. *Wyman v. Northern Pac. R. Co.*, 34 Minn. 210.

See *O. C. &c. R. Co. v. Clark*, 22 Pa. St. 231; *Dietrich v. Penn. R. Co.*, 71 id. 482; *McClure v. P. W. &c. R. Co.*, 34 Md. 532; *Drew v. Central Pac. R. Co.*, 51 Cal. 425; *Hatten v. R. Co.*, 39 Oh. St. 375; *State v. Overton*, 4 Zab. (N. J.) 435; *Cleveland &c. R. Co. v. Bartram*, 11 Oh. St. 457.

Holder of a through ticket entered a train covering only a part of the distance; the ticket having expired he could not thereafter enter a through train, although it might have been the one he should have taken in the first instance. *Gulf &c. R. Co. v. Henry*, 84 Tex. 678.

#### (m). TICKET FOR A CONTINUOUS PASSAGE.

Ticket "good for this day and train only," and dated on the day issued, can be used to ride on any train on such day, but one cannot ride part of the way on one train, and the other part on another train without being liable to expulsion. *Gale v. D., L. & W. R. Co.*, 7 Hun, 670, aff'g nonsuit.

*Pier v. Finch*, 24 Barb. 516; *Beebe v. Ayres*, 28 id. 275; *Elmore v. Sands*, 54 N. Y. 515.

Ticket stating, "good until three days after date, excursion ticket," does not allow stop-over, and passenger cannot take train that stops short of the place to which he desires to go. *Terry v. Flushing, N. S. &c. R. Co.*, 13 Hun, 359, aff'g judg't for pl'ff entered on nonsuit.

Citing *Elmore v. Sands*, 54 N. Y. 515; *Beebe v. Ayres*, 28 Barb. 275; *Gale v. D., L. & W. R. R. Co.*, 7 Hun, 670; *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn. 432.

Passenger purchasing tickets was shown one marked "special first-class continuous passage," and also one not marked in that regard; the latter he accepted. That did not give him the right to stop at intermediate station. The ticket is evidence of the contract. *Kelsey v. Michigan Central R. Co.*, 28 Hun, 460, rev'g judg't for pl'ff.

**From opinion.**—"The plaintiff was bound to a continuous passage over the defendant's road, that is, the plaintiff could not enter one train of the defendant's

cars and then leave it and subsequently take another. *Auerbach v. N. Y. C. & H. R. R. Co.*, 89 N. Y. 281. See, also, *Kessler v. Same*, 61 id. 538. The decisions accord with numerous adjudications on the same subject. All show that the omission of a stipulation for a continuous passage affords no implication of a right to break the journey on either of the roads before reaching the terminus thereof, without the assent of the carrier on the particular road. *Barker v. Coffin*, 61 Barb. 556; *Hamilton v. N. Y. C. R. R. Co.*, 51 N. Y. 100; *Gale v. D., L. & W. R. Co.*, 7 Hun, 670; *Terry v. The Flushing, N. S. & C. R. Co.*, 13 id. 359; *Dietrich v. Pennsylvania R. R. Co.*, 71 Pa. St. 432; *Vankirk v. Pennsylvania R. R. Co.*, 76 id. 66."

Permission of a conductor to stop over at Little Falls without endorsement on the ticket to that effect, does not give right to stop over at Amsterdam as well. *Denvy v. N. Y. & C. R. Co.*, 5 Daly, (N. Y.) 50.

Where there is no limitation on the face of a ticket as to its use and no notice of the rules of the company prohibiting the giving of stop-over privileges except at points of transfer, other than the wording on the ticket "subject to the rules of the company," the apparent authority of the conductor to do so, binds the company. *Ray v. Cortland & C. T. Co.*, 19 App. Div. 530.

That a ticket for a number of single trips provided that they be continuous, did not prevent entering or leaving at an intermediate station upon surrendering a coupon for one of the trips. *Georgia R. & C. Co. v. Clarke*, 97 Ga. 706.

Passenger on a delayed train got off because he was sick and spent the night at a hotel near by; on the following day he entered another of defendant's trains and proffered conductor's check of day before or price of ticket, but conductor demanded train rate. Company is liable in ejecting such a passenger if conductor knew of these facts. *Lou v. Nash. R. Co.*, 11 Ky. L. R. 419.

A ticket "not good to stop off" on, will not avail a passenger who knowingly takes a train not going as far as his destination. *Johnson v. Philadelphia & C. R. Co.*, 63 Md. 106.

A ticket not limited to any train authorized a passenger to make his journey upon a train not contemplated for that class of tickets, unless the rule were brought to the knowledge of the passenger. *Maroney v. Old Colony & C. R. Co.*, 106 Mass. 153.

After unauthorized stop-over and failure on resuming journey, to pay fare, carrier has a lien on passenger's baggage. *Roberts v. Koehler*, 30 Fed. Rep. 94.

#### (n). TICKETS LIMITED IN TIME.

A carrier may insist that passenger ticket shall be used upon the day issued, and that every passenger, when entering a train, shall pay his fare or

produce a ticket showing his right to ride upon that train. The ticket bore the stamp "good this day only," and the date was stamped thereon. An attempt to ride on any other day justified expulsion. *Elmore v. Sands*, 54 N. Y. 512, aff'g judg't for pl'ff.

Citing *Boston &c. R. Co. v. Proctor*, 1 Allen, 267; *Barker v. Coffin*, 31 Barb. 556; *Boyce v. H. R. R. Co.*, 61 id. 611; *Shed v. Troy &c. R. Co.*, 40 Vt. 88; *Dietrich v. Pa. R. Co.*, 71 Penn. St. 432.

Plaintiff attempted to ride on a limited ticket, the time having expired. Rightly ejected, although baggage-master had checked baggage and punched ticket. *Wentz v. Erie R. Co.*, 3 Hun, 241, rev'g judg't for pl'ff.

Where plaintiff, having notice of a time limit, is ejected for offering the ticket, he cannot complain, especially, where, immediately thereafter, he re-enters and pays his fare. *McGhee v. Drisdale*, 111 Ala. 597.

Passage must be begun but need not be completed before the expiration of the stipulated time. *Lundy v. Central Pac. R. Co.*, 66 Cal. 191.

Ticket issued during the day of December 6th and limited to be used within two days from the date sold did not expire until twelve o'clock on the night of December 8th. *Georgia &c. R. Co. v. Bigelow*, 68 Ga. 219.

*Evans v. St. Louis &c. R. Co.*, 11 Mo. App. 462.

Where a ticket issued by a company from which defendant was organized was still within the time limit, ejection was improper. *Tompkins v. Augusta &c. R. Co.*, 102 Ga. 436.

A time limit, prescribed in consideration of a reduced fare, is binding. *Central &c. R. Co. v. Ricks*, 109 Ga. 339; *Southern R. Co. v. Howard*, 111 id. 842.

Where a regulation limiting time for passage gives ample opportunity for safe convenient transit, it is proper and becomes a part of the contract of carriage. *Southern R. Co. v. Watson*, 110 Ga. 681.

Plaintiff, who purchased a lay-over ticket, good for thirty days, was rightfully ejected from defendant's train, if after the expiration of that time he took passage on the same and refused to pay the regular fare. *Churchill v. Chicago &c. R. Co.*, 67 Ill. 390.

Company is not estopped because ticket had been used several times after it had expired. *Sherman v. R. N. &c. R. Co.*, 40 Iowa, 45.

That plaintiff regarded a limitation of time on a ticket as unreasonable did not justify him in boarding a train with such a ticket knowing that the time limit had expired. *Trezona v. Chicago &c. R. Co.*, 107 Iowa, 22.

In the absence of a general custom, the acceptance of one ticket after

its period of limitation had expired was not a waiver of the condition in another. *Hanlon v. Illinois C. R. Co.*, 109 Io.

A ticket dated and marked "good only two days after" will be valid at expiration of two days. *Boston &c. R. Co. v. Mass.* 267.

*Penn. R. Co. v. Hine*, 41 Oh. St. 276; *Pennington v. Wilmington* Md. 95.

Regulation of a street car company that a transfer from one route to another shall not be valid unless used within five days of the time it was issued, is reasonable. *Heffron v. Detroit* Mich. 406.

Where the period of limitation appears by the face of the ticket to have expired and the conductor has no means of knowing that the ticket agent has made a mistake, the passenger cannot recover damages by inducing an ejection by force. *Krueger v. Chicago &c. R. Co.* 68 Minn. 445.

There was no recovery, where one attempted to ride on a street car after the limit of which had expired. *Illinois C. R. Co. v. M.* 956.

Where the time limit of a ticket by its face has expired, and the conductor that the agent refused to identify him in the ticket, his refusal to use the ticket did not make ejection improper. The expiration of the ticket that it shall not be good "later than the expiration of the journey must be completed before the expiration of the ticket, provided no delay due to inevitable accident or negligence intervenes. *Mitchell v. Southern R. Co.*, 77 Miss. 917.

Mileage ticket, good for six months, is void after expiration of six months, although the mileage is not exhausted. *Lillis v. Co.*, 60 Mo. 646.

A full fare ticket gives no stop-over privileges. *Louisiana R. Co. v. Klyman*, (Tenn.) 67 S. W. Rep. 472.

A provision that a ticket be used "on and from" a certain day for a journey to be commenced on that day, though it may cover a longer period, is not binding on others. *Demilley v. Texas &c. R. Co.*, 91 Texas 215; 13 S. W. Rep. 147; *Texas &c. R. Co. v. Powell*, 13 Tex. Civ. App. 147.

Though the ticket is so mutilated as to make it uncertain whether it has expired, the conductor is justified in refusing it, only if he exercises of reasonable diligence, he is satisfied it is not good. *R. Co. v. Crone*, (Tex. Civ. App.) 37 S. W. Rep. 1074.

Where a ticket is expressly limited as to time in connection with the reduced fare and contains a statement that no agent can use it if it cannot be presented to a connecting carrier, in the

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ourney, a day after the limit has expired, though the agent who issued it said that it would be good. *Landers v. Missouri &c. R. Co.*, (Tex. Civ. App.) 50 S. W. Rep. 528.

Plaintiff contracted for a stop-over privilege, which, however, did not appear on face of the ticket. Conductor denied the privilege and took up the ticket. Plaintiff resumed journey on later train, insisting on her contract without a ticket, and was ejected. Was held entitled to recover for the ejection, and was not negligent *per se* in attempting to ride without a ticket. *Scofield v. Pennsylvania R. Co.*, 112 Fed. 855.

#### (o). NON-TRANSFERABLE TICKET.

Where one receives the power to sell or transfer a ticket, the use of which is expressly limited in the ticket to the first purchaser, it can be sold but once, and used only by the vendee. *Davis v. South Carolina &c. R. Co.*, 107 Ga. 420.

A special ticket signed by the purchaser restricting use to him is non-transferable, and a purchaser from him is not warranted in relying on the statement of the agent that it will be good in his hands; especially where the ticket itself denies the authority of the agent to alter its conditions. *Coyle v. Southern R. Co.*, 112 Ga. 121.

That one conductor failed to discover an imposition by a holder of a ticket, restricted to the original purchaser, and accepted it, was not such a waiver as prevented a second conductor, on discovering it, to take it up and demand the fare. *Dangerfield v. Atchison &c. R. Co.*, 62 Kan. 85.

No restriction appearing, a round trip ticket may be sold after it has been used one way, and the purchaser is a passenger on the train. *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454.

A ticket restricted to personal use is not forfeited, where the party with whom the purchaser leaves it permits others to use it without authority. *Mueller v. Chicago &c. R. Co.*, 75 Minn. 109.

Condition for forfeiture on presentation by another than the purchaser, held valid. *Eastman v. Maine C. R. Co.*, 70 N. H. 240.

One is not entitled to a receipt upon surrendering a non-transferable ticket as a condition to payment of his fare. *Houston &c. C. R. Co. v. Ritter*, 16 Tex. Civ. App. 482.

A carrier may take up a ticket, by its terms non-transferable in consideration of reduced rates, when presented by one not the purchaser. *Levinson v. Texas &c. R. Co.*, 17 Tex. Civ. App. 617.

In the absence of the stipulation required by statute as to limitation of transfer on a ticket it is transferable. *International &c. R. Co. v. Ing*, (Tex. Civ. App.) 68 S. W. Rep. 722.



In consideration of a reduced rate carrier may require that the ticket be non-negotiable. *Delaware &c. R. Co. v. Frank*, 110 Pa. 689.

A cut rate ticket with provision that it shall be void if the original holder will not avail a purchaser in good faith on the statement of unauthorized agent that it would be good. *Drummond v. Southern Pac. R. Co.*, 7 Utah, 118.

(p). LOST TICKET.

Passenger should be allowed a reasonable time to find the ticket. Time between two stations is a reasonable time. *Chicago & N. W. Ry. v. Willard*, 31 Ill. App. 435.

One on a train is not a trespasser because he cannot find the ticket. He becomes a trespasser, however, upon failure to produce the ticket and pay his fare. *Ham v. Del. & H. Canal Co.*, 142 Pa. St. 617.

Plaintiff under mistake as to amount of fare demanded. He paid the fare he was used to paying and declined to tender more. A reasonable time should be given him to tender the amount demanded. *Chicago &c. R. Co. v. Bond*, 62 Tex. 442.

Passenger should be allowed a reasonable time to find the ticket. What is reasonable time is for the jury. *International & N. W. Ry. v. Wilkes*, 68 Tex. 617.

(q). DETACHING COUPON FROM TICKET.

A ticket not good if detached, may be detached by passenger in presence of conductor. *Chicago &c. Co. v. Holdridge*, 118 Pa. 250.

See *Norfolk &c. v. Wyson*, 82 Va. 250.

Plaintiff's coupon book stated that coupons were invalid if detached. He detached one and presented it but refused to show the ticket. He did not offer, nor the conductor demand, cash fare. He was permitted to recover for ejection. *United R. &c. Co. v. Hardes*, 100 Atl. Rep. 406.

Condition that detached coupons shall not be accepted by carrier is binding upon the passenger. *Boston &c. R. Co. v. Chipman*, 107 Mass. 107.

*Louisville &c. R. Co. v. Harris*, 9 Lea, (Tenn.) 180.

Detachable ticket with words "not good for passage" and "if detached" on the other side, is valid although detached parts be presented together. *Wightman v. Chicago &c. R. Co.*, 169 Ill. 169.

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## (r). FAILURE TO STOP TRAIN AT SCHEDULED STATION.\*

Refusal of carrier to carry the plaintiff, a dancing master, on a train scheduled to leave at a certain time, by which he failed of an appointment, renders it liable. *Savannah &c. R. Co. v. Bonaud*, 58 Ga. 180.

Failure of a conductor to discover before reaching a flag station whether there is a passenger to alight thereat, does not excuse the latter, upon seeing that he has been overlooked, in failing to call attention to it. *Central &c. R. Co. v. Dorsey*, 106 Ga. 826.

Failure to stop a train at a station as scheduled, by reason of which plaintiff was left, gives right of action. *I. B. &c. R. Co. v. Birney*, 71 Ill. 391.

Regulation of not stopping train at scheduled station cannot be established without notice to the public. *Louisville &c. R. Co. v. Cayce*, (Ky.) 34 S. W. Rep. 896.

A carrier is chargeable with damages for delay in running its train according to schedule time, and any person sustaining damage from a failure to run its trains upon such time is entitled to recover for the same. 2 Woods Railway Law p. 1174, sec. 312.

When company has advertised starting of trains in newspaper, it cannot change same by posting hand bills at stations; and when one has bought a ticket and presents himself to go, he may recover damages for delay.

Person hired livery to carry him, and damages, if liable at all, were stipulated at \$10. *Sears v. Eastern R. R. Co.*, 14 Allen 433.

See *Buckmaster v. Gt. East. Ry. Co.*, 23 Law T. Rep. (N. S.) 471.

Where, however, without fault of defendant its train was over-loaded, and it was obliged to leave without the plaintiff but returned later and transported him, no action lies. *Gordon v. R. Co.*, 52 N. H. 596.

Citing *Denton v. Great Northern R. Co.*, 5 El. & Bl. 860; *Sears v. Eastern R. R. Co.*, 14 Allen, 433; *Lafayette &c. R. Co. v. Sims*, 27 Ind. 59; *Dunlap v. Edin. &c. R. Co.*, 16 Jurist. pt. 2, 407-8; *New Orleans &c. R. Co. v. Hurts*, 36 Miss. 660; *Heiar v. McCaughan*, 32 Miss. 17; *Angell on Carriers*, 4th ed. sec. 527 (a). See *Glaholm v. Hays*, 2 Man. & G. 257; *Crockwit v. Fletcher*, 1 Hurl. & Norm. 893; *Howard v. Cobb*, 19 Monthly L. Rep. 377; *Hawcroft v. Great Northern R. Co.*, 16 Jurist. 196; 8 Eng. L. & Eq. 362; L. J. vol. 30, N. S.; vol. 21 Q. B. 178.

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\* NOTE.—"Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previously thereto, and at the junction of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from, and to, such places, on the due payment of the fare or freight legally authorized therefor. No preference for the transaction of business upon its cars, or in its depots or buildings, or upon its grounds, shall be granted by any railroad corporation to any one of two or more persons, associations or corporations competing in the same business, or in the business of transporting property for themselves or others." Sec. 34, chap. 565, Laws of New York, 1897.

(s). CARRYING PASSENGER BEYOND DESTINATION.\*

Passenger may recover, where a passenger was carried a n  
his destination. *East Tenn. &c. R. Co. v. Lockhart*, 79 Ala. 3  
Mobile &c. R. Co. v. McArthur, 43 Miss. 180.

No recovery was allowed a passenger carried beyond her  
if she knew that the train was scheduled not to stop there  
standing the conductor had agreed to let her off. *Alabama &c.  
Carmichael*, 90 Ala. 19.

A female passenger carried several hundred yards beyond  
and obliged to walk back in the rain with a baby in her han  
cumbered with a valise, may recover exemplary damages. *A  
R. Co. v. Sellers*, 93 Ala. 9.

Where a conductor promised to inform plaintiff when she  
destination she was not chargeable with failure to listen  
nouncement. *Louisville &c. R. Co. v. Quick*, 125 Ala. 553.

Where plaintiff fails to avail herself of the reasonable o  
for alighting at her destination, she can not complain of  
off a quarter of a mile beyond it, defendant not being oblig  
her back to it. *St. Louis &c. R. Co. v. Lewis*, 69 Ark. 81.

Announcement of the station is sufficient; personal inform  
necessary. *Southern R. Co. v. O'Bryan*, (Ga.) 42 S. E. Rep.

See, also, *Southern R. Co. v. O'Bryan*, 112 Ga. 127.

Passenger may recover where train failed to stop and pl  
carried beyond his destination. *Chicago &c. R. Co. v. Fish*  
152.

One may recover compensatory damages for being neglig  
beyond her destination. *Louisville &c. R. Co. v. Jackson*,  
S. W. Rep. 173.

Passenger who alights from a train after being negligently o  
her station without requiring the conductor to back cannot co  
cause the place was an improper one for her to alight at. *Lo  
R. Co. v. Keith*, (Ky.) 58 S. W. Rep. 468.

Conductor promised to see that a girl of eight got off at h  
tion. She was helped off at an intermediate station by one ne  
be the conductor. Carrier was not liable. *Louisville &c.  
Jordan*, (Ky.) 66 S. W. Rep. 27.

Holder of a ticket to a flag station failed to notify the con  
was carried by. She was not allowed to recover for the m  
venience, having suffered no other damage. *Pence v. Louisi  
Co.*, (Ky.) 64 S. W. Rep. 905.

\* NOTE.—For damages for failure to duly carry, see "Damages."



Fear that still more passengers will board a crowded train was not a "legal or just excuse" within a statute imposing a penalty for failure to discharge a passenger at his station without such an excuse. *Hoyt v. Cleveland &c. R. Co.*, 112 Mich. 638.

The plaintiff who was sick on defendant's train sued for failure to back the train after learning that he had been unable to get off at the regular stopping place; held, that it was the duty of the plaintiff to have notified conductor if he wished to have the train delayed at the station; and for failure to do so he could not recover. *New Orleans &c. R. Co., v. Statham*, 42 Miss. 607.

The plaintiff's train had passed several hundred yards beyond the station and upon failure to back it as he requested, plaintiff got off and was injured on the ice; the company was liable. *Memphis &c. R. Co. v. Whitfield*, 44 Miss. 466.

See, also, *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346.

No recovery was allowed a plaintiff who was asleep when the train reached his station and being told, on awakening, that he was still near it, got out and was obliged to walk a mile back over the track. *Wilson v. New Orleans &c. R. Co.*, 68 Miss. 9.

Promise to look after a small boy did not bind the company so as to make it liable for carrying him beyond his destination, especially, where he was safely returned the same day. *Gage v. Illinois C. R. Co.*, 75 Miss. 17.

Defendant failed to stop at a flag station which plaintiff's ticket called for and refused to back up to it. It was for the jury to say whether plaintiff was contributorily negligent in walking back on the track at night, unfamiliar with the surroundings, though he could not go off it on account of water on each side. *Yazoo &c. R. Co. v. Aden*, 77 Miss. 382.

The loss of time, inconvenience and expense in traveling back may be recovered for, if plaintiff was not imprudent in leaving the train under the circumstances. *Owens v. Wabash R. Co.*, 84 Mo. App. 143.

Conductor of a trolley car was not negligent *per se* in directing one, carried past his destination, to walk on the track which crossed a trestle. *Camden &c. R. Co. v. Young*, 60 N. J. L. 193.

Plaintiff is entitled to at least nominal damages for being carried by, as failure in the statutory duty to stop is negligent *per se*. *Cable v. Southern R. Co.*, 122 N. C. 892.

Nonsuit was proper, where plaintiff was carried by her destination to next stopping place, but suffered only such injuries as she would have suffered had she gotten off at her proper station. *Smith v. Wilmington &c. R. Co.*, (N. C.) 41 S. E. Rep. 481.

Where one had been carried by through his own negligence, let off at his own request and for his accommodation he was not to recover for injuries received in walking back upon the track. *v. Paxon*, 182 Pa. St. 457.

Falling into a ditch at night while looking for a road to home, is embraced in damages for negligently carrying one to destination. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App. Rep. 710.

Plaintiff was not permitted to complain of being carried by station was announced and a reasonable time allowed to alight. If the conductor failed to inform her, as he promised to do. *St. Louis &c. R. Co. v. McCullough*, (Tex. Civ. App.) 33 S. W. Rep. 285.

So where passenger failed to hear the announcement on account of his preoccupation. *Central &c. R. Co. v. Hoard*, (Tex. Civ. App.) 49 S. W. Rep. 142; *St. Louis &c. R. Co. v. Ricketts*, 22 Tex. 515; *Houston &c. R. Co. v. Cohn*, id. 11 (asleep when station was announced).

A passenger, after being negligently carried by, alighted at a station and in walking back on the track fell through a bridge not allowed to recover. *Gulf &c. R. Co. v. Jordan*, (Tex. Civ. App.) 33 S. W. Rep. 690.

Defendant was held liable for carrying a young girl two miles from her station, putting her off at 2 o'clock on a damp morning with a twenty-pound bundle. *International &c. R. Co. v. Sampson*, (Tex. Civ. App.) 64 S. W. Rep. 692.

Where plaintiff asked to be put off at a given place, where a conveyance waiting for her, defendant was chargeable with negligence if carried by, such conveyance might not be there when she alighted. *Missouri &c. R. Co. v. Hennessey*, 20 Tex. Civ. App. 316.

In the absence of statute, a carrier is not *per se* negligent for failing to announce stations. *Houston &c. R. Co. v. Goodyear*, (Tex. Civ. App.) 66 S. W. Rep. 862.

Where plaintiff knew that the train was at her station she cannot complain of a conductor's failure to give her notice thereof. *Missouri &c. R. Co. v. Miles*, 20 Tex. Civ. App. 570.

Passengers compelled to go out of their way by reason of a failure to carry them to their destination, may recover for inconvenience suffered. *Hobbs v. London &c. R. Co.*, L. R. 10 Q. B. 274.

#### (t). SPECIAL TICKETS.

Where company's rule provides for special tickets for freight, a conductor is justified in ejecting passenger from such train if he presents a freight ticket. *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 217.

*Indianapolis &c. R. Co. v. Kennedy*, 77 Ind. 507; *Falkner v. Ohio &c. R. Co.*, 55 Ind. 369.

A commutation ticket containing red and black figures representing miles on the eastern and western division respectively of defendant railroad, and providing for the canceling of the same according to which division the passenger rode on, will not permit him to ride on either division when all the figures representing miles on that division have been canceled. *Terre Haute &c. R. Co. v. Fitzgerald*, 47 Ind. 79.

A rule requiring persons riding on freight trains to present a written permit from one in authority is reasonable. *Thomas v. Chicago &c. R. Co.*, 72 Mich. 355.

But where custom had been to take money for fare in freight trains, passengers are entitled to notice of change. *Lane v. E. T. &c. R. Co.*, 5 Lea, (Tenn.) 124.

*Lake Shore &c. R. Co. v. Greenwood*, 29 P. F. Smith (Pa.) 373. See *Jones v. Wabash &c. R. Co.*, 17 Mo. App. 158.

A station agent has no authority to abrogate a rule of his company requiring permits on freight trains, and, where a passenger with knowledge of the rule, relies on the agent's statement that he could ride without one, he can not complain of ejection. *Houston &c. R. Co. v. Stell*, (Tex. Civ. App.) 67 S. W. Rep. 537.

Plaintiff may recover for being ejected for failure to pay cash, where he was informed by the agent that his regular ticket entitled him to passage on the freight train, which arrangement the conductor assented to before he got aboard. *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592.

(u). AT WHAT PLACE AND UNDER WHAT CIRCUMSTANCES PASSENGERS MAY BE EJECTED.

Where a person was in a condition of sickness accompanied by nausea, which necessitated his violating either a rule against spitting on the floor or one against standing on the rear platform, he was in such a condition as justified his being expelled from the car, especially where his appearance gives no indication of his condition. *Montgomery v. Buffalo R. Co.*, 165 N. Y. 139; aff'g s. c., 24 App. Div. 454.

Drunken passenger could not pay fare or show ticket; his companion offered to pay for him; conductor demanded ticket and put him off in a cut twenty feet deep. He traveled 1,700 feet, and then fell or laid down on the track and was killed by the following train. Expulsion was unlawful and the defendant was liable as the conductor was bound to receive the money. (*O'Brien v. N. Y. Cent. &c. R. Co.*, 80 N. Y. 236.) *Guy v. N. Y., O. & W. R. R. Co.*, 30 Hun 399, rev'g judg't for def't on nonsuit.

Question properly left to jury whether farm house two  
thirty rods from crossing, which was itself five rods away  
place, where the passenger was expelled on a dark night for  
ment of fare, was "near any dwelling house," as provided  
*Loomis v. Jewett*, 35 Hun, 313, aff'g judg't for pl'ff.

Passenger was ejected from train for non-payment of fare  
from the station, and about 115 rods from the nearest access  
ing on a dark, cold and stormy Saturday night at 7.30 o'clock.  
Monday following, at 7.30, he was found on the opposite  
track, dead from suffocation and drowning in partially frozen  
water. If more than necessary force were used, whereby he  
dered *incapable of taking care of himself*, the defendant was li  
tance from farm house not discussed. The case seems to  
ceeded upon the ground that the passenger was too drunk to  
and that unnecessary force was used. *Gill v. P. R. R. Co.*  
107, rev'g judg't for pl'ff.

See, as to intoxication, *post*, p. 703.

One has not a right to board a car and ride on the front  
violation of an ordinance because there is no room inside for  
is bound to wait until a car comes into which he can enter  
transfer must be returned before he can be legally ejected.  
*Nassau Electric R. Co.*, 18 App. Div. 137.

Ejection of one, irresponsible from intoxication, at night  
must follow a roughly ballasted track, with a bridge over a cr  
side and cattle guards on the other, was improper. *Louisville*  
*v. Johnson*, 108 Ala. 62; s. c., 31 L. R. A. 372.

Failure to purchase a ticket before boarding, as required  
company, is virtually a refusal to pay fare and requires ej  
usual stopping as provided by statute in cases of refusal to  
*McCook v. Northrup*, 65 Ark. 225.

And, though plaintiff has boarded at a place where defendan  
receive passengers, the statute applies, after being treated as  
by the conductor's demanding the fare. *Kansas City &c.*  
*Holden*, 66 Ark. 602.

Such statute applying only to ejection for non-payment  
not apply where plaintiff is carried by, by reason of her failure  
at her destination. *St. Louis &c. R. Co. v. Lewis*, 69 Ark. 81.

Ejection for failure to possess a ticket is within the scope  
thority of a brakeman charged with the duty of preventing  
out one. *St. Louis &c. R. Co. v. Kilpatrick*, 67 Ark. 47.

Passenger must be ejected at a regular station, and an act

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if he be ejected at any other. *Toledo &c. R. Co. v. Patterson*, 63 Ill. 304.

See, however, *Railroad Co. v. Skillman*, 39 Oh. St. 444.

Where a passenger, too intoxicated to understand that he must pay extra fare if he would ride beyond his destination, was lawfully removed from train, on failure to pay, and subsequently wandered upon the track, and was killed, the company was not liable. *McClelland v. Louisville &c. R. Co.*, 94 Ind. 276.

See *R. Co. v. Valleley*, 32 Oh. St. 345.

But, expelling a child from a train, two miles from its home, and too young to take care of itself, without putting it in any one's care, is negligence in a conductor. *Indianapolis &c. R. Co. v. Pitzey*, 109 Ind. 179.

That the train was not one which carried passengers did not prevent recovery where conductor compelled plaintiff to jump off in the dark and while train was moving. Plaintiff had boarded upon the agent's advice that it would carry him. *Indiana &c. R. Co. v. Ditto*, (Ind.) 64 N. E. Rep. 222.

Failure to return to the station, a distance of a mile and a half, instead of proceeding to his home, a distance of seven miles did not prevent recovery for an unlawful ejection of plaintiff on a dark, stormy night, without money in his pocket. *Atchison &c. R. Co. v. Lamoreux*, 5 Kan. App. 813.

Notwithstanding refusal of plaintiff to pay, if he was helpless from drink and the weather freezing, it was negligence in the company to expel him at a distance of a mile from a station. *Louisville &c. R. Co. v. Sullivan*, 81 Ky. 624.

It was held not negligence to eject a drunken passenger at a station where other passengers alighted, and at which there were hotel porters. *Brown v. Louisville &c. R. Co.*, 103 Ky. 211.

Where plaintiff entered a train with knowledge that it did not stop at his station, but did stop at a coal chute nearer his home than the station, that was regarded as his destination, and where he was put off there no recovery was allowed as for an ejection at a dangerous place. *Bohammon v. Southern R. Co.*, (Ky.) 65 S. W. Rep. 169.

Plaintiff was in charge of a child whose fare was demanded of plaintiff and refused; the father of the child was on the train and conductor had knowledge of this fact. Held, that plaintiff could recover from the company for expulsion from the train due to her refusal to pay the child's fare. *Philadelphia &c. R. Co. v. Hoeflich*, 62 Md. 300.

Putting off one, who is so drunk that he had to be aroused to pay his fare, at a place unlighted where street cars and teams are likely to pass,

three miles distant from shelter was negligence. *Hudson &c. R. Co.*, 178 Mass. 64.

Ejecting a trespasser at a distance from any dwelling or station actionable at common law; and if the conductor was animated by ill-will, malice and malice he, and not the company, is liable. *Greene v. R. Co. v. Miller*, 19 Mich. 305.

See, also, *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *St. L. & N. W. Branch*, 45 Ark. 524; *R. Co. v. Skillman*, 39 Oh. St. 444.

It is proper for the jury to consider the question of defendant's negligence, when a conductor removed passenger who had fallen into sleep to which he was subject, and, on awaking offered to buy a ticket before he was put off. *Ferguson v. Michigan Cent. R. Co.*, Mich. 533.

Where a drunken man after expulsion went with two others 25 or 30 feet from the track it was held that the fitness of the expulsion was eliminated. *Gaukler v. Detroit &c. R. Co.*, (N. W. Rep. 660.

It was error to direct a verdict for defendant where it had a station two miles from his destination, one so sick that he could not be supported. *Eidson v. Southern R. Co.*, (Miss.) 23 South Rep.

So it was negligence to eject a woman in a deserted swamp on a stormy night, where there was no station within three miles. *v. Alabama &c. R. Co.*, 76 Miss. 703.

Rule that street cars must not go back to a crossing after having been properly signaled, is unreasonable, where the road is dark and rainy, and the car runs fifty feet beyond it. *Jackson v. R. &c. Co. v. Lowry*, 79 Miss. 431.

Offer to pay at the time of stopping the train for ejection being put off should have been accepted. *Holt v. Hannibal R. Co.*, 87 Mo. App. 203.

Where defendant not only accepted plaintiff while he was negligently carried him by his station, it was liable for his injury at the next station from which he was also ejected while waiting for the return train, where it was night, and cold and stormy, and no accommodations for travelers in the place. *Haug v. Green Bay &c. R. Co.*, 8 N. D. 23; s. c., 42 L. R. A. 664.

Ejection held not the proximate cause of injury by another party. *Edgerly v. Union Street R. Co.*, 67 N. H. 312.

(v). PASSENGER CANNOT BE EXPOSED TO DANGER OR UNLAWFUL FORCE IN REMOVAL.

A passenger may resist an attempt to eject him from a

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as if it were a direct attack on his life, and his resistance does not present a case of contributory negligence.

Defendant had right to remove passenger for non-payment of fare, but question was whether he was negligent in doing so.

The conductor told passenger that he must pay or leave the car, and without stopping the car, led him to the forward platform and forcibly ejected him therefrom. There was some conflict of evidence as to the extent of the deceased's resistance. It was dark and cold. There was an embankment of frozen snow and ice on each side of the track. As the deceased fell from the car he struck upon this embankment, rolled or slid down between it and the projecting part of the car, and was so crushed and jammed between the embankment and the car as it proceeded on its course, that he died in a few days afterwards at the hospital. *Sandford v. Eighth Ave. R. Co.*, 23 N. Y. 343, aff'g judg't for pl'ff.

See, also, *McCullen v. New York &c. R. Co.*, 68 App. Div. 269.

In an action for injuries resulting from being forcibly put off a street car plaintiff and two witnesses testified that the conductor accused him of being drunk and shoved him off with such force that he fell, and that he was sober. The conductor and driver testified that plaintiff was disorderly and refused to leave the car and that the conductor put him off, but did not pitch him off. Other witnesses, who did not see him until after he was ejected, testified as to his condition, and it appeared that the starter put him on another car to go and make a complaint if he desired. Held, that a verdict in plaintiff's favor would not be disturbed. *Caldwell v. Central Park, North & East River R. Co.*, 7 Misc. 67.

Though ejection was justified for refusal to pay fare, the rude and insulting manner of doing so was not. *St. Louis &c. R. Co. v. Brown*, 62 Ark. 254.

So where ejection was made with unnecessary force. *St. Louis &c. R. Co. v. Osborn*, 67 Ark. 399.

If conductor ejects one riding on freight train contrary to rule, violently, and uses obscene and insulting language, company is liable. *Western &c. R. Co. v. Turner*, 72 Ga. 292.

That the ejection was not within the scope of a servant's duties was no defense where unnecessary force was used. *Brunswick &c. R. Co. v. Bostwick*, 100 Ga. 96.

But such rule does not apply where the excessive force was the result of undue provocation. *City Electric R. Co. v. Shropshire*, 101 Ga. 33.

Defendant was liable, where, upon deceased's refusal to pay more money for his ride on the freight train, defendant's employé attempted to take it from him and threw him off while train was moving rapidly. *McIver v. Florida &c. R. Co.*, 110 Ga. 223.

Refusal to leave does not warrant wantonness in ejection.  
*v. North Chicago Street R. Co.*, 82 Ill. App. 473.

Contributory negligence no defense where passenger was ejected by unnecessary force. *Chicago &c. R. Co. v. Bills*, 118 Ind. 221.

Excess of authority is no defense to the exertion of unnecessary force in making the ejection. *Lake Erie &c. R. Co. v. Matthews*, 133 Ind. 355.

Where one is unlawfully and forcibly ejected the doctrine of contributory negligence does not apply. *Louisville &c. R. Co. v. Smith*, 100 Ind. App. 123.

Rule of the company prohibiting passengers from riding on freight trains unless they present their tickets, did not justify company in ejecting plaintiff from moving train because he had no ticket. *Illinois Cent. R. Co.*, 32 Iowa, 534.

The jury must decide whether blows struck in expelling plaintiff from train were justifiable and to overcome force used by him. *v. New York &c. R. Co.*, 106 Mass. 160.

See, also, *Chicago &c. R. Co. v. Bills*, 104 Ind. 13; *C. & N. W. R. Co. v. Smith*, 48 Ill. 253.

Forcefully ejecting drunken man through a dark passage way was a means of approach to the station, so as to injure one coming through station was negligence. *Gray v. Boston &c. R. Co.*, 168 Mass. 20.

Where a driver of a street car used unnecessary violence in ejecting one who would not pay his fare, the company was liable. *N. J. R. Co. v. Haring*, 18 Vroom (N. J.) 137.

See, also, *Bland v. Southern Pac. R. Co.*, 65 Cal. 626; *Ware v. Swanwick*, 330; *Brown v. Hannibal &c. R. Co.*, 66 Mo. 588.

Defendant was liable where train hand used more force than was necessary to repel an assault upon him. *Haver v. Central R. Co.*, 64 Ill. 312.

Plaintiff cannot complain of rude language, in ejecting, which was abusive. *Daniels v. Florida &c. R. Co.*, 62 S. C. 1.

Though defendant's rule requiring an extra fare where one rode in its cars beyond the limits of the transfer station was reasonable, but if it justified an ejection for refusal to comply, liability was incurred by defendant if more force than was necessary in the ejection. *Nashville Street R. Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

It was error to charge that one riding on a freight train without an authorized permit must be ejected in such manner as any "humble person of ordinary prudence" would employ, as requiring a higher degree of care than that imposed by law. *Fort Worth &c. R. Co. v. Peterson*, 100 Tex. Civ. App. 548.

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It was negligent to obey an order to leave under circumstances of great peril, where it is not accompanied with force or overpowering intimidation. *Bosworth v. Walker*, 83 Fed. Rep. 58.

Liability attaches to a company whose conductor compels a person with a ticket, but on the wrong train, to get off while it is in motion. *Boggess v. Chesapeake &c. R. Co.*, 37 W. Va. 297.

(W). RE-ENTRY AFTER LAWFUL EXPULSION.

A passenger expelled justly for violation of a rule forfeits his right to ride unless at a regular station, he creates anew the relation of passenger and carrier. It has also been held that the passenger must in addition pay the fare for which he is delinquent. Showing the ticket after the train has stopped does not restore the right to ride. *Hibbard v. N. Y. & Erie R. Co.*, 15 N. Y. 455, rev'g judg't for pl'ff.

Where a passenger on a railroad, by an illegal refusal to pay his fare, renders it the duty of the conductor in enforcing the reasonable rules and regulations of the company to eject him from the cars, and the refusal and resistance of the passenger continues until after force had been required and applied to remove him, he cannot, by offering to pay his fare, make the continuance of the process of expulsion unlawful, and although he is ejected after an offer to pay his fare, at a place where the train ordinarily stops and receives passengers, this does not render the railroad company liable.

A carrier of passengers is not required unconditionally to accept all persons who offer themselves for transportation and tender fare; he may lawfully decline to receive or carry those who refuse to conform to his reasonable rules, after knowledge of the same, or may after such refusal lawfully eject those, who have been received.

Plaintiff boarded a train on defendant's road, presented an invalid ticket, which the conductor refused to accept and demanded fare. Plaintiff refused to pay. The conductor informed him that he would be obliged to put him off unless he paid. He replied that he would sue the company, if he was put off. This occurred as the train reached a place, where the track was crossed by another railroad at grade, and where, in compliance with the statute, trains on defendant's road stopped for a moment, and where passengers were in the habit of getting on and off. The conductor called for assistance, and began removal. Plaintiff resisted, until he was landed on the track. When he reached the car door and again while on the platform he stated he would pay the fare. The court charged that if the train had stopped at a station and before it started again plaintiff offered to pay his fare, any subsequent effort to remove him was unlawful, and rendered defendant liable for damages. *Pease*

v. *Delaware, Lackawanna & Western R. Co.*, 101 N. Y. 367, rev. 350 and judg't for pl'ff.

**From opinion.**—"It was held in *O'Brien v. N. Y. C. & H. R. R. Co.*, 236, that if the stoppage of a train is rendered necessary to expel therefrom, for a fractious refusal to pay fare, that he does not, by offering it before expulsion, become entitled to continue the trip. This authority is conclusive upon the question, that a mere offer to pay fare under such circumstances does not establish new relations between the passenger and the railroad, and entitle the passenger to continue his passage. *Hibbard v. N. Y. & H. R. R. Co.*, 15 N. Y. 455, 460, is to the same effect. There the passenger had been put on the train which entitled him to transportation from Hornellsville to Scio. When once shown his ticket to the conductor, he refused to show it again, and, upon request, at a point between the commencement and terminus of his journey, the train had been stopped for the purpose of expelling him therefrom. Upon his refusal he exhibited his ticket, but the defendant put him off the train without standing. It was held that this expulsion was justifiable, because it was necessary for the railroad to comply with the reasonable requirements of the carrier.

"A railroad company has the right, and it is the duty to enforce the same, to eject from its cars, and to eject therefrom those, who by indecent or obscene language, or violent and boisterous behavior, cause danger, discomfort, or annoyance to the passengers; and in the exercise of this right, the officers of the company are to determine as to the propriety of their action, being responsible for the consequences of their exercise of their discretion. 1 Redf. on Railways, 91, 92, 105; *People v. Caryl*, 3 Park. Cr. 234; *People v. Caryl*, id. 326; *Rorer on Railroads*, 958.

"It would be quite absurd to say, that one whose unlawful conduct has provoked a breach of the peace, should be able to throw upon his adversary the blame of the affray, by simply withdrawing his challenge, and changing his mind. He has provoked an unlawful affray and his rights are determined by the rules which apply to persons thus engaged. The action is made legal by his unlawful refusal to pay fare, and any need to require to completely execute it, would be justifiable."\*

Where in consequence of the fractious refusal of a passenger to pay the full fare the company has a right to stop the train, and if the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip, on paying the fare, but may be ejected from the train.

But where the train stops at a regular stopping place, and the passenger, before being ejected, or others in his behalf, offer to pay the full fare, it is the duty of the conductor to accept it; and if he refuses to accept it and ejects the passenger the company is liable. *O'Brien v. New York Central & Hudson River R. Co.*, 80 N. Y. 236, aff'g judg't for pl'ff.

Passenger put off car for refusal to comply with rules, cannot sue for damages as a matter of right to be taken back on complying with rules.

\* **NOTE.**—See *Jeffersonville Co. v. Rogers*, 28 Ind. 1; *Hoffman v. D. & N.W. Co.*, 62 Ind. 1; *People v. Caryl*, 3 Park. Cr. 234; *Stone v. C. & N. W. R. Co.*, 15 Gray 24; *People v. Caryl*, 3 Park. Cr. 234; *Stone v. C. & N. W. R. Co.*, 15 Gray 24; *Hibbard v. N. Y. & H. R. Co.*, 15 N. Y. 457; *Louisville, &c., Co. v. Harris*, 9 La. 180; *St. Louis & N. J. L. Co.*, 300; *Nelson v. L. I. Co.*, 7 Hun, 140; *Hall v. M. & C. Co.*, 9 Am. & Eng. R. & P. Co. v. Casey, 52 Tex. 112; *Swan v. M. & L. Co.*, 139 Mass. 110.

he be at a regular station and-tender fare. *Nelson v. L. I. R. Co.*, 7 Hun, 140, rev'g judg't for pl'ff.

The passenger left the train because of the refusal of the conductor to accept the ticket already used on a previous trip for a portion of the route covered by it, and thereupon purchased a ticket from the station where he so left the train to the place of his destination. The railroad company could not insist, as a condition of his further transportation, that he should pay the fare chargeable for that portion of the road over which he had been carried, and for a refusal to pay the fare for which (when his ticket was refused), he had been directed to leave the train. It appears that a passenger leaving a train at a station before reaching the place for which he has purchased a ticket without having it endorsed for a "stop-over" does not forfeit his right to the further use of his ticket for his transportation to the station named thereon. Verdict for plaintiff. *Ward v. N. Y. C. & H. R. R. Co.*, 56 Hun, 268, affirming order denying new trial.

When once expelled from a car a person cannot immediately thereafter get upon it again without becoming a trespasser, and for injuries resulting from ejecting a passenger there can be no recovery. *North Chicago St. R. v. Olds*, 40 Ill. App. 421.

See, also, *South Carolina R. Co. v. Wise*, 68 Ga. 572.

Where one peaceably submits to ejection at a station for non-payment of fare to a station beyond, he may change his mind and reboard the train. *Louisville &c. R. Co. v. Breckinridge*, 93 Ky. 1.

Plaintiff, trying to get on after being ejected and while train was moving, fell. Conductor was not bound to stop to see if he was injured. *Chesapeake R. Co. v. Saulsberry*, (Ky.) 66 S. W. Rep. 1051.

A person who has been ejected from a railway train for non-payment of fare, has not the right to purchase a ticket at the same station and resume his journey on the same train *without payment of fare for the distance already traveled*. The reason for this rule is that a person ought not to be permitted to take the train at a station where he could not have taken it, had he not stolen a ride up to that point. In other words, the intending passenger, though physically ready to take the train, is treated as being constructively left behind at the point where he began to steal his passage and so he is deprived of the advantage unlawfully gained.

*Swan v. Manchester &c. R. Co.*, 132 Mass. 121; *Stone v. Chicago &c. R. Co.*, 47 Ia. 82; *State v. Campbell*, 3 Vroom, 309; *Beach on Railways*, sec. 854.

The reason of the rule is thus concisely put by the Alabama Supreme Court in *Manning v. Louisville &c. R. Co.*, 95 Ala. 392; s. c., 16 L. R. A. 55.

"If persons who are attempting to ride without paying fare, the past forgiven, and need pay only from the place and time of detection, would not this be the offer of a premium for the undue advantage of the railroad?"

It has even been held that where a stoppage of the train becomes necessary for the express purpose of removing a person who refused to pay fare, he cannot even by tendering his fare for the full trip for the part already traveled, acquire a right to be carried as a passenger, though the rule is otherwise where he is ejected at a regular station.

O'Brien v. Boston &c. R. Co., 15 Gray, 20; Gould v. Chicago &c. R. Co., 155 Rep. 155.

(x). EMPLOYMENT OF FORCE TO COMPEL OBSERVANCE OF RULES.

Whether a trainman can use force to compel him to go into the car; *quaere*; but he can eject him for refusal. Judgment for plaintiff reversed on account of error in refusing to charge that "although there were no seats inside the car, and people were standing there, there was room for the plaintiff he was bound to go there." *Manhattan R. Co.*, 105 N. Y. 525, rev'g judgment for plaintiff.

*From opinion.*—"The safety of passengers on railroads requires that they should comply with reasonable regulations and acquiesce in reasonable directions of persons to whom the management of the train is committed. It is the crowding of passengers on the platform of a steam railroad car which embarrasses the trainmen in the performance of their duties, and it is the plain duty of a passenger standing on a platform, to go inside the car when requested so to do by a person having charge of the train. \* \* \* If there were no unoccupied seats in the car did not, we think, change the duty of the plaintiff to go inside. \* \* \* The car was crowded when the plaintiff entered it at Houston street. He placed himself immediately in a position where he was compelled to submit to some inconvenience, and he was not under the obligation to obey the reasonable directions of the trainmen, in view to the general convenience and safety, because there was no vacant seat."

If a passenger arrive in due time, and the gates being closed, he cannot enter the platform of the rear car, contrary to the manifestation of the company, by leaping over the gate enclosing the platform, upon the door leading therefrom to the car being locked, over the shoulders of the trainman and gain admission to the car by force, an attempt to do so, by him, after having gained such entrance, is unlawful, especially if he shall, at the first station thereafter, go upon the station platform and re-enter the car.

The plaintiff upon finding the gates of the car on an elevated track closed against him, while he was standing on the platform of the station, at the time, as he claimed, for the train, dropped his valise over on the

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form of one car, as the train was moving away and himself leaped over the gates of the platform of the last car, although such gates were closed and locked and there was a sign forbidding the entry of passengers at that place. The door of the car being locked, he rode on the platform until the guard opened the door, but refused to admit him and demanded, who he was and where he was going, which information was not given. Thereupon the plaintiff made a movement to enter the car and the guard moved so as to intercept his passage. Respecting the collision with the brakeman the plaintiff testified: "And as I attempted to pass him he laid his hand on me violently; he grabbed me by the shoulder. He detained me there until I overpowered him and passed into the car. In the struggle which ensued we both fell to the floor, I think; I do not know but what we fell on to a seat first and then slid off on to the floor. \* \* \* I don't say positively that I seized him by the throat, but my impression is that I did. It was applied with the same amount of force that he was applying to me; *I put in what force was necessary to get into the car.* He did not try to get away. I forced him back into the car, first into the seats running lengthwise of the car, and eventually on to the floor; the guard was under and I was over, that was the way we went down. I don't recollect our positions exactly; I may have been under at one time; and when I got him down there I released him. Then I got by him some way and went to the fore part of the car; *I went immediately to the platform. We had then reached Hanover Square.*"

When the plaintiff reached the forward platform, he found that his bag had been removed to the station platform, where the train was then stopping. He hastily left the train and got the bag and was re-entering the car by the platform, when one of the guards obstructed his entrance into the car, and he was ordered to leave the train. An attempt of the entire train force to remove him resulted in such stout and violent resistance, that, from sheer powerlessness, the carrier was obliged to allow him to ride to his destination.

In an action brought by the passenger for assault, it was held by the Court of Common Pleas and affirmed by the Court of Appeals:

I. That the attempt to remove the plaintiff was an unjustifiable assault.

II. That the plaintiff, whatever the irregularity of his entry, was thereafter a passenger of such peaceful and safe deportment, that he had a right to continue his journey.

III. That the facts connected with his entry were not a subject of consideration by the jury, and that the only question was one of damages.

IV. That whatever the means or manner of his entry, the assumption by the passenger of an orderly mien after such entry made him derelict

only as to the past, and not as to the time when the attempt to remove him took place.

V. That the power of the carrier was limited to physical opposition and prevention to his entry, and did not extend to a forcible ejection after such entry was accomplished.

VI. That when the plaintiff stepped off on to the station platform, where the train had arrived and stopped at the time when his entry was accomplished, for the purpose of recovering his valise, that had been set off by the guards preparatory to setting him off also, his return to the platform of the car so rehabilitated him, that his previous character of a wrongdoer, if such he had been, was merged into the inviolable character of an innocent and unoffending passenger. *Smith v. Manhattan Railway Company*, 45 N. Y. State R. 865, aff'g judg't for pl'ff., aff'd without opinion in 138 N. Y. 623.

Citing *Steamboat Co. v. Brockett*, 121 U. S. 637.

In this connection attention is called to some formerly authoritative cases holding that contractual rights cannot be asserted by violence. *Wood v. Leadbitter*, 13 N. & W. 838; *Burton v. Scherpf*, 1 Allen, 133; *McCrea v. Marsh*, 12 Gray, 211.

The same has been held respecting the right to remain in a railway station awaiting a train. *Commonwealth v. Power*, 7 Metc. 596; *Harris v. Stevens*, 31 Vt. 79.

And so in case of contractual rights to enter upon lands. *McMillan v. Cronin*, 75 N. Y. 474; *Parsons v. Brown*, 15 Barb. 590; *Hyatt v. Wood*, 3 Johns. 239; *Churchill v. Hulbert*, 110 Mass. 42; *Drury v. Hervey*, 126 id. 521.

In *North Chicago Street Railway Co. v. Olds*, 40 Ill. App. 421, it was held that a passenger who has once been expelled from a street car, although wrongfully, has no right to attempt to return, and that for a second expulsion he can have no damages. The court says:

"The appellee had no right of property or interest in the car; that, and the authority to control it, belonged to the company. They owed a duty to the public, a refusal to perform which would subject them to an action. Out of that duty sprang a license to every person, having no notice to keep off, to go upon the cars; but with such notice the license was withdrawn; whether rightly or wrongly withdrawn it could not be enforced, *vi et armis*. The remedy of any person aggrieved was by action, if the assault was unjustifiable. \* \* \*

"Having been put off, he knew that the conductor of the car would not let him ride. He says he was angry. For refusal to carry him, if unjustifiable, he had his action, but he had no legal right to use force to compel the company to carry him. The license implied by law for persons to get upon a street car, had been as to him and as to that car, revoked. In attempting to compel the company to carry him, he was himself a trespasser."

The court quotes, as applicable to such circumstances, the language of the Supreme Court of Illinois in *C. B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499:

"A party will be entitled to quite as much damage for any wrong or injury quietly endured, as if violently resisted; indeed, the policy of the law ought to be to award him a higher measure of damages. Whatever personal injuries may result from his violence should be attributed to his own want of subordination for which the law will afford him no redress. He has no more right to redress by his own strong arm what he may deem an annoyance committed by a railroad employé than he has to resist in like manner any other supposed invasion of his convenience or rights. The courts afford opportunity to redress every civil injury, no matter what its character, and the party must pursue the remedy given by law."

A passenger's violation of a rule prohibiting the entrance of a station by way of the tracks, a rule designed for the protection of passengers on account of the danger incident to crossing them, did not justify the station agent, once he has entered, in compelling him to retrace his steps and enter by the ordinary way, as such action was designed to punish him for the violation of the rule and not to secure his protection. *Penfield v. Cleveland &c. R. Co.*, 26 App. Div. 413.

Defendant was entitled as a matter of law to eject one who boarded with such dangerous articles as bayonet mounted rifles, under its reasonable rule prohibiting carrying of dangerous articles. *Dowd v. Albany Railway*, 47 App. Div. 202.

Actual physical force is not prerequisite to recovery for an unlawful ejection, and the indignity sustained is an element of damages. *Ray v. Cortland &c. T. Co.*, 19 App. Div. 530; *Eddy v. Syracuse &c. R. Co.*, 50 App. Div. 109.

Where the car has arrived at a station, where the conductor and brakeman, by reason of plaintiff's refusal to pay his boy's fare, who, it is claimed, is over five, have proceeded to eject him out on the platform, the conductor is not bound then to accept his offer to pay the fare, but may continue the ejection. *Behr v. Erie R. Co.*, 69 App. Div. 416.

Where a passenger is unable to procure a ticket at the ticket office by reason of the absence of the agent, he is, upon informing the conductor of the fact, entitled to resist ejection and may recover for the injuries consequent upon the attempt to overcome resistance. He may sue for the assault and battery, as well as for the unlawful ejection. *Monnier v. New York &c. R. Co.*, 70 App. Div. 405.

A conductor is not negligent in expelling one who fails to comply with the conditions as they are set forth in his ticket, though such failure is the result of the negligence of the ticket agent. Recovery may be had

for the latter, but not for the former. *McGhee v. Reynolds*, 117 Ala. 413.

The question of the degree of care in making ejection does not arise where it was made without cause. *St. Louis &c. R. Co. v. Osborn*, 67 Ark. 399.

Where a train has been stopped to expel one who has not paid his fare, it is too late then to offer to pay it. *Illinois C. R. Co. v. Bauer*, 66 Ill. App. 124.

Plaintiff can not complain where no more than necessary force is used to prevent his entry into a train without the ticket as required by the rules of the company. *Illinois C. R. Co. v. Louthan*, 80 Ill. App. 579.

Plaintiff can not recover for an ejection where no more than necessary force is used, as it is one's duty when required, to leave peaceably. *Chicago &c. R. Co. v. Casazza*, 83 Ill. App. 421.

See, also, *Consolidated Traction Co. v. Taborn*, 58 N. J. L. 1; s. c. aff'd, 58 id. 408; *Light v. Harrisburg &c. R. Co.*, 4 Pa. Super. Ct. 427.

Plaintiff assumes the risk of the injuries he receives by resisting lawful effort to eject him with necessary force. *Kiley v. Chicago City R. Co.*, 90 Ill. App. 275; s. c. aff'd, 189 Ill. 384.

The conditions on the ticket are conclusive as far as the conductor is concerned. *Callaway v. Mellett*, 15 Ind. App. 366.

A conductor is warranted in ejecting a passenger who refuses to comply with defendant's rules by removing a dog he has with him. *Gregory v. Chicago &c. R. Co.*, 100 Iowa, 345.

Where plaintiff had requested an exchange ticket as required by his mileage ticket, but was not supplied therewith because the agent had run out of them, he was entitled to ride upon presentation of the mileage ticket only with a statement of the facts and recover for expulsion without payment of the regular fare. *Pittsburg &c. R. Co. v. Street*, 26 Ind. App. 224.

Defendant cannot set up that plaintiff might have escaped ejection by paying unlawful charges. *Atchison &c. R. Co. v. Dickerson*, 4 Kan. App. 345.

Ejection was lawful where plaintiff was drunk, boisterous and violent. *Chesapeake &c. R. Co. v. Saulsberry*, (Ky.) 66 S. W. Rep. 1051.

That refusal to give one's name on request for the purpose of identification with the name on the ticket presented constitutes a failure to comply with a reasonable rule, does not warrant arrest on the charge of fraudulently evading the payment of fare. *Palmer v. Maine C. R. Co.*, 92 Me. 399; s. c., 44 L. R. A. 673.

In the absence of reasonable evidence to the contrary a conductor is



warranted in relying on the terms of the ticket as expressing the contract of carriage. *Alabama &c. R. Co. v. Drummond*, 73 Miss. 813.

And the fact that the relations of the parties arose from a contract does not prevent liability for expulsion as for a tort. *Book v. Chicago &c. R. Co.*, 75 Mo. App. 604.

The remedy for a failure of passenger to remove packages which he has no right to carry is removing him with the packages, not forcibly taking of them from him and placing them in the express car. *Bullock v. Delaware &c. R. Co.*, 60 N. J. L. 24; s. c., 37 L. R. A. 417.

In an action in tort for forcibly excluding plaintiff from train because he was carrying small packages of merchandise which it was established was sanctioned by the regulations of the company, it was held, in the absence of *mala fides*, that the passenger was justified in reasonable efforts to exercise his right, secured by private contract and public law, and, if the act was not done for the purpose of provoking resistance or insult, the physical force used by defendant's servants in excluding him could not be regarded as an injury brought upon himself by his own misbehavior, but was actionable as a tort and that the accompanying injury was a legitimate element of compensatory damages. *Runyan v. Central R. Co.*, 65 N. J. L. 228.

Defendant was not liable for the use of the force necessary to secure one's ejection for refusing to comply with its regulation forbidding riding on platforms. *McMillan v. Federal Street &c. R. Co.*, 172 Pa. St. 523.

Failure to comply with a condition requiring an exchange ticket by one having a mileage ticket, prevented recovery for ejection though such failure was due to the absence of the ticket agent at the station. *Robb v. Pittsburg &c. R. Co.*, 14 Pa. Super. Ct. 282.

The gist of an action for an insult to a passenger by a motorman is the violation of the obligation safely to carry and not the specific tort of the motorman. *Knoxville Traction Co. v. Lane*, 103 Tenn. 376.

Railroad company is not liable where the mutilated condition of a passenger's ticket raised a reasonable doubt as to its validity, and was the result of his own acts. *Houston &c. R. Co. v. Crone*, (Tex. Civ. App.) 37 S. W. Rep. 1074.

Plaintiff was not allowed to recover special damages, where his sole purpose in refusing to pay an illegal toll was to induce the use of force to eject him, and, when that was done, he paid it and took a receipt. *Patterson v. Southern P. R. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 308.

One who becomes abusive upon demand made for his ticket forfeits his right to remain on the train, and he may be ejected therefrom al-

though he makes a tender of fare. *Gould v. Chicago &c. R. Co.*, 5 McCrary, (U. S.) 502.

Upon the question of injury to one's feelings for an ejection, defendant was entitled to a charge as to plaintiff's conduct, whether he sought to avoid or cause trouble. *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

Where a conductor warns plaintiff that his mileage ticket is invalid and advises him to investigate, he cannot complain of an ejection upon subsequently offering it and refusing to pay fare, though he had used it considerably before, and the conductor, when he warned him, left it with him, though required by the rules to take it up. *Moore v. Ohio River R. Co.*, 41 W. Va. 160.

(y). TICKET; NON-SURRENDER OF AT GATE—DETENTION AND IMPRISONMENT FOR.

Plaintiff purchased a ticket for a passage upon defendant's railway and entered one of its cars; before reaching his destination he lost his ticket, and when he attempted to pass through the gate, from the station platform, he was stopped by the gatekeeper and told that he could not pass until he produced a ticket or paid his fare. He stated the facts of his purchase of a ticket and its loss and insisted on passing out, but was pushed back by the gatekeeper, who sent for a police officer and ordered his arrest; he was arrested, taken to the police station, where the gatekeeper made a complaint against him, and he was locked up over night. In the morning plaintiff was examined before a police magistrate, the gatekeeper appearing against him, and he was discharged. Defendant had given orders to its gatekeepers not to let passengers pass out until they either paid their fares or showed tickets. In an action for false imprisonment, held, that the detention was unlawful, that defendant was responsible for the acts of the gatekeeper, and that plaintiff was entitled to recover. *Lynch v. Metropolitan Elevated R. Co.*, 90 N. Y. 77, aff'g 24 Hun, 506, and judg't for pl'ff.

From opinion.—“The defendant had the right to make reasonable rules and regulations for the management of its business and the conduct of its passengers. It could require every passenger before entering one of its cars to procure a ticket and to produce and deliver up the ticket at the end of his passage *or again pay his fare*. The Northern R. R. Co. v. Page, 22 Barb. 130; Hibbard v. The N. Y. & Erie R. R. Co., 15 N. Y. 455; Vedder v. Fellows, 20 id. 126; Townsend v. The N. Y. C. & H. R. R. Co., 56 id. 295; 15 Am. Rep. 419. The defendant had such a regulation and no complaint can be made of that. But it had no regulation and could legally have none that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and if he did not, that he should then and there be detained and imprisoned until he did so. At most the plaintiff was a debtor to the defendant for the amount of his fare, and that debt could be

enforced against him by the same remedies, which any creditor has against his debtor. If the defendant had the right to detain him to enforce payment of the fare for ten minutes, it could detain him for one hour, or a day, or a year, or for any other time until compliance with its demand. That would be arbitrary imprisonment by a creditor without process of trial, to continue during his will until his debt should be paid. Even if a reasonable detention may be justified to enable the carrier to inquire into the circumstances, it cannot be to compel payment of fare. \* \* \* These views have the sanction of very high authority. In *Sunbolf v. Alford* (3 M. & W. 248), it was held that an innkeeper could not detain the person of his guest in order to secure payment of his bill. Lord Abinger said: 'If an innkeeper has a right to detain the person of his guest for non-payment of his bill, he has a right to detain him until the bill is paid, which may be for life; so that this defense supposes that by the common law a man who owes a small debt for which he could not be imprisoned by legal process, may yet be detained by an innkeeper for life. The proposition is monstrous. \* \* \* Where is the law that says a man shall detain another for his debt without process of law?' In *Chilton v. The London &c. Railway Co.* (16 M. & W. 212), the defendant was organized under an act conferring much broader powers than are possessed by the defendant in this case, and yet it was held that it could not arrest a passenger for refusing to pay a fare which it was entitled to demand. In *Standish v. Narragansett Steamship Co.* (111 Mass. 512), the plaintiff purchased a ticket before going upon defendant's steamboat for a passage from Fall River to New York. The defendant's regulation was that the passenger should, upon leaving the boat at the end of his passage, deliver up his ticket or pay his fare. When the plaintiff reached New York, he found that he had lost his ticket, and when he attempted to leave the boat he was prohibited, and told that he could not pass until he produced a ticket or paid his fare. He was detained two hours and then, under protest, paid his fare and was permitted to leave the boat. He sued the company for false imprisonment and recovered \$50. \* \* \*

A municipal corporation authorized to make by-laws and pass ordinances, and inflict penalties for their violation, cannot enforce obedience to them by imprisonment, unless expressly authorized so to do by statute. *Potter on Corp., sec. 81; Clark's Case, 5 Coke's Rep. 64.*"

A constable, called to eject a person from defendant's train may be its special agent for that purpose, but, if, thereafter, he unwarrantably subjects him to imprisonment, the defendant cannot be held in damages therefor. *Southern Pac. R. Co. v. Hamilton, 54 Fed. Rep. 468.*

See "Willful and Malicious Acts of Servants," *ante*, p. 22.

## (z). LADIES' CAR.

A regulation by a carrier setting apart, in the first instance, a car for females, traveling alone or with a male escort, is a proper one and the reservation of the car for that purpose, may be enforced to the extent of forcibly removing a passenger, disqualified by the regulation from entering, but the carrier would be liable for excessive force, exercised without malice, used by its brakeman in removing a person violating

the regulation. *Peck v. N. Y. C. R. Co.*, 70 N. Y. 587, affirming 8 Hun, 286, and judg't for pl'ff.

See same as to ladies' waiting-room, *Toledo &c. R. Co. v. Williams*, 77 Ill. 354; *Bass v. Chicago &c. R. Co.*, 36 Wis. 450; *Chicago &c. R. Co. v. Williams*, 55 Ill. 185.

Company may set apart a car for exclusive use of women and men traveling with women. *Memphis &c. R. Co. v. Benson*, 85 Tenn. 627.

## XX. Drawing-room and Sleeping Cars.\*

Passengers upon a railroad, taking a drawing-room car, have a right to assume that they are under a contract with the railroad corporation, and that the servants in charge of the car are its servants, for whose acts in the discharge of their duty it is liable. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402; *Carpenter v. N. Y., N. H. & H. R. Co.*, 124 id. 53; *Dwinelle v. N. Y. C. R. Co.*, 120 id. 117; *Penn. Co. v. Roy*, 102 U. S. 451.

The owners of drawing-room or sleeping cars are entitled to charge compensation beyond the railway fare for the use of such additional facilities, and although not liable as innkeepers, it is their duty to use reasonable care and vigilance to protect from loss or harm the persons and property of passengers riding in such cars; but they are only liable for loss of such property as is suitable and appropriate for the journey undertaken. *Carpenter v. N. Y., N. H. & H. R. Co.*, 124 N. Y. 53; *Dwinelle v. N. Y. C. R. Co.*, 120 id. 117; *Lewis v. N. Y. S. Co.*, 143 Mass. 273; *Woodruff &c. Co. v. Diehl*, 84 Ind. 474; *Pullman P. C. Co. v. Gaylor*, 23 Am. L. Reg. (N. S.) 788; 6 Ky. L. 279; *P. P. C. Co. v. Smith*, 73 Ill. 360; *Palmeter v. Wagner*, 11 Alb. L. J. 149; *Welch v. P. P. C. Co.*, 16 Abb. Pr. (N. S.) 352; *I. C. R. R. Co. v. Handy*, 63 Miss. 614.

A passenger not provided with a seat in the common cars may enter the drawing-room car and refuse to pay the extra fare, and for wrongful ejection from the drawing-room car may recover compensation. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402. The carrier must use the same care and diligence respecting the sufficiency of the car as is required in the case of ordinary cars. *Penn. Co. v. Roy*, 102 U. S. 451.

A pass contained this stipulation: "In consideration of receiving this ticket, the person who uses it voluntarily assumes all risks of accident, and expressly agrees, that the company shall not be liable under any circumstances, whether by negligence of their agents, or otherwise, for any

\* NOTE. — Chap. 565, L. of N. Y. 1890. "Sec. 41. *Extra Fare for Sleeping Cars.*—Any patentee of a sleeping car, or his legal representative, may place his car upon any railroad, with the assent of the corporation owning or operating such road and may charge for the use of the same, in all cases, to each passenger occupying it, forty cents, which shall entitle the passenger to the use of a berth for one hundred miles, and at the rate of three mills for every additional mile, but in no case shall the charge exceed eighty cents. The railroad corporation permitting the use of any such car shall be liable for damages for injuries received to the same extent as if received in its own car; and it shall keep sufficient first-class cars of other kinds for the convenient use of passengers not wishing to use a sleeping car. Every person using a sleeping car shall be furnished with a ticket having plainly written or printed thereon 'sleeping car,' and no railroad corporation shall be interested in the additional sum paid for the use of berths in sleeping cars run upon its road."

injury to his person, or for any loss or injury to his property, and that as for him, in the use of this ticket, he will not consider the company as common carriers, or liable to him as such." This exempted the defendant from liability for injury, although the injured passenger purchased a drawing-room seat. Such drawing-room ticket was not for the purpose of transportation but for the passenger's accommodation. *Ulrich v. N. Y. C. & H. R. R. Co.*, 108 N. Y. 80; reversing 13 Daly, 129. and judg't for pl'ff.

Distinguishing *Thorpe v. N. Y. C. & C. R. Co.*, 76 N. Y. 402.

Money necessary for the expenses of a journey, carried by a passenger in his clothing, worn by him, is not in the custody of the carrier (*Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 267), and it is not chargeable for the loss of the same unless negligence on its part be shown.

A carrier running sleeping coaches on its road with sections separated from the aisle only by curtains, must keep an employé carefully and constantly watching the interior of the car occupied by the passengers. Mere proof of the loss of money by the passenger, while occupying a berth, does not make out a *prima facie* case against the corporation. When plaintiff went to bed he placed his pocket book, containing the money in question, in the inside pocket of his vest, which he placed under his pillow on the side next to the window; the next morning he found his vest under his pillow on the side next to the passage-way, with his pocket book in the pocket but the money had been stolen. The upper berth was occupied by a stranger, but was unoccupied when the plaintiff arose in the morning. At one end of the car was the porter's closet. A full view of the passage-way of the car could not be had from all parts of the space at that end. The train made a number of stops at large cities during the night. The porter was the only employé on the car; he acted as conductor, and for his own profit blackened the passenger's boots. The defendant should have had a person constantly watching the interior of the car, and absence of evidence on this point raised a question for the jury. *Carpenter v. N. Y. & N. H. R. R. Co.*, 124 N. Y. 53, rev'g nonsuit.

Passenger could find no seat in the common car, so he went into the drawing-room car and refused to pay the extra fare. Cases cited showing liability of the railroad company for use of drawing-room cars.

Wagner placed his drawing-room cars on defendant's road, kept the interior in order and supplied his own servants; railroad conductor could enter car to collect fares and keep order. Wagner paid the defendant twenty per cent. of the gross receipts of the car. Defendant was liable for the wrongful ejection of a passenger from such car by the

porter. *Thorpe v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 402, aff'g 13 Hun, 70, and judg't for pl'ff.

**From opinion of Supreme Court.**—"The Illinois Central Railroad was held liable for an injury to one of its own passengers on its own road, caused by a fault of a train of the Michigan Central Railroad running on the same road by the owner's permission. *Railroad Co. v. Barron*, 5 Wall. (U. S.) 90, 104, and authorities cited. Drawing-room cars under a contract like that in evidence in this case, were seized for taxes against the company owning the road, but not the cars. *Kennedy v. St. Louis &c. R. Co.*, 62 Ill. 395; 7 Am. Railway Cases, 346. The owner of a road was held responsible for the use of a patented improvement on cars run on its road, although another road held all its stock, provided the cars and worked the road under a special contract. *York &c. R. R. Co. v. Winans*, 17 How. (U. S.) 30, especially top of page 40. See, also, *Railroad Co. v. Brown*, 17 Wall. (U. S.) 445, 450, 451; 1 Redf. Law of Railways, chap. 22, sec. 1, page 598; *Macon and Augusta R. R. Co. v. Mayes*, 49 Ga. 255."

A person who is a passenger on a sleeping car has a right to expect to find the conveniences which are furnished by such cars and for which he has paid.

It is a matter of common knowledge that on sleeping cars passengers are expected to use the conveniences of the car during the night, and also are awakened in time that they may both dress and make their toilet before arriving at their destination.

It cannot be said as a matter of law that a person upon discovering the darkness of the toilet room of a sleeping car should return to the body of the car, find the porter and wait until the room is lighted.

It is the duty of a railroad company not only to light the lamps in the toilet room of its sleeping cars, but also to use reasonable care to keep them lighted, and its neglect to do so a jury may determine to constitute negligence.

Semble, that the negligence of a railroad company may be inferred from the leaving open of the rear door of the last car of a train, when the rules of the company provide that it shall be kept closed between stations. *Piper v. The N. Y. C. & H. R. R. Co.*, 76 Hun, 44.

Where money is lost by a passenger upon a sleeping car, in the absence of proof that such corporation was liable as a common carrier, the corporation operating such car can be charged with liability only on the ground of negligence, in failing to maintain a continued watchfulness over the interior of its sleeping cars while the passengers therein are sleeping.

The burden of proof is upon the plaintiff to establish negligence on the part of the defendant. *Sessions v. N. Y., L. E. & W. R. R. Co.* 78 Hun, 541.

A sleeping car company is bound to maintain a reasonable watch for thieves during sleeping hours, but the liability is for negligence and not

insurance; and in case of money it is limited to reasonable traveling expenses. *Williams v. Webb*, 27 Misc. 508; aff'g s. c., 22 id. 513.

Defendant was liable for the consequences of having to spend the night in a cold day coach, when plaintiff had purchased a berth but had found it occupied by another ticket holder. *Braun v. Webb*, 32 Misc. 243.

Defendant was negligent in permitting a valise to remain in a dimly lighted car aisle where people are liable to stumble over it. *Levien v. Webb*, 30 Misc. 196.

A sleeping car company is liable for failure to maintain reasonable watch over the person and property of those asleep; and it was not negligence in a passenger to remove a ring from his finger and place it in a pocket book in the rack over the berth. *Pullman Palace Car Co. v. Adams*, 120 Ala. 581; s. c., 45 L. R. A. 767.

Defendant was liable for a theft of a valise which it had not used reasonable care to guard against; but recovery was confined to articles of convenience for travel which was held not to include a pistol. *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368.

But where such articles are stolen by defendant's employes under whose protection they are, it is liable irrespective of any question of negligence. *Pullman's Palace Car Co. v. Martin*, 95 Ga. 314; s. c., 29 L. R. A. 498.

A sleeping car company must keep a lookout for property casually left by patrons and restore it to them upon ascertaining ownership. *Kates v. Pullman's Palace Car Co.*, 95 Ga. 810.

Defendant was not liable where theft was made through the car window, left open by plaintiff while he was in another car, the door being properly guarded in the meanwhile. *Pullman's Palace Car Co. v. Hall*, 106 Ga. 765.

Failure to provide a step for an upper berth or to have a porter respond to a bell provided for the purpose of summoning him was negligence. *Pullman's Palace Car Co. v. Fielding*, 62 Ill. App. 577.

Mere proof of loss in a sleeping car is insufficient to establish liability; some negligence must be established. *McMurray v. Pullman's Palace Car Co.*, 86 Ill. App. 619.

Sleeping car company held to have assumed the liability of a common carrier, where porter took plaintiff's cape to carry it from the car to the reception room for her. *Vross v. Wagner Palace Car Co.*, 16 Ind. App. 271.

Reasonable care to prevent theft was for the jury, where the porter in sole charge had been on a long journey through the day and had twice during the night been absent for 20 minutes each time. *Pullman*

*Palace Car Co. v. Hunter*, (Ky.) 54 S. W. Rep. 845; s. c., 47 L. R. A. 286.

A steamboat is responsible for money deposited by travelers, when the deposit is a necessary one; so when plaintiff, a passenger on defendant's boat, deposited a package of money containing \$5,000, in the safe, the defendant is responsible for its loss, if he cannot show that loss was occasioned by some other cause than the negligence of his servant. *Dunn v. Branner*, 13 La. Ann. 452.

Where there was an arrangement between a railroad and a sleeping car company, which made the operation of the cars of both in a measure in common, the former was liable for the failure of the latter's porter to wake a passenger. *Airey v. Pullman & Co.*, 50 La. Ann. 648.

Liability for loss by theft in the use of a sleeping car by passengers cannot be avoided by the carrier by posting notices disclaiming responsibility for personal property in berths. In an action for loss of property by theft it appeared that the property of two passengers was stolen on the same night; that the porter was found asleep at an early hour in the morning in a position not commanding a view of that part of the car where the passengers were, and that he had been on duty for thirty-six hours, which covered two nights. The question of negligence was for the jury. *Lewis v. N. Y. S. Co.*, 143 Mass. 273.

Porter carried plaintiff's baggage to his section, which was on the side opposite the platform, put it on the seat, opened the window, contrary to a rule of the company, and left the car; plaintiff also left the car though his wife remained in the car and passed up and down the aisle. In an action for loss of baggage by theft the questions of negligence and contributory negligence were properly left to the jury. *Dawley v. Wagner Palace Car Co.*, 169 Mass. 315.

Where plaintiff's satchel was placed in his compartment near the door in the day time, and he remained in the smoker compartment for five hours, during several stops, he was guilty of negligence, contributing to its loss. *Whicher v. Boston & C. R. Co.*, 176 Mass. 275.

A palace car company is liable to a female passenger for the loss of her valise, containing articles of wearing apparel, although the same were not necessary to her on that particular journey. *Hampton v. Pullman & Co.*, 42 Mo. App. 134.

A sleeping car company is not liable to a passenger for the loss of his watch left in his berth while he is in the toilet room. *Chamberlain v. Pullman & Co.*, 55 Mo. App. 475.

Sleeping car companies are not liable as innkeepers, but only for the lack of ordinary care. *Falls River & C. Co. v. Pullman Palace Car Co.*, 4 Oh. N. P. 26; s. c., 6 Oh. Dec. 85.



Palace car company liable for overcoat placed in care of the porter. *Pullman &c. Co. v. Lowe*, 28 Neb. 239.

As to the safety of passengers themselves, a sleeping car porter or conductor acts in the capacity of servant of the railroad company. *Louisville &c. R. Co. v. Ray*, 101 Tenn. 1.

Loss of valise in sleeping car although in exclusive custody of passenger, chargeable to company, when due to company's negligence in keeping the car doors open. *Pullman Co. v. Pollock*, 69 Tex. 120.

Palace car company liable for theft of a purse containing \$165 left by passenger in his berth while washing his hands. *Pullman &c. Co. v. Matthews*, 74 Tex. 654.

The liability of a sleeping car company is neither that of a common carrier or an innkeeper, but it is liable for negligence in connection with the property of its passenger. *Stevenson v. Pullman Palace Car Co.*, (Tex. Civ. App.) 32 S. W. Rep. 335; *Belden v. Pullman Palace Car Co.*, 43 id. 22.

Where a sleeping car company sells a negress a berth to a designated point, but she is compelled by the railroad company to leave the sleeper before reaching the point, it is bound to furnish the same accommodations in some other car. *Pullman Palace Car Co. v. Cain*, 15 Tex. Civ. App. 503.

Rules of company, requiring windows and doors to be closed while at a certain station, were not complied with on the part of those in charge, and in consequence plaintiff's valise, which he had left by an open window while he left his seat, was stolen. Defendant was held liable. *Pullman Palace Car Co. v. Arents*, (Tex. Civ. App.) 66 S. W. Rep. 329.

Defendant was liable for injury to a sick person by being compelled to sit in a smoker, because of its failure to reserve a berth in a sleeper, as agreed by its ticket agent. *Pullman Palace Car Co. v. Nelson*, 22 Tex. Civ. App. 223.

1. A carrier of passengers for hire is bound to observe the utmost caution, and is responsible to them for such injuries received in the course of their transportation as might have been avoided or guarded against by his exercise of extraordinary vigilance, aided by the highest skill.

2. Such caution and vigilance extend to all the appliances and means used by him in transporting them. He must, therefore, provide cars or vehicles adequate, that is, sufficiently secure as to strength and other requisites, for their safe conveyance, and he is liable in damages if, by reason of the slightest negligence or fault in that regard, injury results to a passenger.

3. Passenger purchased from a railroad company a ticket over its line,

and, at the same time, from a palace car company, a ticket entitling him to a berth in one of its sleeping cars, constituting a part of the train of the railroad company. In the course of transportation he was injured by the falling of a berth in the sleeping car in which he was at the time riding. Held, that for the purposes of the contract with the railroad company for transportation, and in view of its obligation to use only cars that there were adequate for safe conveyance, the palace car company, its conductor and porter, were, in law, the servants and employes of the railroad company, and that the negligence of either of them, as to any matters involving the safety or security of passengers, was that of the railroad company. *Pennsylvania Company v. Roy*, 102 U. S. 451.

*Cleveland R. Co. v. Walroth*, 36 Ohio St. 401; *Louisville &c. R. Co. v. Katzenberger*, 16 Lea, (Tenn.) 380; *Pullman &c. R. Co. v. Gardiner*, 3 Penny. (Pa.) 78.

A female passenger is entitled to recover from palace car company for the indecent assault of one of its porters while on the car. *Campbell v. Pullman &c. R. Co.*, 42 Fed. Rep. 484.

No liability attaches to a sleeping car company for loss of passenger's money, except what is necessary for his wants and conveniences on the journey. *Barrott v. Pullman's Palace Car Co.*, 51 Fed. Rep. 796.

A palace car company is not a common carrier, and if a ticket agent selling tickets for both palace and ordinary cars refuse a palace car ticket to a passenger, the action is against the railroad and not the palace car company. *Lemon v. Pullman Palace Car Co.*, 52 Fed. Rep. 262.

A sleeping car company is liable in damages for the proximate results of an unlawful expulsion from its car of a delicate woman. *Mann Boudoir Car Co. v. Dupre*, 54 Fed. Rep. 646.

The duty resting on a sleeping car company is to use ordinary care to equip and maintain its cars and man them with competent servants. *Bull v. Pullman Palace Car Co.*, (U. S. C. Ct. S. D. N. Y.) 1 Am. Neg. Rep. 200.

A sleeping car company, though not a common carrier, owes its patrons, by virtue of the nature of the business, the duty of reasonable care. *Hughes v. Pullman Palace Car Co.*, 74 Fed. Rep. 499.

Plaintiff can not complain of an open ventilator window where he neither notifies defendant of his delicate condition, requests it closed or attempts to close it himself, which he could easily do. *Edmunson v. Pullman Palace Car Co.*, 92 Fed. Rep. 824.

A sleeping car company, by selling a berth in connection with a ticket over a certain route, virtually represents that the car will pass over the lines named on the ticket, so as to enable the holder to recover for the consequences of being expelled for failure to pay additional fare, where

a different line is pursued without notice to him. *Pullman's Palace Car Co. v. King*, 99 Fed. 380.

Where defendant did not know of the danger and there was nothing to put it on its guard, it was not liable for the murder of passenger while asleep. *Connell v. Chesapeake &c. R. Co.*, 93 Va. 44; s. c., 32 L. R. A. 792.

## XXI. Ferry Companies.

A ferryman occupying a position in the line of public travel, and holding himself out for general employment is a common carrier and liable as such for property carrier. *Wilson v. Hamilton*, 4 Oh. St. 723, 738; *Angell on Carriers* secs. 82, 130; *Story on Bailm.* sec. 496; 2 *Kent's Com.* 599; 3 *Barr.* 342; 5 *Mo.* 30; 1 *McCord*, 444; 1 *Nott & McCord*, 19; 18 *Ala.* 96; 11 *Leigh*, 521; 12 *Ill.* 344; 10 *M. & W.* 161.

If the owner takes upon himself the care of his property in transit, and it is lost by his carelessness, the carrier is not responsible. *Wilson v. Hamilton*, 4 Oh. St. 723; *White v. Winnisimmet Co.*, 7 *Cush.* 155; *Willoughby v. Horridge*, 16 *Eng. L. & Eq.* 437; and it is sometimes held that the ferry company is not liable as a carrier for property that traveler retains in his custody. *Wyckoff v. Queens Co. Ferry Co.*, 52 *N. Y.* 34.

The owner of a young, timid and easily frightened horse is not guilty of negligence in taking it on a ferry-boat, where it was injured by the negligence of the ferry company. The defendant used a defective end chain and the frightened horse backed against it, when it broke; hence the injury. *Clark v. Union Ferry Co.*, 35 *N. Y.* 485, aff'g judg't for pl'ff.

It is negligence for a ferry company to order teams to leave a boat before the adjustment of the bridge is complete. In consequence of the crowd moving off the boat plaintiff was obliged to step upon the stringer separating the passage from the carriage-way. Plaintiff's witness testified that before the bridge was adjusted to the level of the boat, and while it was some eight or nine inches above it, defendant's employes dropped the chain and ordered the teams to pass off. A horse, attached to a heavily laden cart, in attempting to do so, struck his foot against the bridge and fell; the shaft of the cart struck plaintiff and broke his leg. *Hazman v. L. & I. Co.*, 50 *N. Y.* 53, aff'g judg't for pl'ff.

Distinguishing, *King v. Manchester R.*, 12 *Jur.* (N. S.) 525.

A ferry company is not a common carrier as to property retained by the passenger in his custody, but undertakes against defects and insufficiency of the boat and lack of skill of those in charge, and the owner of the horse must use ordinary care.

The barrier chain was not up, or not sufficient, and a horse was scared

dations for the receiving and landing of passengers, which are reasonably sufficient for that purpose, and for the protection of persons using the means provided, in a reasonable way. (*Blackman v. London &c. R. Co.*, 17 W. B. 769; *Rigg v. Manchester &c. R. Co.*, 12 Jur. [N.S.] 525; *Cornman v. Eastern Counties R. Co.*, 4 H. & N. 781; *Crafter v. Metropolitan R. Co.*, L. R., 1 C. P. 300; *Dougan v. Champlain Tr. Co.*, 56 N. Y. 1; *Crocheron v. North Shore &c. Ferry Co.*, id. 656; reversing 1 N. Y. Sup. Ct. [T. & C.] 446; *Cleveland v. New Jersey Steamboat Co.*, 68 N. Y. 306). It is not enough to make out a case of negligence, to suggest that additional precautions would have prevented the accident. *Loftus v. Union Ferry Co.*, 22 Hun, 33, granting new trial after verdict for plaintiff; s. c. aff'd, 84 N. Y. 455.

The defendant's boat came with such force against bridge of slip that the plaintiff was thrown down and his leg crushed between the boat and the bridge. He was standing in front of the forward chain with other passengers. Question was for jury. *Gannon v. Union Ferry Co.*, 29 Hun, 631; reversing nonsuit.

The same strict rule of care as to the safety of passengers on the trains of a railroad applies in the maintenance of a ferry in connection therewith. Where plaintiff was injured by the breaking of a portion of the machinery of a ferry bridge, while standing in the passageway of the bridge used by passengers, it raised a presumption of negligence against defendant. *Bartnik v. Erie R. Co.*, 36 App. Div. 246.

By permitting passengers to habitually use a roadway designed for vehicles, a ferry company undertakes the duty of keeping it in a reasonably safe condition for such use. Plaintiff recovered for injury by a projecting splinter. *Wolf v. Brooklyn Ferry Co.*, 54 App. Div. 67.

Where appliances are of the best known kind, the liability may not attach. *Duke v. Ferry Co.*, 9 Misc. 268.

A passenger on a ferry boat may recover for injuries received from the negligence of a stranger. *Louisville &c. Ferry Co. v. Nolan*, 135 Ind. 60.

Ferry company not liable for loss of horse when owner of the same failed to use ordinary care and left him unattended, when the sound of the bell on the boat frightened him, and he jumped overboard. *White v. Winnisimmet Co.*, 61 Mass. 155.

Leaving the cabin of a ferry boat, as it approaches the wharf, and standing between the cabin and the end of the boat, was not *per se* negligent. *Peverly v. Boston*, 136 Mass. 366.

*Wheelock v. Boston &c. R. Co.*, 105 Mass. 203; *Barden v. Boston &c. R. Co.*, 121 id. 426; *Northern v. Grand Trunk R. Co.*, 125 id. 99.

An educational corporation running a ferry boat cannot escape from

liability for negligence on ground of *ultra vires*. *Nims v. Mt. Hermon*, 160 Mass. 177.

Ferry company not bound to prevent, by railings, runaway teams from passing over a boat when not in use. *Evans v. Goodrich*, 46 Minn. 388.

No negligence attaches to ferry company by reason of slippery condition of boat due to existing snowstorm, when no further act of negligence is alleged. *Fearn v. West Jersey Ferry Co.*, 143 Pa. St. 122.

Ferry company must have boat and landing in a state of repair. *Cohen v. Hume*, 1 McCord, (S. C.) 439.

*Mills v. Johnson*, 1 McCord, (S. C.) 157.

Stepping over a guard chain of a ferry boat, according to custom, although contrary to rules, if not restrained by the management was not *per se* negligent. *The Manhasset*, 19 Fed. Rep. 430.

Ferry company not liable for injuries caused by guard chain when passenger attempted to leave the boat by the horse gangway instead of the one adapted for passengers. *Graham v. Penn. R. Co.*, 39 Fed. Rep. 596.

Town operating ferry boat liable for injuries caused by failure to warn passengers against danger, where all parts of boat do not come close to wharf. *Drake v. Dartmouth*, 25 Nova Scotia, 177.

## XXII. Medical Treatment of Passengers.

Does a steamship company owe duty to its passengers of furnishing a surgeon?

Where by law or by choice the company has become bound to furnish such officer, reasonable care and diligence in the selection of a person reasonably competent is all that is required, and it is liable only for a neglect of that duty. It is not compelled to select and employ the highest skill and longest experience. (*Chapman v. Erie R. Co.*, 55 N. Y. 579; *McDonald v. Hospital*, 120 Mass. 432; *Secord v. St. Paul R. R. Co.*, 18 Fed. Rep. 221.)

Accordingly held, that in the absence of evidence of any carelessness or negligence on the part of the steamship company, in its selection of a surgeon for one of its steamships, it was not liable for the negligence of the surgeon. *Laubheim v. DeKoninglyke*, 107 N. Y. 228, aff'g judgt for def't.\*

The "passenger's act of 1855," required every *English* ship to carry a duly qualified medical practitioner, and its owner or charterer to provide, for the use of the passengers, a supply of proper and necessary medicines for their medical treatment during the voyage, properly

\* NOTE.—The injury complained of in this case occurred prior to the passage of the act of congress of August 3, 1882, imposing upon steamboat companies the duty to provide physicians or surgeons.

packed and placed under the charge of a medical practitioner "to be used at his discretion."

In an action against a corporation of Great Britain for injuries alleged to have been sustained by the plaintiff, as passenger on one of the steamers, from taking calomel furnished by the steamer's physician in response for a request for quinine, it appeared that the defendant had advertised the statement that an experienced surgeon was carried on board each ship and all medicines were supplied *gratis*. The defendant assumed no duty or liability beyond that imposed by the statute and was not liable for the errors and mistakes of the physician, if so duly furnished.

These views find support in *Laubheim v. DeK. N. S. Co.*, 107 N. Y. 229, and in *O'Brien v. Cunard S. S. Co.*, 154 Mass. 272. Evidence of confusion, disorder, etc., in the surgery after the steamer went to sea and after the medicines were put in the charge of the physician, properly packed and labeled, did not justify a finding of negligence on the part of the defendant. *Allen v. State S. S. Co.*, 132 N. Y. 91, rev'g judg't for pl'ff.

Distinguishing *Van Wyck v. Allen*, 69 N. Y. 62; *Thomas v. Winchester*, 6 id. 397.

A railroad company has discharged its duty to a passenger injured in a collision if it provides a surgeon of ordinary skill, and is not liable for the negligence of such surgeon. *Secord v. St. Paul &c. R. Co.*, 18 Fed. Rep. 221.

*O'Brien v. Cunard S. S. Co.*, 154 Mass. 272.

### XXIII. Baggage.\*

The carrier is bound to carry, under the same rules, that govern the carriage of goods, and without extra compensation beyond the passage money, baggage, consisting of such clothing, money and articles of usual personal adornment, as may be reasonably proper for the purpose of the whole journey, undertaken, and may, to the same extent, as in the carriage of goods, limit and extend its liability concerning same.

A contract by a common carrier of passengers, to carry a passenger from one place over his line or route to another, obliges the carrier not only to carry the passenger, but a reasonable amount of personal baggage, although nothing is received or paid for this carriage of the baggage in addition to that paid for the carriage of the passenger. *Angell on Carriers*, sections 107, 108, 109; *Hawkins v. Hoffman*, 6 Hill 586; *Powell v. Myers*, 26 Wend. 591; *Orange Co. Bank v. Brown*, 9 id. 85;

\*NOTE.—This topic would properly be treated under the head of "Common Carrier of Goods," which see for more extended citation of authorities.

Camden & Amboy R. R. Co. v. Burke, 13 id. 611; Hollister v. Nowlen, 19 id. 239; Cole v. Goodwin, id. 251; *Merrill v. Grinnell*, 30 N. Y. 544.

A common carrier is an insurer of safe transportation of baggage to the same extent as if delivered to it for freightage. *Parsons' Mercantile Law*, 226, 227; 2 Kent's Com. 602; *Hollister v. Nowlen*, 19 Wend. 234; *Cole v. Goodwin*, id. 251.

*Merrill v. Grinnell*, 30 N. Y. 594; *Hannibal R. Co. v. Swift*, 12 Wall. 262; *Powell v. Meyers*, 26 Wend. 591; *Bennett v. Dutton*, 10 N. H. 481; *Dexter v. Syracuse &c. R. Co.*, 42 N. Y. 326.

Common carrier is liable only for gross negligence, where he carries baggage without reward. *Rice v. Illinois Central R. Co.*, 22 Ill. App. 643.

#### (a). WHERE BAGGAGE MAY BE CARRIED.

A carrier by water furnishing staterooms to passengers owes the duties of an innkeeper to them and is an insurer as to the safety of their goods. *Adams v. New Jersey S. B. Co.*, 151 N. Y. 163; s. c., 34 L. R. A. 682; aff'g s. c., 9 Misc. 25.

Citing *Crozier v. Boston &c. Steamboat Co.*, 43 How. Pr. 466; *Macklin v. New Jersey Steamboat Co.*, 7 Abb. Pr. 229.

A carrier, whose constant employment was the transportation of property and passengers upon its railroad, for hire, agreed with the plaintiff to furnish the motive power to draw his cars, laden with his property, coal, over its railroad, the plaintiff being bound to load and unload the cars, and to furnish brakeman, under the control of defendant's conductor. Defendant was liable as a common carrier for injury to cars of plaintiff and his property therein. *Mallory v. Tioga R. Co.*, 39 Barb. 488.

From opinion.—“If a servant of the owner happen to go with the goods, but there is no intention to let him meddle with the care of them, the carrier will be answerable for loss. Marsh Ins. B. 1, ch. 7, sec. 5; *Abbott on Ship.*, part 3, ch. 2, sec. 3; *Story on Bail.*, sec. 533. So if a man travel in a stage coach, and take his portmanteau with him, although he has his eye upon the portmanteau, yet the carrier is not absolved from his responsibility, but will be liable if the portmanteau be lost. Per Chamber, J., in *Robinson v. Dunmore*, 2 Bos. & Pull. 418. It was said by Bronson, J., in *Hollister v. Nowlen* (19 Wend. 237) that ‘when there is no fraud the fact that the owner accompanies the property cannot affect the principle on which the carrier is charged in case of loss.’ He likened the liability of a carrier to that of an innkeeper, and cited the remark in *Calve's Case* (8 Co. 63) that ‘it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber in which he lodged and that he left the door open; but he ought to keep the goods and chattels of his guests therein safely.’

See *Hannibal R. v. Swift*, 12 Wall, 262.

A passenger may take his light baggage, like a valise, into the state-room of a steamboat and the rule of the company prohibiting the same is not reasonable. *Macklin v. N. J. Steamboat Co.*, 7 Abb. Pr. N S. 241; 9 Am. L. Reg. 239.

*S. P. Midgett v. Bay State Steamboat Co.*, 1 Daly, 151; *Gore v. Norwich &c. Co.*, 2 id. 254; *Contine v. L. & S. W. R. Co.*, L. R. 1 C. B. 54; *Talley v. Great Western R. Co.*, L. R. 6 C. P. 44; but see this doctrine criticized in *The R. E. Lee*, 2 Abb. U. S. C. I. R. & Dist. Ct. Rep.

Plaintiff was not negligent in leaving his locked hand bag in a state room, the door of which he closed, while he went for the key to the room. *Lincoln v. New York &c. S. S. Co.*, 30 Misc. Rep. 752.

In *McKee v. Owen*, 16 Mich. 115, the court was divided as to whether steamship proprietors furnishing staterooms were liable for loss of baggage to the extent of innkeepers.

Where articles in a valise were lost, which might have been carried, instead, in passenger's trunk, the court would not rule as a matter of law that they could not be recovered for. *Hampton v. Pullman &c. R. Co.*, 42 Mo. App. 134.

*Carpenter v. N. Y., N. H. & H. R. Co.*, 124 N. Y. 53.

From opinion.—“Money necessary for the payment of the expense of a journey undertaken, which is carried in the trunk of passenger is part of his baggage, and if lost while in the custody of a carrier for transportation it is liable. *Merrill v. Grinnell*, 30 N. Y. 594; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 id. 167; 2 Red. R. R. 59. But carriers do not undertake to carry and safely deliver the effects of travelers not delivered into their custody, and it cannot be held that money in a passenger's clothing worn during the day and placed under his pillow at night is in the custody of the corporation which carries and furnishes travelers with berths in sleeping coaches. *Lewis v. N. Y. Sleeping Car Co.*, 143 Mass. 367; 2 Rorer R. R. 887.

The mere proof of the loss of money by a passenger while occupying a berth does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given.”

The owner of a vessel is not an innkeeper and is not liable in the absence of some particular breach of duty, where baggage is not delivered into its exclusive custody. *The Humboldt*, 97 Fed. Rep. 656.

See, also, “Bailments—Innkeepers,” *ante*, p. 135.

If goods be placed in a vehicle without knowledge of the carrier he is not liable. *Lovett v. Hobbs*, 2 Show. 127.

*Leigh v. Smith*, 1 Carr. & P. 640; *Packard v. Getman*, 6 Cow. 757.

#### (b). ARTICLES OF UNUSUAL VALUE IN POSSESSION OF PASSENGER.

Under the ordinary contract for carriage, a carrier of passengers makes no contract and enters into no duty, as to articles of property of



great value, forming no part of a passenger's ordinary baggage or personal equipment. *Weeks v. N. Y., N. H. & H. R. R. Co.*, 72 N. Y. 50, aff'g 9 Hun, 669, setting aside verdict for plaintiff.

See *First National Bank v. R. Co.*, 20 Ohio St. 259; through negligence of defendant's servant bridge gave way and money on his person was burned; no recovery.

A passenger on a steamboat retired to his berth and placed under his pillow a gold watch with \$70, a gold pen and pencil, railroad tickets worth \$7, and a silver watch, and all were stolen. It was error to charge that, if the jury found it negligent to have the *money* in the berth, the plaintiff could not recover, as it implied that he could not even recover for the *articles* stolen. So, it was error to charge, that the plaintiff had a right to carry these articles with him on the trip, but not to retain them in his berth, as the jury might have inferred, that the plaintiff had no cause of action because he took such articles in his berth. *Dunn v. N. H. Steamboat Co.*, 58 Hun, 461, reversing order denying new trial after verdict for defendant.

Where \$4,000 in gold was carried in satchel no recovery for that sum was allowed. *Doyle v. Kiser*, 6 Ind. 242.

*Pfister v. R. Co.*, 70 Cal. 169; *Steamboat Palace v. Vanderpool*, 16 B. Mon. 302.

Carrier held not liable for baggage while in care of passenger. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

#### (c). WHERE THE PASSENGER AND BAGGAGE, PROPERLY CHECKED, GO BY DIFFERENT TRAINS.

Where baggage in charge of the wife went on a different train from her husband and was lost, recovery was had. *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116.

See *Logan v. R. Co.*, 11 Rob. L. A. 24.

A railroad company may reasonably require that baggage be checked only to the point of destination named in the ticket, though a passenger is permitted to stop over, and is not liable for the consequences of its refusal to unload it at an intermediate point. *Howell v. Grand Trunk R. Co.*, 92 Hun, 423.

Defendant was not liable for mere negligence in the loss of trunks of a passenger of another line carried on its road under the mistaken but *bona fide* assumption that they belonged to a passenger of its own. *Beers v. Boston &c. R. Co.*, 67 Conn. 417; s. c., 32 L. R. A. 535.

See, also, *Wald v. Pittsburg &c. R. Co.*, 162 Ill. 545; s. c., 35 L. R. A. 356; *Edson v. Pennsylvania R. Co.*, 70 Ill. App. 654.

In the absence of other direction, a carrier impliedly undertakes to ship baggage on the same train as the passenger and is liable for an inexcusable failure to do so, though the loss itself happened through an act of God. *Wald v. Pittsburg &c. R. Co.*, 162 Ill. 545; s. c., 35 L. R. A. 356.

A carrier is not liable for baggage ordered to be forwarded by the passenger subsequently to his passage, unless negligence be shown. *Wilson v. Grand Trunk R. Co.*, 56 Me. 60.

Where a passenger put his baggage, consisting of merchandise, on train, unchecked, intending himself to go but was left, and went by the next train, he did not recover in the absence of gross negligence. *Collins v. Boston &c. R. Co.*, 10 Cush. 506.

Where a passenger put his baggage on a steamboat, unchecked, and without delivery to any one, and was left by accident, the carrier was not liable. *Wright v. Caldwell*, 3 Mich. 51.

A carrier should use suitable care of property left by mistake in the cars. *Bonner v. DeMondosa*, (Tex. App.) 4 Wills. 392; s. c., 16 S. W. 976.

A carrier does not impliedly undertake to ship baggage on the same train as the passenger, but only within a reasonable time after it is received and checked. *St. Louis &c. R. Co. v. Ray*, 13 Tex. Civ. App. 628.

#### (d). NATURE AND EXTENT OF LIABILITY.

A carrier is liable for the negligent loss or injury to baggage while being delivered by its porters, although gratuitously to a cab engaged by the plaintiff, and for baggage delivered to such porters for shipment. *Wharton on Negligence*, sec. 612, note.

Baggage delivered to carrier the night before the train was to leave, was lost, and carrier was held liable. *Lake Shore &c. R. Co. v. Foster*, 104 Ind. 293; s. c., 2 West. R. 299.

See same heading under "Common Carrier of Goods."

Where plaintiff purchased a ticket only for the purpose of having his trunk sent by rail, defendant was not even a warehouseman, but only a gratuitous bailee liable only for gross negligence. *Marshall v. Pontiac &c. R. Co.*, 126 Mich. 45.

Though one intends to become a passenger, his valise, left with the company before he purchases his ticket, not for immediate transportation but as an accommodation, is left with it in the capacity of a warehouseman. *Murray v. International S. S. Co.*, 170 Mass. 166.

The question of delivery to the carrier was for the jury, where there was a doubt as to its having been put in the usual and proper place. *McKibbin v. Great Northern R. Co.*, 78 Minn. 232.

Baggage was left with carrier to be shipped at a certain time, unless directions to the contrary were received. Liability of carrier arises when the time set has arrived, and no orders have been received. *Illinois Central R. Co. v. Troustine*, 64 Miss. 834.

A rule refusing to receive baggage into the baggage room until after ticket is purchased is unreasonable. *Coffee v. Louisville &c. R. Co.*, 76 Miss. 569; s. c., 45 L. R. A. 112.

The duty as to baggage is incident to the duty as carrier of the passenger. *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287.

Where defendant had taken charge of the baggage it was immaterial that it had been unloaded on a union platform. *Texas & R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144.

Deck passengers cannot recover for loss of baggage kept in their own possession. *Defrier v. The Nicaragua*, 81 Fed. Rep. 745.

Where trunk was taken to the station at night 12 hours before train time with knowledge of defendant's rule not to check trunks until thirty minutes before such time, it was left to the jury to say whether the delivery was within a reasonable time. *Goldberg v. Ahnapee &c. R. Co.*, 105 Wis. 1; s. c., 47 L. R. A. 221.

#### (e). WHAT IS BAGGAGE.

A proper sum of money for the whole of contemplated journey is a proper part of baggage, and also for sickness and accident; it may be such sum as a reasonably prudent man would think necessary. In Massachusetts the question is definitely settled by the case of *Jordan v. The Fall River Railroad Company* (5 Cush. 69). The sum of \$325, placed in the trunk of a traveler, which was lost upon a very short journey, was recovered. The judgment was sustained by the court. Similar decisions have been made in Ohio, Tennessee, Illinois and Indiana, and in the Court of Common Pleas of the city of New York (9 Humphrey 61; 11 id. 419; 10 Ohio 145; *Davis v. Michigan Central Railroad Co.*, 22 Ill. 278; *Doyle v. Keyser*, 6 Ind. 242. *Duffy v. Thompson*, 4 E. D. Smith 178.) \* \* \*

A right of action against a common carrier to recover the value of property entrusted to him, is assignable; and the assignee may sue in his own name. *Merrill v. Grinnell*, 30 N. Y. 594.

**From opinion.**—"Baggage embraces such articles as it is usual for persons to carry with them whether from necessity or for convenience or amusement. Tools used by the passenger in his trade (*Davis v. Cayuga & Susquehanna R. R. Co.*, 10 How Pr. 330) gems (Same, and *Van Horne v. Kermit*, 4 E. D. Smith 453); a watch and such jewelry as is usually worn about the person (*McCormick v. Hudson River R. Co.*, 4 E. D. Smith, 182) money for traveling expenses (*Duffy v. Thompson*, 4 E. D. Smith 178; *Orange Co. Bank v. Brown*, 9 Wend. 85; *Grant*

v. Newton, 1 E. D. Smith 95; Angell on Carriers sec. 115; Jordan v. Fall River R. R. Co., 5 Cush. 69; Parsons' Mercantile Law, 225; Weed v. Saratoga R. R. Co., 19 Wend. 534). \* \* \* \* \*

In *Orange County Bank v. Brown*, 9 Wend. 85, it was said by Justice Nelson that money is not a part of a passenger's baggage, beyond such sum as is reasonably necessary for his expenses. Even this doctrine was repudiated by *Bronson, J., in Hawkins v. Hoffman*, 6 Hill 586.

The Common Pleas of New York, in *Duffy v. Thompson* and *Grant v. Newton*, cited, *supra*, has held, in conformity with the dicta in the 9 Wend. 85 and the 19 Wend. 534, that money for necessary expenses may be recovered for as part of a passenger's baggage."

Baggage may include a sum of money which is reasonable and proper for the purposes of the journey. *Adams v. New Jersey Steamboat Co.*, 151 N. Y. 163; s. c., 34 L. R. A. 682.

Where a commercial traveler's sample trunk, checked as excess baggage, is of such a character as to be capable of giving notice that its contents was merchandise and not baggage, it was for the jury to say whether plaintiff had had notice thereof and carried it as freight, though the salesman, in getting it checked, gave no information as to what it contained. Failure of a company's own servants, to exact the release required by its rules in case of trunks containing merchandise was no defense. *Trimble v. New York &c. R. Co.*, 162 N. Y. 84; aff'g s. c., 39 App. Div. 403; s. c., 48 L. R. A. 115.

The sum of \$285 contained in traveler's trunk was recovered for, and the reasonableness of the amount was rightly left to the jury. *Weed v. Saratoga &c. R. Co.*, 19 Wend. 534.

*Dictum*, in *Bank v. Brown*, 9 Wend. 85; *dictum*, in *Hawkins v. Hoffman*, 6 Hill, (N. Y.) 586; *Jordan v. Fall River R. Co.*, 5 Cush. 69; *Bomar v. Maxwell*, 9 Humph. (Tenn.) 621; *Johnson v. Stone*, 11 id. 419. But see *Davis v. Michigan Southern &c. R. Co.*, 22 Ill. 278; *Duffy v. Mason*, 4 E. D. Smith (N. Y.) 178; *Grant v. Newton*, 1 id. 195; *Jones v. Vorhees*, 10 Ohio 180; *Dunlap v. International &c. R. Co.*, 98 Mass. 371.

But, as to carrying money in trunk, see *Weed v. R. Co.*, 19 Wend. 534; *Hickox v. R. Co.*, 31 Conn. 281.

Carrier is not chargeable with the knowledge of an agent that a valise contains only merchandise, where it was acquired in a purely personal transaction with a passenger. *Central &c. R. Co. v. Joseph*, 125 Ala. 313.

By receiving trunks knowing them to contain more than ordinary baggage, a carrier assumes responsibility therefor. *Kansas City &c. R. Co. v. McGahey*, 63 Ark. 344; s. c., 36 L. R. A. 781; *Lake Shore &c. R. Co. v. Hochstim*, 67 Ill. App. 514.

By transporting luggage, which an expressman knows is that of a rail-

road passenger, he takes the risk of the contents being suited to her condition. *Hebard v. Riegel*, 67 Ill. App. 584.

In the absence of a custom permitting officers to perform such service, defendant was not liable for the loss of telegram received by them under a promise to deliver it to a passenger. *Davies v. Eastern Steamboat Co.*, 94 Me. 379.

Delivery of six trunks of large and uniform size as those of a ladies' tailor and the baggage master's remark in receiving them that he knew the owner as the dressman who had imported dresses, were evidence for the jury to affect the railroad company with notice of their contents when checked as baggage. *Amory v. Wabash R. Co.*, (Mich.) 90 N. W. Rep. 22.

Carriers of passengers insure safe delivery of such baggage as is by custom ordinarily carried by travelers. *Oakes v. Northern Pac. R. Co.*, 20 Ore. 392.

*Shaw v. Northern Pac. R. Co.*, 41 N. W. (Minn.) 548.

Where carrier, with knowledge of its character, receives and checks merchandise it is liable for it as baggage. *Toledo & C. R. Co. v. Dages*, 57 Oh. St. 38.

Verdict for defendant was set aside, where the porter accepted plaintiff's valise and deposited it in the station as baggage with knowledge that its owner was a traveling merchant. *Snaman v. Missouri & C. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1003.

Baggage includes jewelry and money to pay expenses of the journey. *Mexican & C. R. Co. v. Ware*, (Tex. Civ. App.) 60 S. W. Rep. 343.

Baggage is not confined to wearing apparel, but extends to other articles of convenience for the journey. *Runyan v. Central R. Co.*, 61 N. J. L. 537; s. c., 43 L. R. A. 284

The following have been held to be baggage:

Tools used by the passenger in his trade. *Davis v. Cayuga & C. R. Co.*, 10 How Pr. 330.

See *Brock v. Gale*, 14 Fla. 423; *Porter v. Hildebrand*, 14 Pa. St. 129.

Gems. *Van Horn v. Kermit*, 4 E. D. Smith (N. Y.) 453.

A revolver. *Davis v. Michigan Southern & C. R. Co.*, 22 Ill. 278.

*Woods v. Devin*, 13 Ill. 746.

Clothing, traveling expenses, a few books, a lady's jewelry for dressing, an opera glass. *Toledo & C. R. Co. v. Hammond*, 33 Ind. 379.

Salesman's catalogue, used by, and necessary to, him, in his business. *Staub v. Kendrick*, 121 Ind. 226.

*Gleason v. Goodrich & Co.*, 32 Wis. 85.

Articles of necessary convenience. *Jordan v. Fall River R. Co.*, 5 Cush. 69.

*Macklin v. N. J. S. Co.*, 7 Abb. Pr. (N. S.) 238.

A watch. *Jones v. Vorhees*, 10 Oh. 145.

*McCormick v. Hudson R. R. Co.*, 4 E. D. Smith (N. Y.) 181. See *Mad River &c. R. Co. v. Fulton*, 20 Oh. St. 318; *Dunn v. N. H. &c. Co.*, 58 Hun, 461; *American Contract Co. v. Cross*, 8 Bush. (Ky.) 472.

Jewelry of wife and for her use. *McGill v. Rowand*, 3 Pa. St. 451.

Jewelry for a lady's use and a part of her wardrobe.

Wharton on Negligence, sec. 607, and cases cited.

Manuscript music. *Texas &c. R. Co. v. Morrison Faust Co.*, 20 Tex. Civ. App. 144.

Surgical instruments, in the case of a surgeon in the army traveling with troops. *Hannibal R. Co. v. Swift*, 12 Wall. 262.

Cloth not yet made into garments, but procured for purpose of manufacture into wearing apparel. *Mauritz v. N. Y. &c. R. Co.*, 23 Fed. Rep. 765.

*Dexter v. Sy. &c. R. R. Co.*, 42 N. Y. 326. (But this does not cover goods purchased for one not a member of passenger's family.) *Wilson v. Railroad Co.*, 56 Me. 60.

Manuscripts. *Hopkins v. Westcott*, 6 Blatch. C. Ct. 64.

Bedding of emigrant in his trunk. *Ouimit v. Henshaw*, 35 Vt. 605.

#### (f.) WHAT IS NOT BAGGAGE.

Defendant was not liable for loss of *merchandise* received by it under guise of baggage, unless the transportation was knowingly undertaken, and not then, if the passenger knowingly violated the company's rules. The inference that baggagemaster knew contents of trunks was not justified. *Sloman v. Great Western R. Co.*, 6 Hun, 546, rev'g judg't for pl'ff; s. c., rev'd, 67 N. Y. 208 on the ground that it was properly submitted to the jury.

**From opinion.**—"Railroad companies are not liable for the loss of merchandise delivered to them, under the guise of baggage, for transportation along with a passenger. *Belfast &c. R. R. Co. v. Keys*, 9 H. of L. Cases 556; *Cahill v. London & N. W. R. R. Co.*, 13 C. B. (N. S.) 818; *Hudston v. Midland R. R.*, 4 Q. B. (L. R.) 366; *Smith v. B. & M. R. R.*, 44 N. H. 325; *Collins v. Boston & M. R. R.*, 10 Cush. 506; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill 586; *Dexter v. Syracuse R. R. Co.*, 42 N. Y. 326; *Stimson v. Conn. River R. R.*, 98 Mass. 83. They are liable, if they knowingly undertake to transport merchandise, in trunks or boxes which have been received by them for transportation, in passenger trains, unless the agent who receives the packages for that purpose, violates a regulation of the company by so doing, and the passenger or owner of the goods has notice of such regulations. Cases, *supra*; *Gt. Northern*

*R. R. v. Shepherd*, 8 Exch. 30; *Buther v. Hudson River R. R.*, 3 E. D. Smith 571; *Brooke v. Pickwick*, 4 Bing. 218; *Stoneman v. Erie Railway*, 52 N. Y. 429.

*Paintings* were shipped as baggage, without advising the defendant's agent of the nature of the same. The United States Statutes, that notice in writing of such paintings, when shipped as baggage, shall be given the master, &c., and that they be entered on the bill of lading thereof, or carrier should not be liable, was held to be a bar to the loss of the same. *Wheeler v. Oceanic S. Nav. Co.*, 52 Hun, 75, affirming nonsuit; s. c., rev'd, 125 N. Y. 155 on ground that defendant was still liable as bailee for hire for negligence.

Distinguishing *Curtis v. Delaware, L. & W. R. Co.*, 74 N. Y. 116; *Fairfax v. N. Y. C. & H. R. R. Co.*, 73 id. 167, and not following *Golden v. Romer*, 20 Hun, 438.

*Samplers* carried by a commercial traveler do not constitute baggage, nor is a carrier liable for the loss thereof, although the baggagemaster was informed of the contents of the trunk, in the absence of evidence, that the baggagemaster had authority or had been accustomed to exercise the authority to contract for the carriage thereof. A contract made by the traveler did not inure to another person, who owned the goods. *Talcott v. Wabash R. Co.*, 66 Hun, 456, rev'g judg't for the pl'ff.

Distinguishing *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429; *Sloman v. Great Western R. Co.*, 67 id. 211, as compensation, aside from the passage tickets, was received in these cases.

Defendant was not liable for plaintiff's trunk, transported free, under the false representation that he was still an employé of defendant, where it was stolen from station platform, where it was left by his direction. *Burkett v. New York & C. R. Co.*, 24 Misc. 76.

Recovery is limited to personal baggage and does not extend to costly merchandise. *Simpson v. New York & C. R. Co.*, 16 Misc. 613.

Knowledge that it was against the rule of the company to receive jeweler's sample cases, prevented recovery and the receipt by the agent in violation of the rule did not constitute a waiver. *Weber Co. v. Chicago & C. R. Co.*, 113 Iowa, 188.

Loss of samples of merchandise carried by traveler as personal baggage without the knowledge of the carrier, is not chargeable to him. *South Kans. R. Co. v. Clark*, 52 Kans. 398; *Missouri & C. R. Co. v. Liveright*, 7 Kan. App. 772.

A railroad company may refuse to carry merchandise as personal luggage. *Collins v. R. Co.*, 10 Cush. 606.

The *Ionic*, 6 Blatchf. (U. S.) 538; *Dibble v. Brown*, 12 Ga. 217; *Smith v. R. Co.*, 44 N. H. 325; *Stimson v. R. Co.*, 98 Mass. 83; *Hannibal R. v. Swift*, 12 Wall. 262.

Where trunks contained *merchandise*, carrier was liable only for gross negligence. *Clark v. R. Co.*, 139 Mass. 423.

*Haines v. Chicago &c. R. Co.*, 29 Minn. 160; *Hamburg &c. Packet Co. v. Gattman*, 127 Ill. 598; *Blumantle v. R. Co.*, 127 Mass. 322; *Stimson v. Conn. R. R. Co.*, 98 Mass. 83; *Cosmelly v. Warren*, 108 Mass. 146; *Southern Kans. R. Co. v. Clark*, 52 Kans. 398; *Cahill v. London &c. R. Co.*, 13 C. B. (U. S.) 818; *Belfast &c. R. Co. v. Keys*, 9 H. L. Cas. 556; *Collins v. Boston &c. R. Co.*, 10 Cush. 506; *Chamberlain v. West Trans. Co.*, 45 Barb. 223.

A passenger, by the terms of his ticket, entitled to "personal passage" cannot take groceries into the car with him. The company cannot take away his packages. Its remedy is to eject him with his packages. *Bullock v. Delaware &c. R. Co.*, 60 N. J. L. 24; s. c., 37 L. R. A. 417.

In an action on the contract for failure to carry by one excluded by force from defendant's train because he was carrying packages of merchandise, it was held that, if the defendant company had, previous to the denial of the admission of the plaintiff to their cars, for a long time acquiesced in, and made accommodation for, the carriage of small packages of merchandise of its passengers as personal baggage, so as to lead them to accept and rely upon its attitude in that respect as one of its regulations, it could resume its rights under the law only after reasonable notice of its rescission of the regulation so made. It could not suddenly enforce the right resumed without reasonable notice as against passengers who were in good faith traveling in reliance upon the previous regulation, and ignorant of, and unprepared for any change in it. *Runyan v. Central R. &c.*, 61 N. J. L. 542.

As to the proof required to establish such custom, see *Runyan v. Central R. &c.*, 65 N. J. L. 228; *id.*, 64 N. J. L. 67.

Where merchandise is shipped under the guise of baggage, plaintiff cannot recover, in the absence of gross negligence amounting to wilfulness. *Toledo &c. R. Co. v. Bowler &c. Co.*, 63 Oh. St. 274.

Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practiced or attempted upon its employes, it assumes with reference to the property the liability of a common carrier of merchandise. *Hannibal R. Co. v. Swift*, 12 Wall. Rep. 262, aff'g judg't for pl'ff.

**From opinion.**—"A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it was not pretended that any was attempted. Where a railroad company received for transportation in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is prac-



ticed or attempted upon its employes, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travelers for their personal use and convenience; such quantity depending, of course, upon the station of the party, the object and length of the journey, and many other considerations. *But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage.* \* \* \* On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travelers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character, in the case of a surgeon in the army traveling with troops, may be properly regarded as part of his baggage. He may be required to use these instruments at any time, and must, accordingly have them near his person where they can be had upon a moment's notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff."

If agent checked with knowledge of contents, liability of common carrier attaches. *Jacobs v. Tutt*, 33 Fed. Rep. 412.

*Central Trust Co. v. Wabash &c. R. Co.*, 39 Fed. Rep. 417; *Winter v. Pac. R. Co.*, 41 Mo. 503; *Chicago &c. R. Co. v. Conklin*, 3 Pac. 762; *Oakes v. Northern Pac. R. Co.*, 26 Pac. Rep. (Ore.) 230; *Great Northern R. Co. v. Shepherd*, 8 Exch. 30.

A traveling salesman, who would not certify that his trunk contained only baggage, as the rules provided, could not recover for failure to transport the same. *Norfolk &c. R. Co. v. Irvine*, 84 Va. 553.

The following articles were held not to be baggage:

Books purchased for another. *Horwitz v. Hamburg-American Packet Co.*, 27 Misc. 814.

Traveling salesman's samples are not baggage within a statute pre-

scribing rates for excess baggage. *Kansas City &c. R. Co. v. State*, 65 Ark. 363; s. c., 41 L. R. A. 333.

Feminine jewelry carried for transportation by a man. *Metz v. California &c. R. Co.*, 85 Cal. 329.

*Chicago &c. R. Co. v. Boyce*, 73 Ill. 510.

Agreement to transport bedding will not render carrier liable for wearing apparel said to have been wrapped up in the bedding. *Savannah &c. R. Co. v. Collins*, 77 Ga. 376.

Articles carried for sale. *Spooner v. Hannibal &c. R. Co.*, 23 Mo. App. 403.

A bicycle. *State v. Missouri P. R. Co.*, 71 Mo. App. 385.

Jewelry carried as personal baggage and not known to company's agent. *Humphreys v. Perry*, 148 U. S. 627.

Knowledge of the carrier that a trunk contains jewelry renders him liable for its loss. *Central Trust Co. v. Wabash &c. R. Co.*, 35 Fed. Rep. 147.

Deeds and documents, to be used by passenger, an attorney, on a trial to which he was bent, not luggage. *Phelps v. N. W. R. Co.*, 19 C. B. (N. S.) 321.

A "spring horse," weighing seventy-eight pounds, and measuring forty-four inches in length, is not personal luggage. *Hudston v. Midland R. Co.*, L. R. 4 Q. B. 366.

Articles intended for household use. *Macrow v. Great Western R. Co.*, L. R. 6 Q. B. 612.

*Connolly v. Warren*, 106 Mass. 146.

Nor bullion, money or plate concealed in baggage (beyond that necessary for traveler's expenses), without notice to the carrier. Wharton on Neg. sec. 608.

Citing *Jordan v. R. R.*, 5 Cush. 69; *Bell v. Drew*, 4 E. D. Smith, 59; *Phelps v. R. R.*, 19 C. B. N. S. 321; *Bomer v. Moxwell*, 9 Humph. 621; *Orange Co. Bk. v. Brown*, 9 Wend. 85; *Weed v. R. R.*, 19 Wend. 534; *Davis v. Mich. R. R.*, 22 Ill. 278; *Jones v. Preston*, 1 Tex. L. J. 66.

A package of nails and a letter file. *Runyan v. Central R. Co.*, 61 N. J. L. 542.

#### (g). WHEN LIABLE AS CARRIER AFTER ARRIVAL.

A passenger, with the consent of the agents of a carrier, checked his baggage to a station, intermediate to that of his departure and the one to which he purchased his ticket, upon the understanding that the baggage would be all right until he claimed it on the following morning. The baggage was destroyed by fire at such intermediate station during the night. A finding for the plaintiff was sustained, that the defendant

After the liability of a railroad company as a common carrier ceases, its strict responsibility as a carrier changes to a modified liability, such as that of warehouseman, and it can be charged with responsibility for the loss of the trunk only on the ground of negligence. *Mortland v. Philadelphia & Reading Railroad Company*, 81 Hun, 473.

**From opinion.**—"The trial court, rightly, as we think, dismissed the complaint after the plaintiff had rested her case. Defendant's liability to the plaintiff as common carrier was in force from the time the trunk was checked at Wilmington until its arrival at Mahoney City, and for such a time thereafter as should afford plaintiff reasonable opportunity to remove it. *Roth v. Buffalo & S. L. R. R. Co.*, 34 N. Y. 548; *Fanner v. Buffalo & S. L. R. R. Co.*, 44 id. 505; *Burnell v. N. Y. C. R. R. Co.*, 45 id. 184; *Mattison v. N. Y. C. R. R. Co.*, 57 id. 552.

As to what constitutes a reasonable time cannot be measured by any arbitrary and inflexible rule, but depends upon the circumstances of each case. When, however, the facts are undisputed, what is a reasonable time is a question of law for the court. *Hedges v. H. R. R. R. Co.*, 49 N. Y. 223.

In this case the facts were not in dispute. Only one witness was sworn, and he was the baggage manager of the theatrical company. His testimony required the court to hold that before the trunk was taken from the possession of the defendant the plaintiff had had a reasonable time within which to remove it, because the person who was authorized to act for her, and for that purpose had possession of the check, removed from the same car other baggage, and could have removed this had he desired to do so. For his own convenience, or for that of his principal, or both, he elected not to take it away, but to leave it in the custody of the defendant.

The baggagemaster of the defendant suggested that he leave it in the car, and told him where the car would be located, and that the defendant had a night watchman.

Plaintiff's representative acquiesced in the suggestion, delivered the check, with others, to the baggagemaster, and the car was closed. Thus was terminated defendant's relation to the plaintiff as common carrier of her trunk.

*Deninny v. N. Y. & N. H. R. Co.*, 49 N. Y. 546, is not an authority for the plaintiff. The decision in that case was predicated on a finding of fact that 'The plaintiff caused the demand to be made for said trunk and contents within a reasonable time, and made reasonable efforts, and within a reasonable time, to demand and procure the trunk and contents; and, that the defendant refused and neglected to deliver the contents of said trunk.'

We have not overlooked the case of *Burgevin v. N. Y. C. & H. R. R. R. Co.*, 69 Hun, 479. The proposition of law which the court asserts to be controlling in such a case as this accords with the views we have expressed, but under the peculiar circumstances of that case it was held that plaintiff called for his trunk within a reasonable time after its arrival at the station.

It does not follow, of course, that because defendant's responsibility as a carrier ceased, the company could thereafter leave it uncared for. It still owed a duty to the plaintiff in respect to the trunk. The strict responsibility of a carrier had been changed to a modified liability such as that of a warehouseman. As a warehouseman, the defendant could be charged with responsibility for the loss of the trunk only on the ground that it was negligent and failed to dis-

charge in full the duty it owed to the plaintiff as such. But upon the question of negligence the record is silent. Hence no question was presented for the consideration of the jury.

The judgment should be affirmed."

Liability even as a warehouseman was not established, where, to the passenger's knowledge, the baggagemaster checked merchandise without taking bond of release, in violation of the company's rules, though at the request of a co-employé. *Weber Co. v. Chicago &c. R. Co.*, 113 Iowa, 188.

Defendant as warehouseman is not bound to keep an absolutely burglar proof storeroom but only one reasonably well secured. *Kansas City &c. R. Co. v. Patten*, 3 Kan. App. 338.

Liability of carrier with respect to personal baggage that has reached its destination, but has not been called for within a reasonable time over night, is that of bailee for hire. *Nealand v. Boston &c. R. Co.*, 161 Mass. 67.

*Vineberg v. R. Co.*, 13 Ont. App. 91; *R. Co. v. Boyce*, 72 Ill. 510; *R. Co. v. Fairclough*, 52 id. 106; *Bartholomew v. R. Co.*, 53 id. 227; *R. Co. v. Hardway*, 17 Ill. App. 321; *Hoeger v. R. Co.*, 63 Wis. 100; *Ouimit v. Henshaw*, 35 Vt. 605; *R. Co. v. Mahan*, 8 Bush, (Ky.) 184; *Mote v. R. Co.*, 27 Iowa, 22; see, also, *Goodbar v. Wabash R. Co.*, 53 Mo. App. 434; *Galveston &c. R. Co. v. Smith*, 81 Tex. 479; *Rome &c. R. Co. v. Wimberly*, 75 Ga. 316.

The liability of a railroad company for the burning of a passenger's trunk left in the baggage room over night, after he had arrived at his destination, was that of warehouseman. *Nealand v. Boston &c. R. Co.*, 161 Mass. 67.

A statute limiting liability as carrier, held not to apply to liability as warehouseman. *Wiegand v. Central R. &c. Co.*, 75 Fed. Rep. 370.

#### (i). WHO MAY RECOVER FOR LOSS OF.

The baggage was for the use of the plaintiff, his wife and child. The wife and child went on the train with the baggage and the plaintiff on another train. This did not effect recovery. *Curtis v. Delaware, L. &c. R. Co.*, 74 N. Y. 116.

From opinion.—"The baggage being, to some extent, at least, for the benefit of the members of the plaintiff's family, who were on the train, and had paid their fare, the case is distinguishable from one where the plaintiff's servant, or some other person, who has no interest in the baggage, takes his place, or even where the plaintiff himself follows the baggage on a later train. See *Wilson v. Grand Trunk Co.*, 56 Me. 60; *Becher v. Great Eastern Co.*, 5 L. R. (Q. B.) 241; *Stimson v. Conn. River Co.*, 98 Mass. 83; *Belfast and Ballymena Co. v. Keys*, 9 H. of L. Cases, 556. Held, also, that the plaintiff could recover for the paraphernalia of his wife which he had given her. As the evidence did not show any gift of same to wife, the right of the husband was paramount and should be up-

held. Where there is a gift, the wife may bring an action, but otherwise the husband must sue. *Rawson v. Penn. R. Co.*, 2 Abb. (N. S.) 220; s. c. on appeal, 48 N. Y. 212; *Rodgers v. Long Island R. R. Co.*, 1 N. Y. S. C. Rep. (T. & C.) 396."

Where a trunk was checked as excess baggage for extra compensation with notice that it was the sample trunk of a commercial traveler, without exacting release of liability, in violation of a rule of the company unknown to the passenger, it was not necessary, to enable his employer to recover, that the latter's ownership should have been disclosed. *Trimble v. New York & C. R. Co.*, 162 N. Y. 84; s. c., 48 L. R. A. 115; *affg*, 39 App. Div. 403.

Where merchandise of an employer was included in baggage without a carrier's knowledge, the latter was only a gratuitous bailee, liable only in case of gross or willful negligence. *Cattaraugus Cutlery Co. v. Buffalo & C. R. Co.*, 24 App. Div. 267.

Where plaintiff made no effort to secure the removal of his trunk or to request that the station remain open to give an opportunity to have it removed, but went away and made no inquiry till the following morning, defendant's duty as carrier ceased upon the closing of the station, for the night, though only ten minutes after the train left; thereafter it was only liable as warehouseman. *Graves v. Fitchburg R. Co.*, 29 App. Div. 591.

Railroad company was only chargeable as warehouseman, where one left his baggage on the platform until morning, though he arrived after eleven o'clock at night and there was no one there to remove it for him. *Kansas City & C. R. Co. v. McGahey*, 63 Ark. 344; s. c., 36 L. R. A. 781.

Where a passenger was informed when her trunk would arrive, defendant was not liable, where she failed to call for it for a week, during which time it was stored in a reasonably safe place. *Indiana & C. R. Co. v. Zilly*, 20 Ind. App. 569.

Carrier held not liable for loss of firm goods checked as baggage of a member of the firm. *Pennsylvania R. Co. v. Knight*, 58 N. J. L. 287.

Citing *Weed v. Saratoga & C. R. Co.*, 19 Wend. 534; *Stimson v. Connecticut River R. Co.*, 98 Mass. 83; *Dunlap v. International Steamboat Co.*, id. 371; *Alling v. Boston & C. R. Co.*, 126 id. 121; *Becker v. Great Eastern R. Co.*, L. R., 5 Q. B. 241.

#### (j). FAILURE TO DELIVER ON DEMAND.

The failure of a carrier to deliver baggage to a passenger, when duly demanded, is *prima facie* evidence of negligence, even though the baggage is checked through and delivered to the connecting line; and if passenger does not call for it within a reasonable time, the carrier must use the care of a warehouseman, and, if it contracted to carry the baggage

through, it is liable for default of connecting carrier. *Carey v. Cleveland & Toledo R. R. Co.*, 29 Barb. 35; *The Norway Plain Co. v. B. & M. R. R.* 1 Gray 271, and cases cited.

The carrier should keep the baggage until called for or disposed of according to law, and use ordinary care therefor. *Burnell v. N. Y. C. R. Co.*, 45 N. Y. 184, aff'g judg't for pl'ff.

As the baggage was not delivered when demanded, and no satisfactory explanation given of its non-delivery, without regard to the question whether the defendant became liable as a common carrier, it incurred the responsibility of a warehouseman, or that of an analogous character, and was liable for negligence. *Curtis v. D., L. & W. R. Co.*, 74 N. Y. 116.

*Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; Story on Contracts, secs. 446, 447, 448; 2 Parsons on Contracts, 140; Angell on Carriers, 267; Hathorn v. Ely, 28 N. Y. 78; *Burnell v. N. Y. C. R. Co.*, 45 id. 184, 186.

The plaintiff purchased a ticket of G. T. R. Co. and checked baggage from Montreal to New York. The defendant received and deposited the baggage in its room at New York, but it could not thereafter be found nor accounted for. The defendant was *prima facie* liable. *Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; reversing 5 J. & S. 516, and directing judg't for pl'ff.

#### (k). EXTRA COMPENSATION.

The defendant's agent refused to check baggage without a ticket, and while the plaintiff went for a ticket the trunks were put aboard and an extra charge for baggage was demanded and refused. The plaintiff demanded the trunks and he was refused, because they were covered by other trunks and train would be delayed while recovering them; they were taken by the train and burned. An action for *conversion* was sustained. Defendant did not occupy the position of common carrier of the plaintiff, and could not avail itself of any of the rules which have been established as to the liabilities of common carriers of passengers. Whether or not the qualification of the refusal to deliver, because train would be delayed, was reasonable in this case, was a question of fact for the consideration of the jury under proper instructions from the judge. *Mount v. Derick*, 5 Hill 455; *Watt v. Potter*, 2 Mason, 80; *Alexander v. Southey*, 5 Barn. & Ald. 247; *Delano v. Curtis*, 7 Allen 470; see *McEntee v. N. J. S. Co.*, 45 N. Y. 34; *McCormick v. P. C. R. Co.*, 49 N. Y. 303, rev'g judg't for pl'ff.

Criticising and limiting *Jones v. N. & C. Co.*, 50 Barb. 193.

By checking a trunk with knowledge that it contains merchandise for which extra charge is made, the defendant becomes liable for its safety

as a carrier of freight, not baggage. *Trimble v. New York &c. R. Co.*, 162 N. Y. 84; s. c., 48 L. R. A. 115; aff'g s. c., 39 App. Div. 403.

The plaintiff, in a former action for loss of baggage, was not entitled to recover for merchandise checked in a separate box and paid for as "merchandise" as it was not baggage. *Dexter v. Syracuse R. R. Co.*, 42 N. Y. 326. Held, entitled to recover for same in second action. *Millard v. M., K. & T. R. Co.*, 20 Hun, 191. aff'g judg't for pl'ff; s. c. aff'd, 86 N. Y. 441.

Where no provision is made in the contract for *overweight*, and passenger was charged, and paid for, extra weight, such an arrangement was an independent agreement, and liability for loss could not be avoided by reason of limitations in the written contract. *Glovinsky v. Cunard Steamship Co.*, 4 Misc. (N. Y.) 388; s. c. aff'd, 6 Misc. 388.

## CONTRACTS.

A pledgor, through false representations, pledged property to another: the latter got no title and the pledgor was not negligent in not ascertaining the truth of the representation. *Meud v. Bunn*, 32 N. Y. 275.

Where a party signs a paper, and is misled as to the character and extent of an obligation, it is no defense as to one not a party to the fraud. *Western N. Y. L. Ins. Co. v. Clinton*, 66 N. Y. 331.

Citing *McWilliams v. Mason*, 31 N. Y. 294; *Casoni v. Jerome*, 58, id. 315, 321.

Where a party who has *actually executed* an instrument is chargeable with negligence in attaching his signature, he is liable to an innocent third party who has acted to his prejudice upon the faith of the instrument, although the signature was procured by fraud. *Page v. Krekey*, 137 N. Y. 307, rev'g judg't for pl'ff.

(In this case the defendant signed a letter directed to the plaintiff, guaranteeing that one "T." was a good tanner, honorable and straightforward, and that if the plaintiff would send him hides to be tanned that "T." would not convert or misappropriate them, and that the defendant would guarantee that they should, if not purchased by "T." be delivered to a certain firm. The defendant was intoxicated when he signed the paper, was unable to read it, was ignorant of its contents and signed it upon the false representation that it was an application for a license. In reliance upon this the plaintiff shipped "T." certain hides for which "T." did not properly account. The question was submitted to the jury whether the defendant, in signing the paper, *observed proper care and caution*, or was chargeable with neglect, and the plaintiff recovered. It was held that, if the defendant actually signed the paper, though induced to do so by fraud, if he was chargeable with negligence, he was liable to an innocent party, who acted to his prejudice upon the faith of the instrument upon the equitable rule that, where one of two innocent parties must suffer, he who has put it in the power of a third person to commit the fraud must sustain the loss. *McWilliams v. Mason*, 31 N. Y. 294; *Western &c. Co. v. Clinton*, 66 id. 326; *Powers v. Clarke*, 127 id. 417; *Casoni v. Jerome*, 58 id. 315; *Baylies on Sureties and Guarantors*, 214; *Burge on Suretyship*, 218. If the instrument had been negotiable paper, the defendant's liability to the plaintiff would depend upon the question of negligence, and there was no sound reason for the application of the different rule in this case. *Chapman v. Rose*, 56 N. Y. 137; *Whitney v. Snyder*, 2 Lans. 477; *National Exchange Bank v. Veneman*, 43 Hun, 241; *Fenton v. Robinson*, 4 id. 252. The judgment



was reversed upon the ground that the court erred in excluding evidence offered to fortify the defendant's testimony that he could not read.)

A party cannot evade a provision of a contract he failed to notice at the time of execution. *Consolidated &c. Storage Co. v. Atlantic Trust Co.*, 24 App. Div. 172.

Widow, inexperienced in business, bought fluctuating securities from bank, represented by its president, pretending to act in her interest in securing an investment, as first class. Contract set aside. *Carr v. National Bank &c. Co.*, 43 App. Div. 10; aff'g s. c., 23 Misc. 368.

So where the judgment debtor's agent, by fraud, obtained the judgment creditor's power of attorney to cancel a judgment, taking advantage of the latter's mental and physical helplessness. *Ballard v. Chicago &c. R. Co.*, 70 Mo. App. 108.

If false representations as to the value of articles could have been discovered by reasonable care, vendor cannot have damages therefor. *Kennedy v. Crandall*, 3 Lansing, 1.

*Smith v. Countryman*, 30 N. Y. 681.

A married woman gave notes and chattel mortgage on her separate property to secure payment of goods, whereof bill of sale was made in her name without her authority. She claimed that she did not read papers. She was negligent and liable. *Flower v. Trull*, 1 Hun, 409.

In the absence of actual fraud, a party cannot complain of terms of an instrument he executed without reading. *Terry v. Mutual Life Ins. Co.*, 116 Ala. 242.

See, also, *Lewis v. Dunlap*, 5 Pa. Super. Ct. 625; *Ruby v. Enig*, 12 York Leg. Reg. 174; *Sloan v. Courtenay*, 54 S. C. 314; *Clack v. Wood*, 14 Tex. Civ. App. 400.

Monomania on subject matter of contract vitiates it. *Dommick v. Randolph*, 124 Ala. 557.

Contract of sale prepared by a proposed lessee was signed by a woman, aged, illiterate and infirm, in belief that it was a lease as agreed. She did not have it read to her, but trusted the lessee to prepare it in accordance with oral agreement. Instrument set aside. *Moore v. Copp*, 119 Cal. 429.

When the facts are within the knowledge of both parties and there is no fiduciary relation, expressions of opinion as to title do not amount to fraud or deceit. *Choate v. Hyde*, 129 Cal. 580.

A mortgagor was not allowed to complain of erasures and changes in a chattel mortgage he executed without reading. *Dingle v. Trask*, 7 Colo. App. 16.

A contract executed by one while intoxicated was set aside. *Hale v. Stery*, 7 Colo. App. 165.

See, also, *Rogers v. Warren*, 75 Mo. App. 271; *Boner v. Meyer*, 11 York Leg. Reg. 58; *Wells v. Houston*, 23 Tex. Civ. App. 629; *Hauter v. Tolbard*, 47 W. Va. 258.

Weakness of mind not amounting to imbecility will not vitiate a contract in absence of fraud. *Nance v. Stockburger*, 111 Ga. 821.

See, also, *Shea v. Murphy*, 164 Ill. 614.

Reformation was refused as to a note so executed as to be an individual and not a corporate note, when individual liability was in fact demanded and promised. *Hackemack v. Wiebrock*, 71 Ill. App. 71; s. c. aff'd, 172 Ill. 98.

An instrument under seal is valid unless it appears that fraud has induced the signing of an instrument not intended. *Resser v. Corwin*, 72 Ill. App. 625.

See, also, *North v. Stevenson*, 71 Mo. App. 429, (a receipt).

Negligence of a vendee in failing to examine the records, did not bar relief for the actual fraudulent misstatements of the vendor as to location of land. *Rohrof v. Schultz*, 154 Ind. 183.

Plaintiff was unable to read without glasses. Defendant's agent filled in one amount, and read another when asked to read document. Plaintiff was not negligent. *Sawin v. Union &c. Asso.*, 95 Iowa, 477.

A party intending to guarantee only future indebtedness, refused to sign an instrument covering existing debts. The other party directed him where to make erasures that would eliminate this feature. There were, however, other provisions regarding it which a careful reading would have discovered. Failure to read it was negligence. *Reid &c. Co. v. Bradley*, 105 Iowa, 220.

But an illiterate man is not necessarily negligent in trusting another to reduce his oral agreement to writing. *Williams v. Hamilton*, 104 Iowa, 423.

See, also, *Nicol v. Young*, 68 Mo. App. 448.

Agreement to be liable for all cattle that escape from a certain pasture. construed to apply to an escape through negligence and not by an extraordinary storm. *Well v. Sutphin*, (Kan.) 68 Pac. Rep. 648; s. c., 64 Kan. 873.

Although a mistake of fact is caused by the negligence of one party, he may avail himself of it if the other can be relieved of any prejudice caused thereby. Storage company was permitted to stop a check paid for sack overlooked in a negligent search but afterwards found. *State &c. Bank v. Buhl*, (Mich.) 88 N. W. Rep. 471.

See, also, *Walker v. Conant*, 65 Mich. 195; *Pingree v. Gas Co.*, 107 id. 156; *Eberle v. Heaton*, 124 id. 205; *Hewitt v. Attick's Sons*, 15 Lanc. L. Rev. 240; *Alexander v. Brogley*, 62 N. J. L. 584; *Engman v. Taylor*, 46 W. Va., 669.

Reliance on expressions of opinion, easily verified, is not ground for relief. *Cornwall v. McFarland Real Estate Co.*, 150 Mo. 377.

Where one signs a document, he is conclusively presumed to have read its contents, in the absence of fraud. *Fivey v. Pennsylvania R. Co.*, (N. J. L.) 52 Atl. Rep. 472.

Mistake induced by fraud, was waived by permitting the performance of contract after discovery of the fraud. *Dellinger v. Gillespie*, 118 N. C. 737.

See, also, *Avondale Marble Co. v. Wiggins*, 12 Pa. Super. Ct. 577; *Rouzie v. Daingerfield*, 97 Va. 708; *Landreth Co. v. Schevenal*, 102 Tenn. 486; *Whitcomb v. Hardy*, 73 Minn. 285.

An executed contract cannot be avoided because its legal effect was misunderstood, though the mistake was mutual and might have been an excuse for non-performance. *Mitchell v. Holman*, 30 Or. 280.

Parties stipulated for the mining of coal, whereby the second party agreed to pay the first party a stipulated price per ton for the coal taken out. The second party mined under the land so negligently and left such insufficient support that the rock, earth and coal fell down into and ruined the mine, and the whole bed of coal was lost to the plaintiff. Held, that although there was no express stipulation in the contract against such a negligent destruction of the mine, it was to be implied, and that the plaintiff had a right of action upon this implied promise. *Sanderson v. Scranton*, 105 Pa. St. 472.

See "Bills, Notes, etc., Negligence in Executing," p. 166.

Or at least was not induced by the act of the other party. *Coates & Sons v. Early*, 46 S. C. 220.

See *Dewey v. Whitney*, 93 Fed. Rep. 533; aff'g s. c., 83 Fed. Rep. 325.

The fact that certain liens were overlooked in a contract of exchange subject to specified encumbrances, held not of itself ground of rescission. *McGregor v. Johnson*, (Tex. Civ. App.) 34 S. W. Rep. 407.

Contract was binding, though plaintiff made a mistake in figuring his estimates. *Brown v. Levy*, (Tex. Civ. App.) 69 S. W. Rep. 255; *Moffett & Co. v. Rochester*, 91 Fed. Rep. 28; rev'g s. c., 82 id. 256.

Where an ignorant and unlettered man seeks to get rid of a note and mortgage, on the ground that they were procured by fraud, and he did not understand them, he cannot have a different contract by parol, if it appears that the papers he signed were read and truly explained to him. *Selden v. Myers*, 20 How. (U. S.) 506.

See *Ellis v. McCormick*, 1 Hilt. 313; *Trambly v. Ricard*, 130 MASS. 261.

One will not be relieved of a mistake in making a contract, where it was due to negligence. *Pope v. Hoopes*, 90 Fed. Rep. 451.

Misrepresentations were no defense, where they were such that no intelligent man would have relied on them and their falsity was known before the contract was executed. *Beckley v. Riverside Land Co.*, (Va.) 23 S. E. Rep. 778.

## CONTRACTORS.

Where a person, exercising an independent employment, enters into a contract with another as an independent contractor, and not as a mere servant of the latter for the bestowal of his personal services according to the will of the latter, the doctrine of *respondeat superior* does not apply, and the contractor is alone liable for injuries arising from the negligence of himself or his servants, unless,

- (1) The act to be done is unlawful, or,
- (2) Is intrinsically dangerous, or the injury resulted necessarily from the nature of the work, and not from the lack of care or skill on the part of those executing it, or,
- (3) Unless there be a personal and immediate duty on the part of the contractee to prevent or use due care to prevent the act or condition from which the injury arose.

(In addition to these exceptions to the general rule confining the remedy to recovery against the contractor, it has been urged, and, indeed, held, that the contractee must exercise care in selecting the contractor. See discussion in March-April, 1895, Am. L. Rev. 229, citing *Norwalk &c. Co. v. Borough of Norwalk*, 63 Conn. 395, and *Berg v. Parsons*, 84 Hun, 60.

Such a doctrine, at present, furnishes no recognized exception to the rule, yet it must form a fundamental modification of it. It could not, in any just, legal sense, be considered that a boy or ignorant and inexperienced man could be engaged to do a dangerous work, so as to divest the contractee of liability. Hence, the question of negligence is involved in the engagement of the contractor. But the difficult inquiry relates to the degree of care that a contractee should employ. This would be somewhat proportioned to the danger of the undertaking; but, in general, if it were lawful to do the work at all, through the employment of a skillful contractor, so as to relieve the contractee, the latter should have the right, without subjecting himself to liability, to employ any person following for his vocation the particular employment involved, and holding himself out as competent therein. In such case, however, the conditions surrounding the proposed contractor might be such, or notice of his unfitness might be so particularly brought home to the contractee that the latter would be bound to use reasonable care to determine his competency, and if the research were made in good faith and with reasonable prudence, and resulted favorably to the contractor, the engagement of him should be justified.)

The contractor of a person, licensed to build a sewer, is liable for the failure to guard it with lights; although the license from the city provided, that the *licensee* should provide proper guards to be placed at the excavation and be answerable for any damage to persons injured, this did not enure to third person injured. Horses were driven into an open sewer. Licensee was not liable. *Blake v. Ferris*, 5 N. Y. 48, rev'g judg't for pl'ff.

See *Storrs v. City of Utica*, 17 N. Y. 107, *post*,

The city was held liable, where a person fell into an excavation in the street, against which the contractor had not stipulated to protect the public by barriers, and recovery over against the contractor was not permitted. *City of Buffalo v. Holloway*, 7 N. Y. 493, aff'g judg't sustaining demurrer.

This case would seem to hold the doctrine that the contractor would not be liable for omission to warn persons on street of an excavation by lights, guards or barriers, unless he contracted to do so, and that such duty rested solely on the city. It was assumed that the excavation was necessary.

The defendant was not liable for the negligence of a workman of a contractor, engaged by the defendant to do work. The fact that the work was to be conformed to directions to be given by the defendant was immaterial. Such arrangement applies only to the results of the work, and does not give control over the contractor or his workman. *Pack v. Mayor &c.*, 8 N. Y. 222, rev'g judg't for pl'ff.

The defendant was not liable for negligence of servants of the contractor to grade a street, where blasting was necessary, although to be done under the direction and to the satisfaction of the defendant's officers.

A horse was injured by a stone from a blast negligently sent off. *Kelly v. The Mayor &c. of New York*, 11 N. Y. 432, rev'g judg't for pl'ff.

A contractor was liable for the wrongful act of a sub-contractor, engaged to build houses; boards were placed over excavation on sidewalk and plaintiff fell through. *Creed v. Hartman*, 29 N. Y. 591, aff'g judg't for pl'ff.

The excavation was deemed a nuisance, and the action was not one of negligence, following *Congreve v. Smith*, 18 N. Y. 79.

Defendant, as contractor for repairs upon the canal, and legally bound to keep the same free from all obstructions to navigation, was liable for damages occasioned by negligently permitting obstructions to the navigation of the canal to continue.

Such cause of action is assignable, and the assignee can recover for the same in his own name. *Fulton Fire Insurance Co. v. Baldwin*, 37 N. Y. 648, overruling demurrer to complaint.

*McKee v. Judd*, 2 Kern. 622; *Waldron v. Willard*, 17 N. Y. 466; *Merrill v. Grinnell and others*, 30 id. 594.

"L." agreed to build an arch culvert for the defendant, for which the defendant should furnish the centers, but "L." being short of centers requested the defendant's foreman of carpenters to take down one from those already in use, during which removal, an employé under the carpenter was, by the negligence of "L." and the carpenter, killed. Defendant was not liable, as failure to perform contract was not the proximate cause of the injury. *Hofnagle v. N. Y. C. & H. R. R. Co.*, 55 N. Y. 608, rev'g judg't for pl'ff.

The defendant contracted with the state to keep a section of the canal in repair. The plaintiff's horse fell through a bridge. Chapter 577, Laws of 1867, sections 3 and 4, imposing duties on officers, as to manner of making repairs, did not excuse the defendant from keeping the section in repair, nor did the fact, that he did all that was ordered to be done. The repairs were at his peril and, under the contract, he was liable for all injuries. *French v. Donaldson*, 57 N. Y. 496, affirming 5 Lansing, 293, and judg't for pl'ff.

Citing *Conroy v. Gale*, 5 Lansing, 344; affirmed 47 N. Y. 665.

"A.," contractor to tow boats, hired a steamer to do it, under the management of its master. "A." was liable perhaps on the contract, but not on action based on the negligent management of the steamer, whereby a boat in tow was sunk. *Bissell v. Torrey*, 60 N. Y. 635, aff'g nonsuit.

A railroad corporation, which has let by contract the entire work of constructing its road, and had no control over those employed in the work, was not liable for injuries to a third person, occasioned by negligent acts in doing the work of those employed, such as blasting in such a manner as to throw rocks upon the land of another.

A party is not chargeable with the negligent acts of another, in doing work on his lands, unless he stands in the character of employer to the one guilty of the negligence, or unless the work as authorized by him would necessarily produce the injuries complained of, or they are occasioned by the omission of some duty incumbent upon him.

There is no distinction in this respect between an owner of real and of personal property, and the former is held to no stricter liability for the negligent use and management of his real estate, or of negligent acts upon it by others, than is the latter as to a similar use of his property. *McCafferty v. S. D. & P. M. R. Co.*, 61 N. Y. 178, aff'g judg't for def't.

Distinguishing *Storrs v. City of Utica*, 17 N. Y. 104; *Water Co. v. Ware*, 16 Wall. 566; *Hay v. Cohoes Co.*, 2 Comst. 159. See dissenting opinion by Dwight, C.

Where a contractor sub-lets a part of the work, the sub-contractor is alone liable for his own negligence. *Overton v. Freeman*, 11 C. B., 73 Eng. C. L. 687; *Burgess v. Gray*, 1 C. B., 50 Eng. C. L. 577; *Rapson v. Cubitt*, 9 M. & W. 710. But where the injury arises from the separate negligence of each, and the damage done by each cannot be distinguished, each is liable for the whole. *Van Steenburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Den. 495; *Partenheimer v. Van Order*, 20 Barb. 479; *Colgrove v. R. Co.*, 5 Duer, 382; 20 N. Y. 49.

Water ran into a house from an omitted waste pipe, which the sub-contractor should have put in, and a defective area was made by the

contractor. Both were liable. *Slater v. Mersereau*, 64 N. Y. 138, affirming 5 Daly, 445 and judg't for pl'ff.

See *Webster v. R. Co.*, 38 N. Y. 260.

The owner of land is not liable for the negligence thereon of a contractor or his servants. The negligent act of one person cannot be imputed to another, unless the relation of master and servant exists. *Reedie v. The London & Northwestern Railway Co.*, 4 Exch. 244; *Hobbit v. Same*, id. 253; *Pack v. The Mayor &c.*, 8 N. Y. 222; *Kelly v. The Mayor*, 11 id. 432; *Blake v. Ferris*, 1 Sold. 48.

The owner of machinery not dangerous in its nature loaned it to another, whereupon it became defective, and did injury. The owner was not liable. The defendant's derrick was loaned to one contracting with it to unload iron, and contractor's servant was injured by the contractor's negligent use of it. The presumption was that the contractor was to keep derrick in repair; and if defendant was to repair on notice, it would not be liable, at least, until notice was given. *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, reversing 4 Hun, 769 and judg't for pl'ff.

*Distinguishing Coughtry v. Globe &c. Co.*, 56 N. Y. 124.

The defendants hired "S." and "D." by a written contract, to take logs down the river and put them in the booms of the respective owners. The logs mingled with others and formed a jam and carried away the plaintiff's bridge. "S." and "D." were not servants of such owners, but independent contractors, and the owners were not liable. The undertaking was not *per se* dangerous to third parties, nor unlawful, as the legislature recognized the propriety of it. (Cases cited.) *Town of Pierpont v. Loveless*, 72 N. Y. 211, rev'g judg't for pl'ff.

Through the neglect of the contractor, in repairing upper stories of a building, some property of plaintiff in first story was injured. The contractors and not the owners were held liable, although owner employed superintendent to overlook work and give instructions to contractor. *Morton v. Thurber*, 85 N. Y. 550, aff'g judg't for def't.

The defendant contracted with the county for the services of convicts, rendered in the county building, under its control and with its appliances. The plaintiff was employed to repair the building and fell down the elevator shaft. The shaft and convicts were under control of prison authorities. Defendant was not liable. *Cunningham v. B. S. S. & L. Co.*, 93 N. Y. 481, affirming 25 Hun, 210, and nonsuit.

A contractor and the defendant stipulated that the former should pay all damages done in construction; contractor and not defendant was liable to the plaintiff injured by his horse, which was frightened by blasting.



If it was a prudent thing to notify persons in the vicinity of the blast before it was fired, then the contractors should have given such notice; but the duty to give it did not devolve upon the village. *Herrington v. Village of Lansingburgh*, 110 N. Y. 145, aff'g 35 Hun, 598, and nonsuit.

*Pack v. Mayor &c.*, 8 N. Y. 222; *Kelly v. Mayor*, 11 id. 432, and *McCafferty v. Spuyten Duyvil &c. Co.*, 61 id. 178.

Contractors, under the aqueduct commissioners of the city of New York, were held not liable for negligence of the brakeman of a dump car, on which the commissioner's inspector was injured, while riding into the tunnel, as they owed him no duty to furnish a car, and it was not material that he had ridden before. A different question would have arisen, if plaintiff had been injured by defendant's servants in the course of his duty, and while walking into tunnel. *Morris v. Brown*, 111 N. Y. 318, rev'g judg't for pl'ff, distinguishing *Byrne v. N. Y. Central R. Co.*, 104 id. 362; *Weinhald v. Acker*, 17 J. & S. 182; *Wendell v. Bonter*, 12 N. Y. 494; *Ackert v. Lansing*, 59 id. 646; *Beck v. Carter*, 68 id. 283.

The defendant, a contractor, to build one railway, left a car on the crossing of a track of another railway which crossed the first at grade. The engineer of a special train of the second railway ran into said car and jumped and was hurt. Defendant was liable. *Albert v. Sweet*, 116 N. Y. 364, aff'g judg't for pl'ff.

A municipal corporation is not liable for the injury of a third person, occasioned by the negligence of the servants of a contractor, where the municipality has no control over the manner of performing the work, but the contractor is liable in such case.

After the contractor had completed the sewer he was directed to raise the grade of a street, and the injury happened while doing this. Held, that the work was within the terms of the contract for the sewer, and that the municipality was not liable; also that this would have been the case if the work had not been done in connection with the former contract, as the city had nothing to do with the manner of its performance and had no control over the workman. *Charlock v. Freel*, 125 N. Y. 357, aff'g 50 Hun, 395, and judg't for pl'ff.

**From opinion.**—"In *Vogel v. Mayor &c.*, 92 N. Y. 18, Earl, J., said, referring to the cases of *Kelly v. Mayor &c.*, 11 id. 432, and *Pack v. Mayor &c.*, 8 id. 222: 'The doctrine was again announced that, to make the city liable, it must have the power to direct and control the manner of performing the *very work* in which the carelessness occurred.'"

The owner of a building employed a competent contractor to alter a building, in doing which a wall fell and did injury to a third person. Although the wall was weakened by age and decay the work was not

intrinsicly dangerous, and the owner was not liable and the contractor was. *Engel v. Eureka Club*, 137 N. Y. 100, aff'g nonsuit.

From opinion.—“But the exigencies of affairs frequently require that persons exercising independent employments should be entrusted by owners of property with its improvement, and in various relations and under varying conditions they are employed, not as servants, but as independent contractors to execute contracts, which the person, who secures their services, is unable to execute himself, or the execution of which he prefers to commit to another. The duty which the contractor owes, is defined by the contract or implied therefrom. In such cases the maxim *qui facit per alium, facit per se*, has no appropriate application, and there is no reason founded upon public policy, or the relations between the parties to the contract, which should subject one party to the contract to liability to third persons, for the negligence of the other. The principle that no liability on the part of the innocent party in such cases exists, has become settled doctrine of our law. It leaves an adequate remedy to the party injured, against the real author of the wrong. There are well understood exceptions to this rule of exemption. *Cases of statutory duty imposed upon individuals or corporations; or contracts which are unlawful, or which provide for the doing of acts which, when performed, will create a nuisance, are exceptions.* In cases of the first mentioned class the power and duty imposed cannot be delegated so as to exempt the person who accepts the duty imposed, from responsibility, and in those of the second class, exemption from liability would be manifestly contrary to public policy, since it would shield the one who directed the commission of the wrong. *Storrs v. City of Utica*, 17 N. Y. 104; *Lowell v. L. & B. R. R. Co.*, 23 Pick. 24; *Hole v. S. S. R. Co.*, 6 H. & N. 488; *Butler v. Hunter*, 7 id. 826. There are cases of still another class, where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or, in the language of Judge Dillon, is ‘intrinsicly dangerous,’ in which case, it is held that the party who lets the contract to do the act, cannot thereby escape from responsibility for any injury resulting from its execution, although the act to be performed may be lawful. 2 Dillon on Mun. Corp. sec. 1029, and cases cited. But if the act to be done may be safely done in the exercise of due care, although in the absence of such care injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care. *McCafferty v. L. D. & P. M. R. R. Co.*, 61 N. Y. 178; *Connors v. Hennessey*, 112 Mass. 96; *Butler v. Hunter*, *supra*.”

“H.,” the owner of a lot, contracted with defendants to build a house upon said lot and latter were “to be answerable for any damages \* \* \* to the property \* \* \* of any neighbor.” \* \* \* Defendants contracted with “D.” to do the necessary excavation, and to assume “all responsibility for any loss or damage to persons or property.” In blasting rock upon said lot, plaintiff’s house was injured. The evidence tended to show that the damage was caused by the negligent manner in which “D.” did the blasting. The court charged the jury that the defendants were liable. Error; the defendants were not liable for negligence of “D.,” that if there were no negligence and the injury was the inevitable result of the blasting, no one was liable (*Booth v. Rome & C. R.*

Co., 140 N. Y. 267), and if defendants' contract with "H." was a contract of indemnity, it imposed no liability, as "H." was not liable; that the clause referred to could not be considered as inserted for plaintiff's benefit, but if so, as she was not a party to the contract or in privity therewith, she could not enforce it. *French v. Vix*, 143 N. Y. 90, affirming order granting new trial to defendants.

See *Vroman v. Turner*, 69 N. Y. 280.

Inspection of boat by her owner and his direction to captain to collect bill for contract price under charter party before allowing freight to be unloaded, held not to show control by owner of such vessel, chartered with her crew, so as to make owner liable for negligence of crew in unloading. *Anderson v. Boyer*, 156 N. Y. 93; rev'g s. c., 13 App. Div. 258.

An owner of a city lot, held not liable to adjoining lot owner for negligence of independent contractor in blasting rocks. *Berg v. Parsons*, 156 N. Y. 109; s. c., 41 L. R. A. 391; rev'g s. c., 90 Hun, 267.

**From opinion.**—"There are certain exceptional cases where a person employing a contractor is liable, which, briefly stated, are: Where the employer personally interferes with the work, and the acts performed by him occasion injury; where the thing contracted to be done is unlawful; where the acts performed create a public nuisance; and where an employer is bound by a statute to do a thing efficiently and an injury results from its inefficiency. Manifestly, this case falls within none of the exceptions to which we have referred. There was no interference by the defendant. The thing contracted to be done was lawful. The work did not constitute a public nuisance, and there was no statute binding the defendant to efficiently perform it. In none of these exceptional cases does the question of negligence arise."

A municipal corporation held not liable for construction of an authorized public improvement under an authorized contract reserving only power of inspection and supervision. *Uppington v. New York*, 165 N. Y. 222, aff'g s. c., 44 App. Div. 630; see also s. c., 41 App. Div. 370.

**From opinion.**—"When a municipal corporation furnishes its own materials and makes a public improvement through agents selected by itself, with power to discharge them at will, and to direct them as to the details of the work, they are its servants, and the master who selects and controls them is liable for their negligence." \* \* \* "When, however, the city has power to let the work and it enters into contract with competent contractors, doing an independent business who agree to furnish the necessary materials and labor and make the entire improvement according to specifications prepared in advance, for a lump sum, or its equivalent, they are not the servants or agents of the city, but are independent contractors, and the city is not liable for their negligence, even when it reserves the right to change, inspect and supervise to the extent necessary to produce the result intended by the contract, provided the plan is reasonably safe, and the work is lawful, is not a nuisance when completed, and there is no interference therewith by municipal officers which results in injury. (*Berg v. Parsons*, 156 N. Y. 109; *Engel v. Eureka Club*, 137 N. Y. 100; *Butler v. Townsend*, 126 N. Y. 105; *Char-*

lock v. Freel, 125 N. Y. 357; Harrington v. Village of Lansingburgh, 110 N. Y. 145; Ferguson v. Hubbell, 97 N. Y. 507; Town of Pierrepont v. Loveless, 72 N. Y. 211; Kelly v. The Mayor, 11 N. Y. 432; Pack v. The Mayor, 8 N. Y. 222; Blake v. Ferris, 5 N. Y. 48; Reedie v. London &c. R. Co., 4 Exch. 244; Overton v. Freeman, 21 L. J. C. P. 52). Independence of control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not." \* \* \* "James J. Morgan & Co. were not servants employed in the business of a master and subject to his control as to all parts of the work, but were independent contractors engaged in making an entire improvement, free from control as to the manner of performance, although subject to instructions as to results."

See, also, White v. New York, 15 App. Div. 440.

A licensed public carman, who carries on business on his own account, with his own capital, etc., is not the servant of one employing him to carry merchandise, so as to make the latter liable for injuries caused by the negligent sliding of a barrel over a skid. *McMullen v. Hoyt*, 2 Daly. (N. Y.) 271.

See, for independent contractors: *Donovan v. Laing &c.*, 1 Q. B. 629; *Cohen v. Simmons*, 50 N. Y. S. R. 146; *Davison v. Shanahan*, 93 Mich. 486; *St. Johns &c. R. Co. v. Shalley*, 33 Fla. 397; *Mickoe v. Wood Mowing &c. Co.*, 60 N. Y. S. R. 282; *Chicago &c. R. Co. v. Ferguson*, 3 Colo. App. 414; *Maltbie v. Bolting*, 26 N. Y. Supp. 903; *Morgan v. Smith*, 159 Mass. 570; *McLoughlin v. N. Y. Lighterage Co.* 7 Misc. 119; *Wadsworth Howland Co. v. Foster*, 50 Ill. App. 513.

See, for servant, not independent contractor: *Waters v. Fuel Co.*, 55 N. W. (Minn.) 52; *Brannock v. Elmore*, 21 S. W. (Mo.) 451; *Williams v. Fresno Canal Co.*, 96 Cal. 14; *Donovan v. Oakland*, 36 Pac. (Cal.) 516; *St. Johns &c. R. Co. v. Shalley*, 33 Fla. 397.

If defects of canal bridge were such that the contractor might, by reasonable tests, have discovered them, the question of his negligence is for the jury. It need not be apparent to everybody, or notice brought home to the contractor. *Stack v. Bangs*, 6 Lansing, 262, reversing non-suit.

Citing *Robinson v. Chamberlain*, 34 N. Y. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Conroy v. Gale*, 5 Lansing, 344.

"L," defendant, contracted with "S," defendant, to remove rock, etc., from "L's" lot adjoining plaintiff's lot. "S" subcontracted to "M" who proceeded so negligently as to injure the plaintiff's stable. Such injury was not necessarily caused by the performance of the contract, but by "M's" negligence alone. "M" alone was liable. *King v. Livermore*, and others, 9 Hun, 298, affirming judgment for defendant; s. c., aff'd, 71 N. Y. 605.

Defendant established a grade and ordered sidewalks to conform to it. "A" employed a contractor to conform his walk thereto, and the contractor left one end 15 inches lower than the adjoining walk. A person tripped on it and was hurt. Defendant was not liable. Contractor was

not its agent or servant but that of "A." *Sweet v. Village of Gloversville*, 12 Hun, 302, aff'g nonsuit.

The defendant's contractor, to raise a house, left unguarded a ditch dug without the defendant's knowledge and unnecessarily. Plaintiff was hurt; defendant was not liable, and an owner of real estate under such circumstances is "not" liable for contractor's acts, unless,

1st. Contractor be his employé, or

2nd. Unless work authorized by contract necessarily produced injury, or

3rd. Unless injuries were by the omission of some duty. *Ryder v. Thomas*, 13 Hun, 296, aff'g judg't for def't.

Defendant employed a contractor to excavate for a cellar and build up the same to the level of the curb line, and with another contractor for the balance of the building. First contractor built a fence to keep passers-by from the excavation; the same blew over and injured the plaintiff, while passing. Defendant was not liable for the negligence of contractor. *Martin v. Tribune Association*, 30 Hun, 391, rev'g judg't for pl'ff.

**From opinion.**—"The contract was neither a trespass nor nuisance. The power to permit the defendants to remove the sidewalk and erect under it a vault was given by the legislature to the city authorities. The defendant obtained permission to build this vault, and neither trespass nor nuisance can be alleged against an act, which is permitted in the streets of the city of New York by legislative and municipal authority. *Congreve v. Smith*, 18 N. Y. 79; *People ex rel. Murphy v. Kelly*, 76 id. 475; *Irvine v. Wood*, 51 id. 224; *Crede v. Hartmann*, 29 id. 591.

The principle of those cases is not questioned in *Mairs v. Manhattan Real Estate Association*, 89 N. Y. 498. It was held in that case that permission to build a vault under the sidewalk gave no right to collect the water from the street, and throw it in the excavation and so upon a private owner adjacent. As to passengers upon the street the act done was lawful."

A contractor stipulating to hold city harmless "from all suits for negligence in doing work." is liable for negligence in doing extra work under contract, although done according to plan and under direction of city engineer. *Charlock v. Friel*, 50 Hun, 395, aff'g judg't for pl'ff; s. c. aff'd, 125 N. Y. 357.

Distinguishing *City of Buffalo v. Halloway*, 3 Seld. 493, and following *Kelly v. Mayor*, 11 N. Y. 432.

The defendant employed a firm to repair the truss of a bridge, and this firm contracted with others to do it. Through the negligence of the contractors, and not from the nature of the work itself, the plaintiff was hurt. *Wood v. City of Watertown*, 58 Hun. 298, rev'g judg't for pl'ff.

**From opinion.**—"If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangements, as to the terms and conditions, such employment is in the nature of an independent contract, which imposes upon the employé the responsibility, incurred by acts of negligence, caused by himself or those who are aiding him in the performance of the work. *Hexamer v. Webb*, 101 N. Y. 377, 383; see, also, *Blake v. Ferris*, 5 id. 48; *rack v. Mayor*, 8 id. 222; *Kelly v. Mayor*, 11 id. 432; *McCafferty v. S. D. & P. M. R. R. Co.*, 61 id. 178; *Ham v. Mayor*, 70 id. 462; *Town of Pierrepont v. Loveless*, 72 id. 211; *Devlin v. Smith*, 89 id. 470; *Herrington v. Village of Lansingburgh*, 110 id. 145."

The defendant, as contractor with the United States, blasted rock at Hell Gate in the East River and so shook the walls of the plaintiff's house at Astoria, L. I., as to do damage. The defendant was not liable, in the absence of proof of negligence. *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, rev'g s. c., 58 Hun, 358.

Where a person contracted to supply building with sprinkling system for extinguishing fires, and the system was erected so negligently as to allow the water to escape and do damage, an action therefor against such contractor for injury to tenants could not be defeated by showing that he had sublet such contract, as the injury was produced by a defect in the very article which the defendant had contracted to furnish, and damages were caused by the negligent act of the defendant's agent in letting water in the tank. *Butts v. J. C. Mackey Co.*, 72 Hun, 562.

Upon the trial of an action for personal injuries by a fall on a sidewalk, the plaintiff proved that the defendant owned and was in the actual possession of the property abutting on such sidewalk; that he had dug out cellars and caused the erection of certain buildings thereon; that he visited the premises every day while the excavations were going on, and sometimes half a dozen times each day; that he saw men at work excavating the sidewalk and putting in ashes, and was seen apparently giving directions to men at work both upon such buildings and sidewalk.

Held, that the plaintiff had established by *prima facie* evidence that the work was being done by the defendant or his agents, and that the negligence, if there was any, was chargeable to him.

Upon the trial of such action, the plaintiff having established *prima facie* that the negligence, if any, was that of the defendant or his agents, the defendant testified that the work was being done by an independent contractor; other witnesses testified to independent facts which might be regarded as corroborating the defendant's testimony, but, without his testimony, the evidence would not permit a finding that the work was being done by an independent contractor.

Held, that the court could not assume that it was proved that the work had been done by an independent contractor and dismiss the complaint

on the ground. *Fisher v. Rankin*, 78 Hun, 407; s. c. aff'd, 149 N. Y. 579.

Contractors held not liable for negligence of sub-contractors who worked directly from the plans and specifications without control as to materials and methods of work. Plaintiff was injured by the falling of a tie beam put in by the sub-contractors. *Wittenberg v. Friederich*, 8 App. Div. 433.

In a contract for construction of a retaining wall, a city reserved privilege of supervision and control of location of wall and materials used. The privileges were exercised and the city held liable for an encroachment by the wall and for the dropping of stones from it onto plaintiff's land. *Goldschmidt v. New York*, 14 App. Div. 135.

A street corporation constructing a bridge under a permit, granted on condition that it assume liability for the negligent performance of the work, was held liable for negligence of independent contractor in leaving a lumber pile unlit. *Weber v. Buffalo R. Co.*, 20 App. Div. 292.

So also where an owner was permitted to maintain a coal chute in the sidewalk on condition that he keep it properly guarded and it was left unguarded by an independent contractor. *Downey v. Low*, 22 App. Div. 460.

See, also, *Campion v. Rollwagen*, 43 App. Div. 117.

Where the contractor was to have entire charge of all the work and assume liability for accidents, no recovery was allowed against the owner for injuries from brick falling from the building into the street. *Wolf v. American Traction Soc.*, 25 App. Div. 98; s. c. rev'd, 164 N. Y. 30, for lack of proof as to who let the brick fall.

Owner of a building employed contractors to take it down. He was not liable for the negligence of the independent contractor in overweighting a floor with brick, causing it to give away. *Cullom v. McKelvey*, 26 App. Div. 46.

A lot owner employed a competent architect to plan a building and a contractor to build, subject to the inspection and supervision of the architect. The owner was not liable for the death of a workman in the collapse of the building, from a defect in the foundation, due to the negligence of the architect and contractor. *Burke v. Ireland*, 26 App. Div. 487. The judgment of the Appellate Court on a second appeal (47 App. Div. 428), to the effect that the duty to secure a firm foundation rested on the owner and that the architect was merely his agent for this purpose, was reversed by the court of last resort, which held that he was an independent contractor, (166 N. Y. 305).

Daily inspection and failure to employ architect to supervise the work did not make owner liable for negligence of a reputable contractor, em-

ployed to alter a building pursuant to adequate plans approved by the building department. *Hawke v. Brown*, 28 App. Div. 37.

Owner not liable for death of his watchman caused by fall of brick to sidewalk from the building he was watching, in the course of construction by independent contractor. He was familiar with the danger and had just warned passers-by. *Neumeister v. Eggers*, 29 App. Div. 385.

Owner of uncompleted building, not yet accepted from contractor but partially leased, held not liable for death of one agreeing to furnish room for lessee, struck by a falling tool while riding in an unprotected elevator. *Jehle v. Ellicott Square Co.*, 31 App. Div. 336.

Contractor was to furnish men and teams for a certain price and work under direction of defendant's foreman, who ordered him to blast out a tree whole. Defendant was liable for death of traveler struck by the tree on a public highway 412 feet distant. *Sullivan v. Dunham*, 35 App. Div. 342; s. c., aff'd, 161 N. Y. 290.

A contractor engaging to construct a section of an elevated road and sub-letting the foundation work to another who agreed to remove all surplus excavation, was held liable to a pedestrian for injuries from an unguarded heap of dirt upon the sidewalk. *Johnston v. Phoenix Bridge Co.*, 44 App. Div. 581; s. c. aff'd, 169 N. Y. 581.

So a railroad company, employing an independent contractor to dredge material from the front of a bulk-head and place it in the rear, was liable for the encroachment thereof on adjoining lands through loose crib work and sheet piling, for the tightness of which the contractor was not responsible. *Braisted v. Brooklyn &c. R. Co.*, 46 App. Div. 204.

A railroad company held liable for negligence of independent contractor in leaving an unguarded embankment in the highway while constructing a crossing. *Deming v. Terminal R. Co.*, 49 App. Div. 493.

See, also, *Higgins v. Brooklyn &c. R. Co.*, 54 App. Div. 69; *Wolf v. Third Ave. R. Co.*, 67 id. 605.

A competent truckman was employed to remove paper from one story in a building to another and left free to use his own methods. He employed and paid other men and sent in bill for the finished work. He was held to be an independent contractor. *Kueckel v. Ryder*, 54 App. Div. 252; s. c. aff'd, 170 N. Y. 562.

Owner is liable to servant of independent contractor for active but not passive negligence. *Callan v. Pugh*, 54 App. Div. 545.

A general contractor for a building, at request of sub-contractor, ordered a servant to run an elevator for them to move their material as they wished. It was for the jury to say whose servant he was. *Biehl v. Robinson*, 72 App. Div. 19.

Defendant employed a contractor to erect a building adjoining a pub-



lic street, for which the latter made an excavation running up to the sidewalk line. It was left unguarded, and plaintiff, a girl of 14, in attempting to walk over a narrow strip of rough snow next to it—the rest of the sidewalk being covered with slush and water,—fell into the excavation. Negligence and contributory negligence were for the jury. *Murphy v. Perlstein*, 73 App. Div. 257.

Plaintiff employed by Smith, a contractor, who was repairing defendant's building, was at the time of the injury engaged in pointing up the elevator shaft, and for that purpose was obliged to use the elevator as a scaffold. At the request of the contractor, defendant furnished one of its servants to operate the elevator according to plaintiff's directions. In doing so the elevator man failed to place the lever in the catch, which caused the elevator to start, causing plaintiff to fall and be injured.

The elevator man was not a servant of the contractor, but of the defendant, and the latter was, therefore, liable for the injury, and a direction of a verdict for the defendant was error. *Higgins v. Western Union Tel. Co.*, 8 Misc. 433. (N. Y. Superior Court.)

**From opinion.**—"It may be assumed that the only theory upon which the defendant can be held answerable for Algar's\* negligence is on the principle of *respondet superior*; and in order to make that applicable it must affirmatively appear that he was at the time acting as its servant doing its business subject to its orders and directions.

The relation of master and servant exists where one is bound to render service, and the other to pay the stipulated consideration. Did Algar *at the time* bear this relation to the defendant? or was he *pro hac vice* the servant of Smith, the contractor? The questions put must be subjected to the tests by which such relation is determined. *First*. It has been judicially said that 'he who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, stood in the relation of master to the person doing the act complained of.' *Quarman v. Burnett*, 6 M. & W. 500; *Blake v. Ferris*, 5 N. Y. 48; *Michael v. Stanton*, 3 Hun, 462; *Gerlach v. Edelmeyer*, 47 N. Y. Super. Ct. 292; 88 N. Y. 645; *Annett v. Foster*, 1 Daly, 507; *Butler v. Townsend*, 126 N. Y. 105; *Broom's Leg. Max.* 669; *Story Agency*, sec. 453b.

*Second*. Another inquiry is, whether at the time the person who did the wrong was in charge of the defendant's property by its assent and authority, and whether the injury was done while rendering obedience to his employer's will. *Cosgrove v. Ogden*, 49 N. Y. 255.

*Third*. The master has a general authority and personal control over the one who stands to him in the relation of servant; in fact, he has a property in the service of those whom he thus employs, acquired by the contract of hiring. The master may maintain an action for loss of service against one who wrongfully imprisons the person employed by him (*Woodward v. Washburn*, 3 Den. 369; *Lawyer v. Fritcher*, 130 N. Y. 239), or who wrongfully entices the servant away. *Wood Mast. & Serv.* secs. 230, 239. If Algar had been imprisoned or enticed while

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\* NOTE.—Algar was the person delegated to operate the elevator.

in charge of the elevator, the right of action for the wrong would in either case have belonged to the defendant, and not to Smith. Tested in this manner it would seem reasonably clear that Algar was at the time the servant of the defendant, and that it was his master, and not Smith. Smith did not employ him or pay him; he had no power to control him or discharge him, was not answerable for his skill as an elevator conductor, nor responsible for his incompetency, because he did not select him, and, for all that appears, never saw him. If the defendant had contracted the services of Algar as an elevator conductor to Smith for a compensation, it would have been liable for his competency and the proper discharge of his duties; and it can make no substantial difference in this case that his aid was given by the defendant gratuitously.

It has been held that if 'A,' a livery stable keeper, furnishes a horse and driver to 'B,' a customer, to be used in driving 'B.' about in his own carriage, the driver while so employed will be deemed the servant of 'A.' and not of 'B.' (*Sammell v. Wright*, 5 Esp. 263), and it makes no difference that the arrangement is a continuing one; that the same driver is always sent; that he wears a livery furnished by 'B,' designed to make the public believe he is 'B.'s' coachman, and that he receives gratuities from 'B.' (*Quarman v. Burnett*, 6 M. & W. 499), the person selecting, retaining and dominating the conduct of the servant being, as a rule, regarded in law the real, true and responsible master as to third persons injured by the servant's misconduct. It is seldom, if ever, otherwise.

'A.' hired a team, wagon and teamster of 'B.'; while used in 'A.'s' business, the harness being out of order, it ran against 'C.'s' horse and killed it. 'C.' sued 'B.' for damages. Held, that the teamster was the servant of 'B.,' the bailor, and not of the bailee, and that 'B.' was answerable. (*Crockett v. Calvert*, 8 Ind. 127; *Quinn v. Company*, 46 Fed. Rep. 506. The same rule would apply to a man who hires a carriage and horses to travel on a journey; the carriage and horses are employed for the benefit or pleasure of the traveler, and yet the law has never considered the traveler liable, but the owner only, for the negligence of the driver. *Story's Agency*, sec. 453a; *Richardson v. Van Ness*, 53 Hun, 267; 25 N. Y. St. Repr. 60; 6 N. Y. Supp. 618.

In *Jones v. Mayor &c.*, 14 Q. B. Div. 890, one Dean had contracted with the defendants to furnish a horse and driver to draw a watering cart belonging to the defendants under the supervision of inspectors employed by defendants, whose duty it was to direct the drivers of the watering carts when and where to water the streets. As their order was necessary for this purpose, the inspectors had authority and control over the drivers of the carts. The plaintiff's carriage was injured through the negligence of the driver furnished by Dean. Held, that the plaintiff could not recover of the defendants.

In *Weyant v. N. Y. & Harlem R. R. Co.*, 3 Duer, 360, it appeared that the plaintiff had been thrown out of his wagon by a collision with a railroad car, the property of the New York & New Haven Railroad Company, but which was drawn by horses owned by the New York & Harlem Railroad Company, and was driven by a driver in their employ. The court held that as 'the Harlem Railroad Company was the owner of the horses which drew the car, and the driver was in their employ, paid by them, bound to receive and obey their orders, and liable to be dismissed by them at pleasure,' that company was liable. See, also, *Schular v. Hudson River R. R. Co.*, 38 Barb. 653; *Boniface v. Relyea*, 5 Abb. Pr. (N. S.) 259; 6 Robt. 397; 36 How. Pr. 457.

In *Pack v. City of New York*, 8 N. Y. 222, the contractor engaged to conform

his work to such further directions as might be given by the defendants. The court held that this clause did not change the relations of the parties. It gave the corporation power to direct as to the results of the work, but without control over the contractor or his workmen *as to the manner of performing it*, which control *alone* furnishes ground for holding the master liable for the acts of the servant or agent.

In *Holmes v. Onion*, 2 C. B. (N. S.) 790; 28 L. J. (C. P.) 261, the defendant engaged the services of 'S.,' a thatcher, for a certain period of weekly wages, for the purpose of hiring him out to do thatching work for his profit. 'S.' having during the period thatched some stalks of wheat for the plaintiff, for which work the defendant claimed and received payment; held, that the defendant was responsible to the plaintiff for the injury to the wheat occasioned by the negligent manner in which 'S.' did the work.

A case calling for the exposition of the general principles applicable is that of *Sproul v. Hemmingway*, 14 Pick. 1, in which it appeared that a brig, which was towed at the stern of a steamboat employed in the business of towing vessels in the river Mississippi, below New Orleans, was through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor in the river. A suit was brought by the owners of the schooner against the owner of the brig for the damages sustained by the collision, and the question was, whether the owners of the brig were liable therefor. It was held that they were not, upon the ground that the master and crew of the steamboat were not the servants of the owner of the brig, were not appointed by him, did not receive their wages or salaries from him, had no power to order or control them in their movements, and had no contract with the master or owner of the steamboat, but only through the master with the owners of the steamboat for a participation in the power of the steamboat, derived from the public use and employment thereof by the owners. See, also, *Fenton v. Steam Packet Co.*, 8 Ad. & El. 835; *Dalyell v. Tyler*, 28 L. J. (Q. B.) 52. It was said that the case most nearly resembling the one cited is that of a vessel chartered, where, for the time being, the whole use and benefit of the ship is transferred to the charterers, but the officers are appointed, and the crew engaged and subsisted by the owners; in which case it was held that the owners, and not the charterers, are responsible to third persons for any damage occasioned by the negligence of the officers and crew. *Fletcher v. Braddick*, 5 Bos. & Pull. 182.

If Smith had, for his own purpose, borrowed the use of the elevator, and had run it with a conductor of his own selection, a different question would have been presented (*Herlihy v. Smith*, 116 Mass. 265); and so, if Algar had, for Smith's accommodation, and without the direction of the defendant, or contrary to its instructions, operated the machine. *Sheridan v. Charlick*, 4 Daly, 338; *Wyllie v. Palmer*, 137 N. Y. 248. But neither of these contingencies arose. Indeed, Algar was in the act of carrying out his master's orders when the accident occurred, not only within the scope of his employment, but in the specific performance of it."

One who manages and controls a piece of work on his own premises, notwithstanding his contract with another, is liable for injuries caused by negligence. *Dunton v. Niles*, 95 Cal. 494.

See *Engel v. Eureka Club*, 50 N. Y. S. R. 188; *Crenshaw v. Ullman*, 20 S. W. Rep. (Mo.) 1077; *Woods v. Trinity Parish*, 21 West. L. Rep. (D. C.) 259.

The right to have work performed to the satisfaction of an employer's architect does not prevent a person employed to do the work from being an independent contractor. *Frassi v. McDonald*, 122 Cal. 400.

But otherwise, where the principal is to furnish materials, machinery, etc. *McCall v. Mail S. Co.*, 123 Cal. 42.

The relation of independent contractor may exist between two firms though they have a common member. *Hedge v. Williams*, 131 Cal. 455.

A contractor of a municipality is liable for negligence of his servants although his own wages are by the day and hour. *Geer v. Darrall*, 61 Conn. 220.

If work is of a kind which naturally exposes property of another to unusual peril, company will be liable for injuries resulting. *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495.

*Spence v. Shultz*, 37 Pac. Rep., (Cal.) 220.

Goods in carrier's possession as warehouseman were destroyed through the negligent use of an engine employed by an independent contractor in rebuilding a wharf. Carrier was not liable. *Brunswick Grocery Co. v. Brunswick &c. Co.*, 106 Ga. 270.

Owner of lot, long used by public as thoroughfare, held not liable for negligence of independent contractor in leaving a trench unguarded while excavating for a house. *Ridgeway v. Downing Co.*, 109 Ga. 591.

The contractor to whom a building partially destroyed by fire has been turned over for reconstruction, and not the owner is liable to the servant of a sub-contractor for dangerous condition of the premises. *Butler v. Lewman*, (Ga.) 42 S. E. Rep. 98.

Where contractor is in possession of the premises and controls the work of excavation, he and not his employer is liable for injuries sustained by reason of insufficient fencing. *Kepperly v. Ramsdin*, 83 Ill. 354.

Owner not liable for negligence of one engaged to make repairs with entire freedom as to method. *Jefferson v. Jameson &c. Co.*, 165 Ill. 138; rev'g s. c., 60 Ill. App. 587.

See, also, *Pioneer &c. Const. Co. v. Hansen*, 176 Ill. 100; *Chicago &c. Street R. Co. v. Dudgeon*, 69 Ill. App. 57; *Geist v. Rothschild*, 90 id. 324.

A gas company was liable for injury from an explosion due to neglect on the part of an independent contractor in laying pipes and neglect on the part of a gas company in forcing gas through them before they were in proper condition. *Chicago &c. Gas Co. v. Myers*, 168 Ill. 139; aff'g s. c., 64 Ill. App. 270.

A firm held not liable for negligence of servant of one doing its hauling at a specified price per week, furnishing his own men and wagon,

though the latter had the firm's name on it. *Foster v. Wadsworth & Co.*, 168 Ill. 514; aff'g s. c., 68 Ill. App. 600.

Landlord held liable for damage to tenant in rebuilding party wall by independent contractor, the rule as to independent contractors does not apply to trespass. All are principals. *Northern Trust Co. v. Palmer*, 171 Ill. 383; aff'g s. c., 70 Ill. App. 93.

See, also, *Florsheim v. Dullaghan*, 58 Ill. App. 593; *East St. Louis v. Murphy*, 89 id. 22; *Wertheimer v. Saunders*, 95 Wis. 573; s. c., 37 L. R. A. 146; *Wilber v. Folansbee*, 97 id. 577.

Owner not liable for negligence of contractor building a house from mere fact that he pays cost and certain per cent of profit. *Alexander v. Mandeville*, 33 Ill. App. 589.

*Hale v. Johnson*, 80 Ill. 185.

Reservation by city of right of superintendence by commissioner of public works does not prevent the contractor being an independent contractor. *Cary v. Chicago*, 60 Ill. App. 341.

A contractor was not liable for the negligence of a sub-contractor, over whom he had no control, as to the details of the work. *Mohr v. McKenzie*, 60 Ill. App. 575.

Reservation of the right to discharge an employé of a contractor does not prevent his being an independent contractor. *Bayer v. Chicago & R. Co.*, 68 Ill. App. 219.

Nor does the fact that he is to be paid the cost of material and labor with a percentage added. *Whitney & Co. v. O'Rourke*, 68 Ill. App. 487.

Nor, that an owner employs an architect to superintend the work. *Geist v. Rothschild*, 90 Ill. App. 324; *Smith v. Milwaukee & C. Exchange*, 91 Wis. 360.

An electric light company held liable for injury due to the improper running of its plant by an independent contractor. *Capital Electric Co. v. Hauswald*, 78 Ill. App. 359.

An elevated railway company held liable for negligence of independent contractor constructing its road, in allowing a piece of iron to fall into the street and injure a pedestrian. *Metropolitan & C. R. Co. v. Dick*, 87 Ill. App. 40.

Contractors erecting a building under a contract by which they were to "perform and finish under the direction and to the satisfaction of the said owners all work" in the building and furnish "all labor and materials," were independent contractors. *Bjornson v. Saccone*, 88 Ill. App. 6.

City held liable for injury to private property by negligent performance of a public improvement by an independent contractor. *Chicago*

*&c. R. Co. v. Norton Milling Co.*, 97 Ill. App. 651; s. c. aff'd, 196 Ill. 580.

So, though the work be properly performed. *Cabot v. Kingman*, 166 Mass. 403.

Contractor not liable to pedestrian for injuries from collapse of building negligently constructed, turned over to and accepted by owner. *Daugherty v. Herzog*, 145 Ind. 255.

City was not liable in absence of notice, for the acts of an independent contractor in piling lumber on a street. *Evansville v. Senhenn*, 151 Ind. 42, 61; s. c., 41 L. R. A. 734, 738.

See, also, *Schnurr v. Huntington County*, 22 Ind. App. 188.\*

Owner was held liable for damage to adjoining land by fire set by independent contractor employed to clear land by use of fire. *Cameron v. Oberlin*, 19 Ind. App. 142.

See, also, *Railroad Co. v. Morey*, 47 Oh. St. 207; *Woodman v. Metropolitan R. Co.*, 149 Mass. 335.

One hiring his own help, paid according to work turned out and working in a factory, all the details of management and operation of which were in the hands of its owners, was held not to be an independent contractor. *Indiana Iron Co. v. Gray*, 19 Ind. App. 565.

A party employed to drill a well in schoolhouse grounds left his drilling machine unguarded and a child was injured by it. The danger arising not from the character of the work but from the machinery used, he, and not his employers, were liable to the child. *Wood v. Ind. School Dist. &c.*, 44 Iowa, 27.

*Chicago City R. Co. v. Hennessey*, 16 Bradw. (Ill.) 153, (see, *Ellis v. Sheffield Gas Company*, 22 E. & B. 767); *Robinson v. Webb*, 11 Bush. (Ky.) 464.

Work, over which owner is to exercise no control, though to be done under the direction of an architect and to his satisfaction, is done by an independent contractor. *Humpton v. Unterkirchner*, 97 Iowa, 509.

See, also, *Janesen v. Jersey City*, 64 N. J. L. 243; *Gunther v. Yorkville*, 3 Pa. Super. Ct. 403.

Contractor held liable for negligence of servant of sub-contractor where there was joint supervision and co-operation in the work. *Bau-meister v. Markham*, 101 Ky. 122.

A servant of an independent contractor threw lime into a mortar bed in the street. The owner of the premises was not liable. *Strauss v. City of Louisville*, (Ky.) 55 S. W. Rep. 1075.

Though the express agent of a town agreed to furnish horse and driver for delivery of defendant's parcels, the driver was defendant's servant. *Adam's Exp. Co. v. Schofield*, (Ky.) 64 S. W. Rep. 903.

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\* NOTE.—As to liability of municipalities for obstructions in streets, see "Municipality."

One employed to unload cars under the direction and control of another, though he works with his own tools, is not an independent contractor. *Holmes v. Tennessee &c. R. Co.*, 49 La. Ann. 1465.

A person committing a steam mill to the exclusive control of a contractor is not liable for the negligent use of the same, unless the appliance was, in itself, a nuisance. *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373.

An independent contractor engaged in cutting wood for a railroad company had its cooking car placed on a spur track by the railroad company to facilitate its work; the latter was not liable for the negligence of the former's servant in the use of the car. *Leavitt v. Bangor &c. R. Co.*, 89 Me. 509; s. c., 36 L. R. A. 382.

An owner of a building contracted with a blacksmith to make alterations. The plans were defective and the contractor was incompetent. Landlord was liable for injuries to tenant's goods. *Evans v. Murphy*, 87 Md. 498.

One engaged to make balloon ascensions at a public resort was an independent contractor for whose negligence the proprietor of the resort was not liable. *Smith v. Benick*, 87 Md. 610.

Lot owner liable for injury to adjoining property by excavation by independent contractor. *Bonaparte v. Wiseman*, 89 Md. 12; s. c., 44 L. R. A. 482.

The owner of a house, who has contracted with another, for a fixed sum to raise the house and put another story under it, the contractor to furnish the material and complete the alteration to the satisfaction of the owner, is not responsible if the building fall upon plaintiff's house and damage it. *Connors v. Hennessey*, 112 Mass. 96.

*Lawrence v. Shipman*, 39 Conn. 586.

Where one contracts to take down a building under the directions of, and subject to the approval of, certain trustees, the trustees will be liable for his negligence. *Linnchan v. Rollins*, 137 Mass. 123.

See *Palmer v. Lincoln*, 5 Neb. 136; *Sturges v. Society &c.*, 130 Mass. 414.

Injuries caused by the falling of part of defendant's roof, lately repaired by a contractor under an entire contract, who furnished his own material, &c., are chargeable to the defendant. *Khron v. Brock*, 144 Mass. 516.

The owner of premises directed an independent contractor to pile stones in a place where it would be dangerous. The owner was liable for the latter's negligence though he would not have been, had he not assumed control. *Mahar v. Steuer*, 170 Mass. 454.

The proprietor of a resort engaged an independent contractor to con-

duct an exhibition of marksmanship. It was liable, where a piece of bullet flew off and struck the plaintiff in the eye. *Thompson v. Lowell &c. Street R. Co.*, 170 Mass. 577; s. c., 40 L. R. A. 345.

Lot owner was liable for injury to adjoining land from blasting within eight feet thereof by an independent contractor. *Wetherbee v. Partridge*, 175 Mass. 185.

A physician examining an injured person on behalf of a railroad company, held to be an independent contractor. *Pearl v. West End Street R. Co.*, 176 Mass. 177; s. c., 49 L. R. A. 826.

House owner not liable for injury to pedestrian from fall of a brick through negligence of independent contractor in repairing chimney. *Boomer v. Wilbur*, 176 Mass. 482.

Defendant owned a horse and paid its driver, who had exclusive management of it. Defendant was engaged in a general teaming business, and contracted to do a company's hauling. Driver was defendant's, and not the company's servant. *Driscoll v. Towle*, (Mass.) 63 N. E. Rep. 922.

The wall of one of two adjoining owners leaked. He hired a man to repair it, giving no instructions as to the work, and exercising no control over the latter's men in doing it. He was not liable for their negligence in doing the work, whereby water was turned into the other owner's cellar. *Dutton v. Amesbury Nat. Bank*, (Mass.) 63 N. E. Rep. 405.

A master is liable for the negligence of one who is employed to supply him with ice by the cord, when the master obtains a license to encumber the street for that purpose, and the injuries received flow from such obstructions. *Darmstaetter v. Moynahan*, 27 Mich. 188.

*Butler v. Bangor*, 67 Me. 385; *Circleville v. Neuding*, 41 Oh. St. 465; *Wilson v. Wheeling*, 19 W. Va. 323. See, however, *Reed v. Alleghany City*, 29 P. F. Smith (Pa.) 300.

One engaged in a door factory and paid a given price per door was an independent contractor; he was furnished with the lumber and was uncontrolled in his use of the premises. *Wright v. Big Rapids &c. Man. Co.*, 124 Mich. 91; s. c., 50 L. R. A. 495.

Defendants contracted for logs to be delivered at the mouth of a stream. They were not liable for the contractor's allowing them to "jam" in transit to that point. *Overseers of Highways &c. v. Pelton*, (Mich.) 87 N. W. Rep. 1029.

One employing an independent contractor to tear down a building was not liable to the latter's employés, because he was not competent to oversee the actual execution of the work. *Schip v. Pabst Brew. Co.*, 64 Minn. 22.

One employing his own men and paid by the job but subject to orders



as to details of work, held to be servant. *Barg v. Bowsfield*, 65 Minn. 355.

That one was paid for plowing by the acre, instead of by the day, and that he used his own team and tools did not constitute him an independent contractor instead of a servant. *Whitson v. Ames*, 68 Minn. 23.

House owner held liable for injury to pedestrian from fall of ladder left leaning against a house by independent contractors employed to paint it, after they had finished their work. *Moore v. Townsend*, 76 Minn. 64.

Owner not liable for building material left, unlit and unguarded in the street, by an independent contractor. *Aldritt v. Gillette-Herzog Man. Co.*, 85 Minn. 206.

See, also, *Independence v. Slack*, 134 Mo. 66.

Retention of right of supervision does not alter the relationship of independent contractor. *Vosbeck v. Kellogg*, 78 Minn. 176.

A storekeeper liable to customer for injury due to negligence of independent contractor making repairs. *Corrigan v. Elsinger*, 81 Minn. 42.

The actual relation as regards supervision of the work is the test. So that, where a conductor in fact directs the work of a subcontractor, the former is liable, though the contract expresses a relation of independent contractorship. *Klages v. Gillette-Herzog Man. Co.*, (Minn.) 90 N. W. Rep. 1116.

Owner liable for failure to replace cover to coal hole left off by independent contractor. *Benjamin v. Metropolitan Street R. Co.*, 133 Mo. 274.

Owner held liable to pedestrian for failure of independent contractor to guard excavation for foundation adjoining sidewalk. *Wiggin v. St. Louis*, 135 Mo. 558.

•Landlord not liable to tenant for failure of independent contractor to guard excavation for out house on the premises. *Wiese v. Remme*, 140 Mo. 289.

An opening in a bridge necessarily resulted from the proper execution of the work. City was liable for the contractor's failure to have it guarded. *Ray v. Poplar Bluff*, 70 Mo. App. 252.

Reservation of power of dictation of method and of discharge of employés destroys the relationship of independent contractors. *Scott v. Springfield*, 81 Mo. App. 312.

One hired for fifty cents to drive an animal is not an independent contractor. *O'Neil v. Blase*, (Mo. App.) 68 S. W. Rep. 764.

A contractor building a railroad, who has exclusive control of the running of engines and cars, will be liable for injuries caused by the negligent running of such engines; and the railroad company will not be liable. *Hitte v. Republican Valley R. Co.*, 19 Neb. 620.

See *Carman v. Steubenville &c. R. Co.*, 4 Oh. St. 399; *Seamon v. Chicago*, 25 Ill. 424.

A railroad corporation is liable for injuries caused by blasting, where it contracted with other parties for the building of a part of its road, and the injuries occurred by reason of the negligence of these other parties. *Stone v. Cheshire R. Co.*, 19 N. H. 427.

*Lowell v. Boston &c. R. Co.*, 23 Pick. 24; *Carman v. Steubenville &c. R. Co.*, 4 Oh. St. 399; *Mellen v. Morrill*, 126 Mass. 545.

Joint contractors apportioned the work between them; one was not liable to a third party for negligence of the other in work assumed by him. *Manchester v. Warren*, 67 N. H. 482.

The owner of a private park who invited the public to witness an exhibition of fireworks, held liable for negligence of independent contractor having the display in charge. *Sebeck v. Plattdeutsche Volkfestverein*, 64 N. J. L. 624; s. c., 50 L. R. A. 199.

Owner held liable for injury to adjoining property from fall of a dangerous wall due to negligence of independent contractor in removing it. *Steinbock v. Covington &c. Bridge Co.*, 61 Oh. St. 215.

See, also, *Covington &c. Bridge Co. v. Patrick*, 5 Ohio N. P. 374.

Owner obtained permission to deposit building materials in the street upon condition that he light and guard them. He was liable for the negligence of an independent contractor in failing to light and guard. *Reuben v. Swigart*, 15 Oh. C. C. 565.

If builder is likewise owner, he will be responsible for inherent weakness in the building. *Godley v. Haggerty*, 20 Pa. St. 387.

If building was erected under personal supervision of owner and leased to government, and damage resulted from poor construction, owner will be liable. *Carson v. Godley*, 26 Pa. St. 111.

It was for the jury to say whether interference by owner with work of independent contractor was the cause of accident. *Pender v. Raggs*, 178 Pa. St. 337.

The reservation of a right to fix grades and alignment in the construction of a railroad, and the amount of work to be done per month did not alter relationship of independent contractor. *Thomas v. Altoona &c. R. Co.*, 191 Pa. St. 361.

A contractor employed to erect poles along a street employed another to dig the holes, furnish the material, set the poles, repave, &c., complete, for which he was to be paid per pole. Contractor was liable for latter's negligence. *Fox v. Porter*, 6 Pa. Dist. 85.

A city was liable for a failure to exercise the necessary precautions, in digging a subway likely to injure adjoining property, although it em-

ployed an independent contractor to do the work. *Marsh v. Philadelphia*, 8 Pa. Dist. 340.

Plumbers enlarging heating plant pursuant to their own plans held independent contractors. *Hanna v. Cresh*, 16 Montg. Co., L. R. 182.

An owner of premises abutting on the street was not liable for the negligence of an independent contractor engaged in roofing it. *Rubin v. Miller*, 30 Pitts. Leg. J. (N. S.) 351.

A contractor is not liable for injuries caused by faulty construction, after the building has been accepted by the owner. *Curtin v. Somerset*, 48 Phila. L. J. 96.

*Pickard v. Smith*, 10 C. B. N. S. 480; *Collis v. Selden*, L. R. 3 C. P. 495; *Wharton on Neg.* sec. 438.

Street railway company, under duty to restore street, held not liable for negligence of independent contractor in maintaining a rope across street while work was in progress. *Sanford v. Pawtucket Street R. Co.*, 19 R. I. 537; s. c., 33 L. R. A. 564.

Use of a structure held tantamount to an acceptance and made an owner liable for injury from defect due to negligence of independent contractor. *Read v. East Providence Fire Dist.*, 20 R. I. 574.

Interference by owner with work of contractor must be proximate cause of an accident to make the owner liable. *Wateman v. Shepard*, 21 R. I. 257.

Where the work is intrinsically dangerous, one is liable for negligence of an independent contractor, though it would have been safe if properly done. Defendant was not relieved from the act of his contractor in leaving an excavation in the street unguarded and unlighted. *McCarrier v. Hollister*, (S. D.) 89 N. W. Rep. 862.

The safe construction of a crossing of a highway over a railroad is a duty to the public which the railroad company cannot delegate to an independent contractor. *Taylor & C. R. Co. v. Warner*, 88 Tex. 642.

See, also, *Taylor & C. R. Co. v. Warner*, (Tex.) 60 S. W. Rep. 442; *Dublin v. Taylor & C. R. Co.*, 92 Tex. 535; *Texas Midland R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

A corporation employed a man to bale cotton seed hulls at a given sum per bale; it furnished machinery and power, he supplied the hands and did the work in his own way. He was held an independent contractor. *Wallace v. Southern Cotton-Oil Co.*, 91 Tex. 18.

One using his own men, materials, team and methods, in excavating a reservoir, was held an independent contractor, though he was paid by the day. *Groesbeck v. Pinson*, 21 Tex. Civ. App. 44.

An incorporated company, laying water pipes in a city, is not relieved from liability for injuries, because they were caused by negli-

gence of servants of a sub-contractor. *Water Co. v. Ware*, 16 Wall. 566.

*Robbins v. Chicago*, 4 Wall. 679; *Chicago v. Wallace*, 2 Black. 428; *Colegrove v. Smith*, 33 Pac. Rep. (Cal.) 115.

When the act contracted for becomes a nuisance, as an unguarded excavation in a public sidewalk, the owner is liable for injuries caused thereby. *Chicago v. Robbins*, 2 Black (U. S.) 418.

Contractors who agree to furnish suitable materials, and construct piers, subject to inspection of engineers of the company for whom the piers are to be built, are independent contractors. *Casement v. Brown*, 148 U. S. 582.

*Alabama &c. R. Co. v. Martin*, 14 South Rep. (Ala.) 401.

One engaged to remove dead animals from stock yards, paid and subject to discharge like other employés, held not an independent contractor and defendant was liable for his failure to take care of a maimed steer. *Texas &c. R. Co. v. Juneman*, 71 Fed. Rep. 939.

A ship carpenter was not an independent contractor, where the captain and superintendent had the right to direct the manner of performing the work, though the right was not often exercised. *Atlantic Transport Co. v. Conveys*, 82 Fed. Rep. 177.

Plaintiff was injured by blasting. There was nothing to indicate the necessity for blasting when the contract was made, though provision was made for it in the bid. It was an error to take the question from the jury as to whether the acts were expressly authorized or necessary to the performance of the contract. *McNamee v. Hunt*, 87 Fed. Rep. 298.

Ship owner was liable for negligence of employé of one under a charter, where he, notwithstanding, retained control of the latter's acts. *McGough v. Ropner*, 87 Fed. Rep. 534.

A carrier of passengers cannot relieve itself of the duty of safe carriage by employing an independent contractor. *Barrow S. S. Co. v. Kane*, 88 Fed. Rep. 197.

One employed to superintend work without restriction as to method, receiving a per diem for himself and percentage on pay of labor employed, was held an independent contractor. *Emerson v. Fay*, 94 Va. 60.

Proprietor of resort, inviting public to witness balloon ascension, held liable to patron for injuries from fall of a pole due to negligence of independent contractor in charge of the display. *Richmond &c. R. Co. v. Moore*, 94 Va. 493.

City was liable for the negligence of a contractor, where it had the supervision and control of the work to be done by him. *Cooper v. Seattle*, 16 Wash. 462.

See, also, *Smith v. Seattle*, 20 Wash. 613.

It was left to the jury to say whether the work of floating logs down a river necessarily involved such danger as to make defendant liable for flooding plaintiff's land from a dam opened by an independent contractor employed to do the work. *Carlson v. Stocking*, 91 Wis. 432.

Reservation of the right to relet the contract in case of "improper or imperfect performance," held not to bar relationship of independent contractor. *Kuehn v. Milwaukee*, 92 Wis. 263.

Injuries caused by leaving stones in the road, during the process of filling up a drain, not attributable to trustees employing a contractor. *Hall v. Smith*, 2 Bing. 156.

*Duncan v. Findlater*, 6 Cl. & F. 894.

A railroad restaurant proprietor is liable for injuries caused by an open coal hole in which a coal company was putting coal by his orders. *Pickard v. Smith*, 10 C. B. (N. S.) 470.

See *Bush v. Steinman*, 1 B. & P. 404; *Randleson v. Murray*, 8 Ad. & E. 109.

Where a company was authorized by legislature to build a bridge, and its contractor creates an obstruction to navigation, the company is liable. *Ellis v. Sheffield Gas &c. Co.*, 2 E. & B. 767.

See *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Rylands v. Fletcher*, L. R. 3 Eng. & I. App. 330; *Beatrice v. Reid*, 59 N. W. Rep. (Neb.) 770.

## CONTRIBUTORY NEGLIGENCE.

### I. PRINCIPLES GOVERNING.

- (a) Comparative negligence.
- (b) Actions based on trespass.
- (c) Actions based on acts done with willful intent.
- (d) Proximate cause.
- (e) Want of care induced by conduct of wrongdoer.
- (f) Violation of statute.
- (g) When for the determination of the court or jury.
  - 1. When the question is for the court.
  - 2. When the question is for the jury.

### II. CHOICE OF HAZARDS.

### III. VOLUNTARY EXPOSURE TO ASSIST ANOTHER IN DANGER.

### IV. KNOWLEDGE BY THE PLAINTIFF OF THE DEFECT OR DANGER.

### V. DEFECTIVE PEOPLE—INTOXICATED PERSONS.

### VI. INFANTS.

- (a) Care required of parents.
- (b) Degree of care required from and toward infants.
- (c) Instances when recovery was or was not allowed to parent, or to child or its representative.

### VII. CONTRIBUTORY NEGLIGENCE OF THIRD PERSON.\*

#### I. Principles Governing.

The burden of proof is on the plaintiff to show affirmatively by a preponderance of sufficient evidence, not only that the defendant's negligence contributed to the accident, but also that the plaintiff was entirely free from negligence proximately causing the injury.

*Button v. Hudson R. R. Co.*, 18 N. Y. 248; *Deyo v. N. Y. C. R. Co.*, 34 id. 9; *Cunan v. Warren Chemical & Co.* 36 id. 53; *Gonzales v. N. Y. & Harlem R. Co.*, 38 id. 440; *Hart v. H. R. Bridge Co.*, 28 id. 622; *Becht v. Corbin*, 92 id. 658; *Riordan v. Ocean Steamship Co.*, 124 id. 655; *Chisholm v. State*, 141 id. 246, 249.

The greatest negligence on part of defendant will not cure the least negligence contributory to the injury on the part of plaintiff. *Wilds v. H. R. Co.*, 24 N. Y. 430; *Griffin v. N. Y. Central R. Co.*, 40 id. 34.

Hence evidence of the plaintiff's contributory negligence, if any, must be submitted unqualifiedly to the jury. The qualification "if the defendant's brakes were in order and the collision could have been prevented by ordinary prudence," is error. *Owen v. H. R. R. Co.*, 35 N. Y. 516.

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\* NOTE.—As to pleading of Contributory Negligence, see "Pleading," *post*.

So, it is error to charge that plaintiff's negligence must have *directly* contributed to it to exempt the defendant. *Button v. H. R. R. Co.*, 18 N. Y. 248.

See *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Chicago &c. C. R. Co. v. Clark*, 2 Bradwell (Ill.) 116.

*Contra Locke v. Sioux City R. Co.*, 46 Iowa, 109; *Needham v. San Francisco R. Co.*, 37 Cal. 409.

Burden of proving freedom from negligence is on plaintiff. *Bruce v. Brooklyn Heights R. Co.*, 68 App. Div. 242; *Thies v. Thomas*, 77 N. Y. Supp. 276; *Reed v. Third Ave. R. Co.*, 14 Misc. 458; *Newcomb v. Metropolitan Street R. Co.*, 34 id. 203.

The same general rule requiring plaintiff to show freedom from contributory negligence prevails in the courts of many states. *Neal v. Gillett*, 23 Conn. 437; *Haner v. Northern R. Co.*, (Id.) 62 Pac. Rep. 1028; *West Chicago Street R. Co. v. Boeker*, 70 Ill. App. 67; *Chicago City R. Co. v. Canevin*, 72 id. 81; *Lindberg v. Chicago City R. Co.*, 83 id. 433; *Mutual Wheel Co. v. Mosher*, 85 id. 240; *Potter v. Sjorgren*, 91 id. 530; *Illinois C. R. Co. v. Jones*, 97 id. 131; *Wabash R. Co. v. Jensen*, 99 id. 312; *Crawford v. Chicago &c. R. Co.*, 109 Iowa, 433; *Ward v. Maine C. R. Co.*, 96 Me. 136; *Fuller v. B. & A. R. Co.*, 133 Mass. 491; *McKimble v. B. & M. R. Co.*, 139 id. 542; *Merrill v. East R. Co.*, id. 252; *Commonwealth v. B. & L. R. Co.*, 134 id. 211; *Stinson v. Kenny*, 176 id. 429; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Benedict v. Union &c. R. Co.*, (Vt.) 52 Atl. Rep. 110.

Nevertheless, in the Federal courts as well as in several state courts, contributory negligence is a matter of defense, and recovery does not necessarily depend upon affirmative proof of freedom from negligence contributing to the injury. *King v. Henker*, 80 Ala. 505; *Savannah &c. R. Co. v. Shearer*, 58 id. 672; *Robinson v. W. P. R. Co.*, 48 Cal. 409; *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330; *Louisville &c. R. Co. v. Yniestra*, 21 Fla. 700; *Central R. Co. v. Brinson*, 64 Ga. 475; *Pittsburg &c. R. Co. v. Noel*, 77 Ind. 110; *K. P. R. Co. v. Pointer*, 14 Kas. 37; *Paducah v. Memphis R. Co.*, 12 Bush. (Ky.) 141; *Kentucky &c. R. Co. v. Thomas*, 79 Ky. 160; *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; *Cook v. Missouri &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 230; *Murphy v. Dayton*, 7 Oh. N. P. 227; *Penn. Canal Co. v. Bentley*, 66 Pa. St. 30; *Penn. R. Co. v. Weber*, 76 id. 157; *Lewin v. Pauli*, 19 Pa. Super. Ct. 447; *Carter v. Columbia &c. R. Co.*, 19 S. C. 20; *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056; *Texas &c. R. Co. v. Mayfield*, 56 id. 942; *Galveston &c. R. Co. v. Dehnisch*, 57 id. 64; *Galveston &c. R. Co. v. Gordon*, 54 id. 635; *Watertown v. Greaves*, 112 Fed. Rep. 183; *Hemingway v. Illinois C. R. Co.*, 114 id. 843; *Randall v.*

&c. R. Co. 75 N. Y. 330. See, also, *Reynolds v. N. Y. &c. R. Co.*, 58 N. Y. 248; *Hoag v. id.*, 111 id. 199; *Bond v. Smith*, 113 id. 378).’”

(Presumptions pertinent to this subject will be found under “Evidence,” *post*, 1095.)

(a). COMPARATIVE NEGLIGENCE.

In several of the states, the doctrine of comparative negligence has been recognized, so that, although the injured person has, to some extent, usually slightly, contributed to his own injury by his negligence, yet, if the defendant was grossly negligent, a recovery is allowed.

*U. P. R. W. Co. &c. v. Rollins*, 5 Kas. 167; *Sawyer v. Sauer*, 10 id. 466; *K. P. R. Co. v. Pointer*, 14 id. 37; *U. P. R. Co. v. Henry*, 36 id. 565; *Wichita &c. R. Co. v. Davis*, 37 id. 743; *Chicago &c. R. Co. v. Murray*, 62 Ill. 326; *Ill. Central R. Co. v. Maffit*, 67 id. 431; *Schmidt v. C. & C. R. Co.*, 83 id. 405; *Ill. Central R. Co. v. Hammer*, 85 id. 526; *Ill. Central R. Co. v. Patterson*, 93 id. 290; *Stratton v. Central &c. R. Co.*, 95 id. 25; *Toledo &c. R. Co. v. Grable*, 88 id. 441; *Chicago &c. R. Co. v. Dimick*, 96 id. 42; *Calumet Ice &c. R. Co. v. Martin*, 115 id. 36; *Chicago &c. R. Co. v. Johnson*, 116 id. 206; *Chicago &c. R. Co. v. Krueger*, 23 Ill. App. 639; *K. P. R. Co. v. Cranner*, 4 Colo. 524; *Kenedy v. Denver &c. R. Co.*, 10 id. 493; *Ward v. M. & St. P. R. Co.*, 29 Wis. 144; *Bloor v. Town of Delafield*, 69 id. 273; *Augusta &c. R. Co. v. McElmurry*, 24 Ga. 75; *Houston &c. R. Co. v. Gorbett*, 49 Tex. 573.

The doctrine has, however, been repudiated in the following recent decisions: *Denver Tramway Co. v. Reid*, 22 Colo. 349; *Lake Shore &c. R. Co. v. Hessions*, 150 Ill. 546; *Cicero &c. Street Ry. Co. v. Meixner*, 160 Ill. 320; *Atchison &c. R. Co. v. Henry*, 57 Kan. 154; *Sandy River &c. Coal Co. v. Caudill*, (Ky.) 60 S. W. Rep. 180; *Friend v. Burleigh*, 53 Neb. 674; *Missouri &c. R. Co. v. Fox*, 56 Neb. 746; *Anderson v. Metropolitan Street R. Co.*, 30 Misc. 104; *Tesch v. Milwaukee Electric R. Co.*, 108 Wis. 593; *Missouri &c. R. Co. v. Holwerson*, 157 Mo. 216; *West Chicago Street R. Co. v. Liderman*, 187 Ill. 463; *Galveston &c. R. Co. v. Gordon*, (Tex. Civ. App.) 57 S. W. Rep. 635.

(b). ACTIONS BASED ON TRESPASS.

The doctrine of contributory negligence has no relation to, and is no part of an action founded upon a pure tort, as trespass, unless the evidence show recklessness on the part of the plaintiff.

*Clifford v. Dam*, 81 N. Y. 52; *Claxton v. Lexington &c. R. Co.*, 13 Bush. (Ky.) 636; *Kas. Pac. R. Co. v. Pointer*, 14 Kas. 37; *Stratton v. Central City &c. R. Co.*, 1 Am. & Eng. R. Cas. (Ill.) 115; *Tanner v. Louisville &c. R. Co.*, 60 Ala. 621; *Cook v. Central &c. Co.* 67 id. 533; *Harlow v. Humison*, 6 Cowlus, 189-191; *Dygert v. Schenck*, 23 Wend. 446; *Trapp v. McClellan*, 68 App. Div. 362; *Schaefer v. North Chicago Street R. Co.*, 82 Ill. App. 473; *St. Louis &c. R. Co. v. Jacobson*, (Tex. Civ. App.) 66 S. W. Rep. 1111.

See “Streets—Injuries received on,” “Nature of the liability,” *post*.

(c). ACTIONS BASED ON ACTS DONE WITH WILLFUL INTENT, OR GROSS CARELESSNESS.

Where the defendant's act causing the injury was willful, contributory



**negligence is no defense.** *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; s. c. aff'd, 196 Ill. 156; *Tyler v. Nelson*, 109 Mich. 37; *Bohin v. Chicago & C. R. Co.*, 108 Wis. 333.

In the following cases the defendant's negligence was so willful or gross as to lose him the defense of contributory negligence:

Plaintiff negligently drove on a street car track at 5 a. m., and was struck by a car going 25 miles an hour while the motorman was asleep. Intentional mischief on part of defendant was left to the jury. *Mapes v. Union R. Co.*, 56 App. Div. 508.

Running train 40 miles an hour over crossings in populous city without signals or attempt to check speed. *Louisville & C. R. Co. v. Orr*, 121 Ala. 489.

As to violation of ordinance being equal to willful negligence, see *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Unnecessarily dragging plaintiff 200 feet, where defendant could have stopped the train before he was injured, permitted a recovery, though he was negligently on the track. *Cleveland & C. R. Co. v. Klee*, 154 Ind. 430.

Using inferior machinery would authorize jury in finding a verdict for willful negligence. *Claxton & C. v. Lexington & C. R. Co.*, 13 Bush. (Ky.) 636; *Tanner v. Louisville & C. R. Co.*, 60 Ala., 621; *Cook v. Central & C. R. Co.*, 67 id. 533; *Kansas & C. R. Co. v. Pointer*, 14 Kas. 37; *Ivens v. Cincinnati & C. R. Co.*, 103 Ind. 27.

Company liable where person in charge knew or should have known that cars were so improperly loaded as to imperil the life of a servant or employé. *Louisville & C. R. Co. v. Brice*, 84 Ky. 298; *Stratton v. Central & C. R. Co.*, 1 Am. & E. R. R. Cas. (Ill.) 115; *Shumacher v. St. Louis & C. R. Co.*, 39 Fed. Rep. 174.

Defendant "kicked" coal cars unattended down grade. They collided with other cars and threw plaintiff from the railing of caboose where he had been sitting. *Kansas City & C. R. Co. v. Campbell*, 6 Kan. App. 417.

Neglect to maintain a guard rail about an elevator. *Union Warehouse Co. v. Prewitt*, (Ky.) 50 S. W. Rep. 964.

Plaintiff negligently went upon a trestle 30 feet high and 400 feet long and was overtaken by a train going a mile a minute without warning or attempt to stop. *McLamb v. Wilmington & C. R. Co.*, 122 N. C. 862.

Maliciously blowing whistle to frighten plaintiff's horses. *Brendle v. Spencer*, 125 N. C. 474.

\*NOTE.—As to liability of carriers of passengers to trespassers, see "Carriers of Passengers," *ante*, p. 417. As to whether negligence or contributory negligence was the proximate cause of the injury, see "Proximate Cause," *post*, p. 664.

Engineer threw water and steam on trespasser stealing a ride. *Galveston &c. R. Co. v. Zantzinger*, 92 Tex. 365; s. c., 44 L. R. A. 553.

Running train 25 miles an hour without a headlight. *McGhee v. Campbell*, 101 Fed. Rep. 936.

Defective brakes prevented prompt stopping of a car. *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281; s. c., 40 L. R. A. 172.

In the following cases defendant, by failing to exercise ordinary care after discovering plaintiff's danger, lost the defense of contributory negligence:

The rule applied, where defendant had actual knowledge of plaintiff's danger. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509; *Louisville &c. R. Co. v. Brown*, 121 id. 221; *Memphis &c. R. Co. v. Martin*, 131 id. 269; *Hector Min. Co. v. Robertson*, 22 Colo. 491; *Tully v. Philadelphia &c. R. Co.*, (Del.) 50 Atl. Rep. 95; *Neet v. Burlington &c. R. Co.*, 106 Iowa, 248; *Atwood v. Bangor &c. R. Co.*, 91 Me. 399; *Ward v. Main C. R. Co.*, 96 id. 136; *Sloniker v. Great Northern R. Co.*, 76 Minn. 306; *Dailey v. Burlington &c. R. Co.*, 58 Neb. 396; *Hall v. Ogden &c. Street R. Co.*, 13 Utah, 343; *Thompson v. Salt Lake Rapid Transit Co.*, 16 id. 281.

But not where he had no actual knowledge, or only constructive knowledge. *Highland &c. R. Co. v. Swope*, 115 Ala. 287; *Memphis &c. R. Co. v. Martin*, 117 id. 367; *Cullen v. Baltimore &c. R. Co.*, 8 App. D. C. 69; *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571; *Missouri &c. R. Co. v. Magee*, 92 Tex. 616; *Texas &c. R. Co. v. Tidwell*, (Tex. Civ. App.) 49 S. W. Rep. 641.

See, also, *Denver &c. R. Co. v. Spencer*, 25 Colo. 9.

In the following cases the defendant lost the defense of contributory negligence by failing to discover plaintiff's danger through lack of ordinary care: *Klockenbrink v. St. Louis &c. R. Co.*, 81 Mo. App. 351, 409; *Omaha Street R. Co. v. Martin*, 48 Neb. 65 (Plaintiff asleep on track, engineer failed to keep look out); *Baker v. Railroad*, 118 N. C. 1015; *Pickett v. Wilmington &c. R. Co.*, 117 id. 616; *Arrowood v. South Carolina R. Co.*, 126 id. 629; *Hall v. Ogden City Street R. Co.*, 13 Utah, 243; *Shaw v. Salt Lake City R. Co.*, 21 id. 76; *Bias v. Chesapeake &c. R. Co.*, 46 W. Va. 349.

Failure to give timely and sufficient warning of train's approach to public crossing is willful negligence, where defendants could have seen deceased in a dangerous position. *Eskridge v. Aneumati &c. R. Co.*, 11 Ky. L. R. 557; *Louisville &c. R. Co. v. Maloney*, 7 Bush. (Ky.) 235. See, also, *Battishill v. Humphreys*, 38 N. W. Rep. 581; *Barksdull v. New Orleans &c. R. Co.*, 23 La. Ann. 180.

But if plaintiff's negligence has been willful or gross, or, with knowledge of defendant's negligence, he fails to use ordinary care to avoid danger, the defense of contributory negligence is available to defendant: *Macon &c. R. Co. v. Holmes*, 103 Ga. 655; *Holwerson v. St. Louis &c. R. Co.*, 157 Mo. 216; *Carter v. Columbia &c. R. Co.*, 19 S. C. 20; *Danville Street Car Co. v. Watkins*, 97 Va. 713.

In an action for injuries to a little child from being run over by the defendant's engine, the driver might, with the exercise of ordinary care, have stopped the engine and avoided the injury; hence the contributory negligence of the plaintiff did not constitute a defense. *Kenyon v. N. Y. Cent. &c. R. Co.*, 5 Hun, 479.

From opinion.—“Such a case furnished a just and well established exception to the general rule, that, contributive negligence on the part of the plaintiff will defeat a recovery. *Davies v. Mann*, 10 M. & W. 546; *Bird v. Holbrook*, 4 Bing. 628; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Scott v. Dublin &c. R. Co.*, 11 Irish C. L. 377; *Button v. Hudson River R. Co.*, 18 N. Y. 258; *Austin v. N. J. Steamboat Co.*, 43 id. 75; *Haley v. Earle*, 30 id. 208; *Lannen v. Albany Gaslight Co.*, 44 id. 463; *O'Mara v. Hudson R. R. Co.*, 38 id. 445; *Mangum v. Brooklyn R. Co.*, id. 455; *Costello v. The Syracuse &c. R. Co.*, 65 Barb. 92; *Shear. & Red. on Neg.* (3d ed.) sec. 36; *Add. on Torts*, 21.”

Complaint that the plaintiff's intestate was a passenger on the defendant's boat, and came to his death by drowning; that his death was caused by a wrongful act, neglect, &c., of the defendant in refusing to stop the boat or render assistance as he requested, was sufficient. No allegation of freedom from contributory negligence needed beyond above.

These words set forth a cause of action against the defendant. The general rule of law is, that absence of negligence contributive to the misfortune must be shown by the plaintiff as an essential prerequisite to recovery; yet, this rule is limited and qualified by an exception, or rather another rule, that, where the exercise of ordinary care on the part of the defendant would have avoided the misfortune, the negligence of the plaintiff will not excuse or avail as a defense. *Kenyon v. The Railroad*, 5 Hun, 479; *Melhado v. Poughkeepsie Trans. Co.*, 27 Hun, 99.

Engineer of a train is bound to use proper efforts in stopping train if he sees a person on horseback likely not to be able to get off the track in time; such person's negligence in getting on the track does not excuse engineer's negligence in failing to stop train. *Tanner &c. v. Nashville R. Co.*, 60 Ala. 621; *Gothard v. Alabama &c. R. Co.*, 67 id. 114; *Cook &c. v. Central &c. R. Co.*, id. 533; *Alabama &c. R. Co. v. Chapman*, 80 id. 615; *Kansas &c. R. Co. v. Cranmer*, 4 Colo. 524; *Colorado &c. R. Co. v. Holmes*, 5 id. 197; *Bunting v. C. P. R. Co.*, 6 Am. & E. R. C. (Nev.) 282.

Mere error of judgment not amounting to consciousness of probable injury is negligence merely and not wanton wrong. *Alabama &c. R. Co. v. Moorer*, 116 Ala. 642.

Omission of a ferryman, knowing of plaintiff's negligence, to guard against the consequences of the same, renders him liable. *Harvey v. Rose*, 26 Ark. 3; *Little Rock &c. R. Co. v. Parkhurst*, 36 id. 371.

Notwithstanding plaintiff's driver approached defendant's track contrary to orders, defendant is liable for not stopping train when it saw plaintiff's predicament, and could have avoided the accident. *Macon &c. R. Co. v. Davis*, 18 Ga. 679; *State v. Manchester &c. R. Co.*, 52 N. H. 528.

Person with knowledge of another's dangerous position with reference to cars under his orders, is liable for negligence if he permits those cars to be moved and injury results therefrom; contributory negligence is no defense. *Morris v. C. B. &c. R. Co.*, 45 Iowa, 29.

If deceased failed to use degree of care reasonable in a person situated as he was, there can be no recovery unless company might reasonably have prevented the injury, notwithstanding his negligence. *Jacob v. Louisville &c. R. Co.*, 10 Bush, (Ky.) 263; *Sullivan v. Louisville Bridge Co.*, 9 id. 81.

Plaintiff's horse left standing in violation of city ordinance injured by defendant's wagon; notwithstanding such violation, defendant liable, if he could have driven by with due care. *Steele v. Buckhardt*, 104 Mass. 59; *Greenwood v. Callahan*, 119 id. 298; *Suttle v. Lawrence*, id. 276; *Smith v. Conway*, 121 id. 216; *Spoffard v. Harlow*, 3 Allen, 176; *Welch v. Wesson*, 6 Gray, 505.

Where defendant's servant saw a child in danger and neglected to use due care, the defendants are liable. *Jamison v. Ill. Central R. Co.*, 63 Miss. 33.

Where plaintiff stopped on railway crossing without looking or listening, and yet engine might have been stopped by exercise of due care, the company was liable for injuries received. *Kelly v. Han. &c. R. Co.*, 75 Mo. 138; *Duncan v. Missouri Pac. R. Co.*, 46 Mo. App. 198; *Railroad v. State*, 38 Md. 364; *Norris v. Litchfield*, 35 N. H. 271; *State v. Railroad*, 52 id. 528.

Boy negligently playing near defendant's street car was injured by the same passing over his foot; defendant was liable, as it was possible to have avoided the accident by exercise of due care. *Hays v. R. Co.*, 70 Tex. 602.

Although the plaintiff may have been guilty of negligence that may, in fact, have contributed to the accident, if the defendant could, by the exercise of ordinary care and diligence, have avoided the mischief which

happened, the defendant's negligence will not excuse him. *Radley v. London &c. R. Co.*, L. R. 1 App. Cases, 754, 759.

(d). PROXIMATE CAUSE.\*

There must be a causal connection between the plaintiff's negligence and the injury. Wharton on Negligence, § 301. When the plaintiff's negligence is remote and the defendant's negligence is the proximate cause of the injury, the plaintiff may recover.

(See the logical statement of this doctrine in Wharton on Negligence, secs. 73, 155, 323, &c.)

Although a person be placed in peril by his own negligence, or that of another, yet the unoffending party must nevertheless use such care, under the circumstances, to prevent injury, as a person of ordinary prudence would usually exercise in the same predicament. Thus, if "A." be placed in peril by the negligence of "B.," yet "A." must use such reasonable care to avoid injury as the circumstances permit, although he is not responsible for error of judgment. (See "Choice of Hazards.") His negligence will be measured by his opportunities to think, act and escape. So, if "A.," by his own negligence, be placed in peril of injury, from "B.," it is the duty of "B.," on discovering "A.'s" peril, to use in good faith whatever opportunity may be present to avoid injury to "A." If "B." neglect to do this, such neglect and not the previous neglect of "A." will be regarded as the proximate cause of the injury, as then for the first time, it may be, "B." owes "A." a duty to use some degree of care for his safety.

Hence, the care required of the unoffending person toward the one in peril depends entirely upon the circumstances of the case, the nature and extent of the peril, the knowledge that the innocent party has of it; or his opportunity to see and appreciate it, his time and ability to act, and his capacity to extricate the one threatened.

Thus, an engineer, seeing an infant on the track, should use at once and without delay strenuous efforts to stop the train, as his action can alone save the life. If an adult apparently in control of his person and faculties, be in the same place, he may, if time and space permit, use such preliminary warnings as would be liable to cause the negligent person to protect himself. This principle will be fully illustrated by the decisions that follow.

Where a collision took place between two vessels, whereby the plaintiff's vessel, having grounded, was injured, it was held, that the defendants were not necessarily liable, although those in charge of their vessel,

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\* NOTE.—For a discussion of the doctrine of proximate cause, see *Laidlaw v. Sage*, 158 N. Y. 73.

by the utmost diligence, might have seen the plaintiff's vessel in time to have avoided the collision. *Kelsey v. Barney*, 12 N. Y. 425.

The law imposes upon a party subject to injury the active duty of making reasonable exertions to render the injury as light as possible. If the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him. *Miller v. Mariner's Church*, 7 Greenleaf, 51; *Shannon v. Comstock*, 21 Wend. 461; *Heckscher v. McCrea*, 24 id. 309; *Clark v. Marsiglia*, 1 Denio 317; *Spencer v. Halstead*, id. 606; *Locker v. Damon*, 17 Pick. 284; *Hamilton v. McPherson*, 28 N. Y. 72.

The failure of the defendant to place a canal boat in an agreed place in a tow, does not relieve the other party from the necessity of care. The boat was placed outside, and got the storm and waves, and the plaintiff did not use proper care to protect it and prevent injury, and this was the immediate cause of the injury. Defendant was not liable. *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 210.

Notwithstanding the previous negligence of those managing a grounded vessel, if, at the time when the defendant's vessel collided with it and did the injury, which was the subject of the action, such collision might have been avoided by defendant by the exercise of reasonable care and prudence, an action will lie for the injury. *Austin v. N. J. Steamboat Co.*, 43 N. Y. 75; *S. P. Silliman v. Lewis*, 49 id. 379.

The principle is applicable to all who claim indemnity for losses either upon express contract or for torts, that they shall take all reasonable measures to avoid losses or diminish the damages that may occur. *Milton v. Hudson River Steamboat Co.*, 37 N. Y. 210; *Wilson v. Newport Dock Co.*, 4 H. & C. 232; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 753.

The court in an action for injury to plaintiff, on account of a hole in the street, charged, that, if in the use of ordinary care and prudence, such as an ordinarily prudent man would have used, under the same circumstances, the hole might have been discovered, the plaintiff could not recover, and the charge was held proper. But a request to charge that, if the jury shall find, that, if the hole was *one which might have been seen, &c.*, no recovery could be had, was unsound. *Minick v. The City of Troy*, 83 N. Y. 514.

Although the defendant was not to blame for the situation, in which the plaintiff's boat was placed, and it became a nuisance, which the defendant had a right, for its own protection, to remove, yet, in exercising that right, it was his duty to use ordinary care to do no unnecessary injury to the boat. *Hicks v. Dorn*, 42 N. Y. 47; *Mark v. H. R. Bridge Co.*, 103 id. 33.

Plaintiff boarded a train moving at the rate of two or three miles an hour, and, after reaching the platform was thrown by a sudden jerk of the train. It was error to dismiss the complaint. The jury should have decided whether the management of the train, and not the act of boarding it while in motion, was the proximate cause of injury. *Distler v. Long Island R. Co.*, 151 N. Y. 424; rev'g s. c., 78 Hun, 252.

Plaintiff, at work in a trench under a street car track, knowing that cars pass frequently, laid his hand on the rail without looking for cars. It was held to be the proximate cause of the injury, though the cars were running at excessive speed. *Nolan v. Metropolitan Street R. Co.*, 65 App. Div. 184.

Ejection from a car was not the proximate cause of a marriage postponement, where the plaintiff refused to board it again unless it was backed to him after it had started on. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Plaintiff was allowed to recover where his wagon was left unattended in a position where the wheels were dangerously near the car track, which motorman should have seen, if he actually didn't. *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352.

As to definition of contributory negligence, see *Nesbit v. Crosby*, (Conn.) 51 Atl. Rep. 550; *Norton v. Volzke*, 158 Ill. 402.

Proximate cause is such natural result as might reasonably have been foreseen. *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208.

It is not necessary that plaintiff's negligence shall have caused the injury. That it contributed thereto is sufficient. *Chicago &c. R. Co. v. Scranton*, 78 Ill. App. 230.

Plaintiff is only bound to use ordinary care in avoiding injury, and it is erroneous to charge that she cannot recover if she could have done anything which would have prevented injury. *Elwood v. Chicago &c. R. Co.*, 90 Ill. App. 397.

If negligence of both contribute, verdict should be for defendant. *Wabash R. Co. v. Jamsen*, 99 Ill. App. 312.

Instruction that plaintiff was entitled to recover unless she contributed "equally" with the defendant to cause her injuries, was error. *Gulf &c. R. Co. v. Warlick*, (Ind. Terr. App.) 35 S. W. Rep. 235.

Instruction as to plaintiff's negligence, held to express the idea of "contributory negligence," though those words were not used. *Louisville &c. R. Co. v. Boulds*, (Ky.) 64 S. W. Rep. 957.

Carrying passengers by station, where there was no conveyance to be had, held proximate cause of injury from long walk to reach home in

bad weather; though shelter could have been had among strangers. *Kentucky C. R. Co. v. Biddle*, (Ky.) 34 S. W. Rep. 904.

Failure to look before crossing, held proximate cause of injury from fright of horse; though statutory signals were not given. *Louisville &c. R. Co. v. Survant*, (Ky.) 44 S. W. Rep. 88.

An instruction is erroneous which gives the impression that plaintiff is not barred unless his negligence was the sole cause. *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323.

Incompetency in a motorman, half blind, and not negligence in allowing a child to approach the track unattended, was the efficient cause of its injuries. *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

The degree of contributory negligence is immaterial. *Ward v. Maine C. R. Co.*, 96 Me. 136.

Decedent stood negligently on car of defendant and was killed by collision of that car and another through negligence of defendant. Defendant was liable. *Northern Cent. R. Co. v. State*, 31 Md. 357.

County commissioners liable for permitting a road to be out of repair, notwithstanding plaintiff was negligent in driving over it. *Kennedy v. County Commissioners &c.*, 69 Md. 65.

Denial of recovery where plaintiff was guilty of negligence which "directly" contributed to the injury, was proper. *Baltimore v. Lobe*, 90 Md. 310.

It must be the direct and proximate cause. *Locke v. Sioux City R. Co.*, 46 Iowa, 109; *Needham v. San Francisco R. Co.*, 37 Cal. 409; *Bowen v. Southern R. Co.*, 58 S. C. 222; *Holmes v. Ashtabula Rapid Transit Co.*, 10 Oh. C. D. 638; *Missouri &c. R. Co. v. Lyons*, (Tex. Civ. App.) 53 S. W. Rep. 96; *Schwienfurth v. Cleveland &c. R. Co.*, 60 Oh. St. 215; *Martin v. Southern R. Co.*, 51 S. C. 150; *Brady v. Chicago &c. R. Co.*, 59 Neb. 233; *Gutrie v. Missouri &c. R. Co.*, 51 Neb. 746.

The violation of an ordinance against dangerous driving, to bar recovery, must be shown to have contributed to the injury. *Hovey v. Michigan Teleph. Co.*, 124 Mich. 607.

Plaintiff's negligence must enter directly into and form an efficient cause of the accident. *Outes v. Metropolitan Street R. Co.*, 168 Mo. 535.

The act of the one who has the last clear chance of averting danger, is the sole cause of an accident. *Klockenbrink v. St. Louis &c. R. Co.*, 81 Mo. App. 351.

Where bather negligently went beyond his depth, it was error not to submit to the jury the negligence of the bath house company in not using due diligence to find him after notification. *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563; s. c., 33 L. R. A. 598; s. c. aff'd, 50 Neb. 214.



To be "contributory," negligence must in some degree proximately contribute to the injury. *Culbertson v. Holliday*, 50 Neb. 229.

Ordinary, not extraordinary, is the degree of care required. The amount of prudence and caution required by ordinary care varies with the danger suggested by the circumstances. *Missouri P. R. Co. v. Fox*, 60 Neb. 531.

A theft is not necessarily the natural and probable consequence of a direction to decorators to enter a private room. *Searle v. Parke*, 68 N. H. 311.

See, also, *Harbison v. Iliff*, 10 Oh. S. & C. P. Dec. 58.

Company is liable where it neglected to stop train and remove to place of safety a person who, to their knowledge, was injured by falling from the train. *R. Co. v. Kassen*, 49 Oh. St. 230.

It is improper to charge that plaintiff cannot recover if he "contributed in any degree" to the injury, instead of "directly" or "proximately." *Matthews v. Toledo*, 21 Oh. C. C. 69.

That a drunken man took the strychnine ordered for another, was not the necessary consequence of failure to properly label it. *Ronker v. St. John*, 21 Oh. C. C. 39.

Defendant ran a train on the wrong track without notifying the plaintiff, a watchman, who was on the track unaware of its approach. Failure to notify was the proximate cause of death. *Lake Shore &c. R. Co. v. Schultz*, 19 Oh. C. C. 639.

Riding on a platform of a street car was not the proximate cause of an accident arising from its negligent management. *Vail v. Cincinnati &c. R. Co.*, 7 Oh. Dec. 28.

Falling off a wagon was not the necessary consequence of a driver's suddenly starting up with the knowledge that a party was standing therein with his back to him. *Flannagan v. Holloway*, 11 Oh. C. D. 313.

When both use ordinary care, however, neither can be chargeable with negligence. It is but an accident for which there can be no recovery. *Murphy v. Dayton*, 7 Oh. N. P. 227.

Selling liquor to a drunkard, in violation of statute, was the proximate cause of injury, though the immediate cause, was the cold which froze his hands, while he lay exposed as a result of his state of intoxication. *Littell v. Young*, 5 Pa. Super. Ct. 205.

One cannot be held for consequences which could not reasonably have been foreseen; not being the natural result, but the result of the interposition of a new and independent force. *Miles v. Postal Teleg. &c. Co.*, 55 S. C. 403.

Putting passenger off at wrong station held proximate cause of sickness contracted from walking home one-half mile in bad weather, where

there was no conveyance or place to stop. *Texas &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 34 S. W. Rep. 1057.

When a cause is the immediate cause, the question of proximate cause does not arise. *Central &c. R. Co. v. Hoard*, (Tex. Civ. App.) 49 S. W. Rep. 142.

Father having negligently grasped electric wire was shocked, but revived. Soon after, however, he became dizzy and fell against his son, who fell against the wires. Father's negligence was not the proximate cause of the son's death. *Brush Electric Light &c. Co. v. Lefevre*, (Tex. Civ. App.) 55 S. W. Rep. 396.

Refusal to charge that, to enable plaintiff to recover, the defect must have directly and immediately caused the injury, held proper. *Galveston &c. R. Co. v. Newport*, (Tex. Civ. App.) 65 S. W. Rep. 657.

Defining contributory negligence as, such negligence as, with defendant's concurring negligence, is the proximate cause of the injury, held proper. *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 67 S. W. Rep. 769; s. c. aff'd, id. 768.

Charge as to plaintiff's negligence without adding, that it must have contributed to the injury in order to preclude recovery, held improper. *Gulf &c. R. Co. v. Mangham*, (Tex. Civ. App.) 69 S. W. Rep. 80.

Horse car driver negligently attempted to cross before an approaching train. Gateman negligently lowered gates and shut him on track. Both negligent acts were proximate causes of resulting collision. *Washington &c. R. Co. v. Hickey*, 166 U. S. 521.

A defective gate in a crossing, which admitted a boy to the tracks, was not the proximate cause of an injury to a boy while attempting to cross before a train he saw approaching. *Baltimore &c. R. Co. v. Anderson*, 75 Fed. Rep. 811.

Fire from burning oil tank, due to negligent switching, held not the proximate cause of injury, by an explosion, to one voluntarily approaching to assist in subduing the flames. *Cleveland &c. R. Co. v. Ballentine*, 84 Fed. Rep. 935.

Standing in a dangerous place, while applying an unusual strain, held the proximate cause of injury from fall of beam, the defective work on which caused it to stick. *Maryland v. Westoll*, 106 Fed. Rep. 233.

See, also, *The Aldborough*, 106 Fed. Rep. 90; *Rogers v. Warren*, 75 Mo. App. 271; *Boner v. Meyer*, 11 York Leg. Reg. 58; *Wells v. Houston*, 23 Tex. Civ. App. 629; *Hunter v. Tolbard*, 47 W. Va. 258.

Instruction that contributory negligence must have contributed "substantially or directly" to the injury, was proper. *Trumbull v. Erickson*, 97 Fed. Rep. 891.

Defective steam chest, obscuring view of signals, held not proximate

cause of injury to one who did not give a signal in time to avoid the injury had it been seen. *Hunt v. Kane*, 100 Fed. Rep. 256.

Brakeman's failure to apply brakes and stop rear section of train, parted through defective coupling, was held proximate cause of his injury from collision with forward section stopped by engineer contrary to orders. *Richmond &c. R. Co. v. Tribble*, (Va.) 24 S. E. Rep. 278.

Plaintiff is barred, if his negligence contributes in the least degree. The use of the word "material" instead of "least" is objectionable, as it permits the jury to consider degrees of negligence. *Laflam v. Missisquoi Pulp Co.*, (Vt.) 52 Atl. Rep. 526.

Definition of contributory negligence as that which proximately or naturally contributed to the injury was not erroneous. *McLeod v. Spokane*, 26 Wash. 346.

Person riding on cowcatcher is negligent, but company is liable, if its negligence is the immediate cause of injury. *Downy v. R. Co.*, 28 W. Va. 732.

A servant risking danger to save his master's property is not contributorily negligent. *Schwartz v. Shull*, 45 W. Va. 405.

Breaking of a line was proximate cause of fall from wagon striking an obstruction at the side of the road, where the horse was steered by the extra pull on the opposite line. *McFarlane v. Sullivan*, 99 Wis. 361, 367.

See *Deiseurieter v. Krause &c. Co.*, 97 Wis. 279.

The injury must be the natural and probable consequence of the act: such as should have been foreseen. *Conrad v. Ellington*, 104 Wis. 367.

An instruction that the proximate cause is the direct and natural cause, instead of the natural and probable one, is erroneous. *Baxter v. Chicago &c. R. Co.*, 104 Wis. 307; *Mauch v. Hartford*, 112 id. 40.

Probable to the ordinary man. Probable from the standpoint of the one charged, is erroneous. *Hudson v. Northern P. R. Co.*, 107 Wis. 620.

(e). WANT OF CARE INDUCED BY CONDUCT OF WRONGDOER.

**If the defendant by his act or his conduct has led the plaintiff to believe, that care is not needed on his part, the plaintiff is not negligent in failing to use care or continuing the risk.**

A boy of eleven, standing on a pier, was requested by the mate of a tug to "cast" the stern line by which she was moored. Being unfamiliar with the movements of the vessel, he was injured, in attempting to do so, by his failure to notice the vessel as she swung around. The question of whether the defendant had created a dangerous situation into which the plaintiff was invited and which he was unaware of should have been left to the jury. *Geibel v. Elwell*, 19 App. Div. 285.

Where an automobile came so suddenly upon plaintiff as to induce fright, defendant cannot complain of his error of judgment. *Thies v. Thomas*, 77 N. Y. Supp. 276.

Where defendants agreed to stop running a "fan" in a planing mill for the space of one hour, and the plaintiff relied on that understanding, and was injured by the negligent starting of the same, they were liable. *Kinney v. Folkert*, 78 Mich. 687; *Penn. R. Co. v. Ogier*, 35 Pa. St. 60; *Morrissey v. Ferry Co.*, 47 Mo. 521.\*

Gates were open as an indication that it was safe to cross the track. Traveler was not held to the same degree of care as otherwise. *Threlkeld v. Wabash R. Co.*, 68 Mo. App. 127. †

Plaintiff was misled as to the safety of crossing by the absence of signals or warnings. *Schweinfurth v. Cleveland &c. R. Co.*, 60 Oh. St. 215.

Road was left unbarricaded; See *Snyder v. Penn Township*, 14 Pa. Super. Ct. 145.

An imprudent action, when placed in a perilous position by another's negligence, is not contributory negligence. *International &c. R. Co. v. Byrant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Plaintiff attempted to cross a track but stepped back on seeing an engine approaching, which had been obstructed by other cars in the way, when he was struck by still other cars "kicked" along with no one at the head to protect pedestrians from injury. *Steele v. Northern P. R. Co.*, 21 Wash. 287.

Plaintiff cannot recover on the ground that defendant's negligence placed him in a situation of sudden danger which required him to form a hasty judgment, where it was in fact his own negligence which placed him in such position. *Dummer v. Milwaukee Electric R. &c. Co.*, 108 Wis. 589.

#### (f). VIOLATION OF STATUTE.

Where the defendant directly violates a positive enactment, contributory negligence has been held in some instances to be immaterial.

Failure to obey an ordinance as to the inclosure of elevator shafts, had it been the proximate cause of the accident, would have been tantamount to willful injury. See *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Contributory negligence is no defense to an action based upon the statute imposing on railroads the duty of fencing their tracks. *Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; *Jeffersonville &c. R. Co. v. Ross*, 37 id. 545; *Louisville &c. v. Whitesell*, 68 id. 297; *Fort Wayne*

\* NOTE.—This rule would be applicable to similar instances as above, occurring between master and servant. See "Master and Servant," *post*, p. 1886.

† NOTE.—See also "Crossings," *post*, p. 733.

&c. R. Co. v. Herbold, 99 id. 91; Louisville &c. R. Co. v. Cahill, 63 id. 340.

See, also, "Domestic Animals," *post*.

Sale of liquor to an habitual drunkard in violation of statute held not to give action for his death. *Bissell v. Starzinger*, 112 Iowa, 266.

Statutory liability for acts of a vicious dog does not exclude the defense of contributory negligence. *Bush v. Wathen*, (Ky.) 47 S. W. Rep. 599.

See, also, "Domestic Animals," *post*.

Person about to cross defendant's track has a right to presume that an ordinance limiting speed of trains will be observed. Such presumption is not negligence to defeat an action for injuries inflicted under those circumstances. *Correll v. B. C. R. &c. R. Co.*, 38 Iowa 120; *contra*, *Taylor v. M'Fg. Co.*, 143 Mass. 470.\*

That plaintiff was a trespasser, did not *per se* prevent his recovery, where defendant violated a statute regulating the speed of its trains. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Defendant does not escape statutory liability for act of his dog in frightening a horse by the fact that plaintiff's situation, in driving a skittish horse in an unsafe carriage, was dangerous anyway. *Chickering v. Lord*, 57 N. H. 555.

Selling liquor to drunkard in violation of statute made seller liable for injuries from exposure and cold. *Littell v. Young*, 5 Pa. Super. Ct. 205.

A statute, requiring constant lookout and performance of certain acts on discovery of obstruction, and imposing liability for injury due to violation thereof, construed to impose an absolute liability regardless of contributory negligence. *Louisville &c. R. Co. v. Truett*, 111 Fed. Rep. 876.

#### (g). WHEN FOR THE DETERMINATION OF THE COURT OR JURY.

Depending upon the facts presented in each particular case, the question of negligence may be one of law or fact. It is sometimes, however, considered that the court should always conclude, whether the facts established impute negligence.†

There are four heads to this subject:

(A). When the facts are uncontroverted or incontrovertible, and the question of negligence is for the court.

(B). When the facts are uncontroverted or incontrovertible, and the question of negligence is for the jury.

\* NOTE.—This rule does not apply in New York to railway crossings. See "Crossings," *post*, p. 781.

† NOTE.—For further illustration of circumstances which require or justify a finding of negligence, see specific headings.

(C). When the facts are to be found by the jury, and the question whether such facts, if so found, impute negligence is to be determined by the court.

(D). When the facts are to be found by the jury, and the question, whether such facts, if so found, impute negligence, is to be determined by the jury.

I. The jury should pass on the question of the existence or non-existence of the facts, that is, determine where the weight of testimony lies, when there is a conflict of evidence. *Maher v. Central Park & C. R. Co.*, 67 N. Y. 52, 55; *Hackford v. N. Y. Central & C. R. Co.*, 53 id. 654; *Bernhard v. Rensselaer & C. R. Co.*, 1 Abb. Ct. App. Dec. 131; *Hozman v. The Hoboken Land & C. Co.*, 50 N. Y. 53; *Hamilton v. Third Ave. R. Co.*, 53 id. 25.

II. The question whether the facts impute negligence is for the jury, when the circumstances are such, that men of ordinary prudence and discretion might differ as to the character of the act, under the circumstances of the case, or when the inferences to be drawn from, or the significance to be attached to the testimony are doubtful. *Thurber v. Harlem & C. R. Co.*, 60 N. Y. 331; *Hays v. Miller*, 70 id. 117; *Nolan v. Brooklyn City & C. R. Co.*, 87 id. 67; *Belton v. Baxter*, 58 id. 415; *Cook v. N. Y. Central R. Co.*, 3 Keyes 476; *Oschsenbein v. Shapley*, 85 N. Y. 214; *The People v. Conroy*, 97 id. 80; *Connolly v. Knickerbocker Ice Co.*, 114 id. 104, 107; *Weber v. N. Y. Central & C. R. Co.*, 58 id. 456; *Bernhard v. Rensselaer & C. R. Co.*, 1 Abb. Ct. of App. Dec. 131; *Massoth v. Delaware & C. Canal Co.*, 64 N. Y. 524; *Sullivan v. N. Y. Central & C. R. Co.*, 34 id. 29; *Beisiegel v. N. Y. Central & C. R. Co.*, id. 622; *Ernst v. The H. R. R. Co.*, 35 id. 9; *Hogan v. Eighth Ave. & C. R. Co.*, 15 id. 383; *Keller v. N. Y. Central & C. R. Co.*, 24 How. 177; *Bagley v. Bowe*, 105 N. Y. 171; *Griffin v. N. Y. Central R. Co.*, 112 id. 126; *Gardner v. Friederich*, 163 N. Y. 568; aff'g s. c., 25 App. Div. 521; *Mohr v. Wetherill*, 33 Misc. 791.

(The views here expressed also relate to the negligence of the defendant, and the decisions relating thereto are also gathered at this place.)

#### 1. WHEN THE QUESTION IS FOR THE COURT.

Facts may be undisputed and may so clearly indicate, that the injured person did, to some extent, contribute to his own injury, as to reasonably justify the court in so declaring.

*Morrison v. Erie R. Co.*, 56 N. Y. 302; *Deyo v. N. Y. C. R. Co.*, 34 id. 13; *McIntyre v. N. Y. C. R. Co.*, 37 id. 287; *Filer v. N. Y. C. R. Co.*, 49 id. 47; *Solomon v. Manhattan E. R. Co.*, 103 id. 437; *Hunter v. Cooperstown & S. & C. R. Co.*, 112 id. 377; *Weber v. N. Y. C. & C.*

R. Co., 58 id. 451; *Davis v. N. Y. C. &c. R. Co.*, 47 id. 400; *Hackford v. N. Y. C. &c. R. Co.*, 53 id. 654; *Lane v. The Atlantic Works*, 111 Mass. 136; *Gonzales v. N. Y. &c. R. Co.*, 38 N. Y. 440; *Van Schaick v. Hudson R. Co.*, 43 id. 527; *Wilcox v. Rome &c. R. Co.*, 39 id. 358; *Wilds v. The Hudson R. Co.*, 29 id. 315; *Woodward v. N. Y. L. E. R. Co.*, 106 id. 369. See *Penn. R. Co. v. Kilgore*, 32 Pa. St. 292.

Jury decide on facts, but not the inference therefrom. *Pleasants v. R. Co.*, 95 N. C. 195; *Empire &c. Co. v. McIntosh*, 82 Ky. 554; *Witty v. C. &c. R. Co.*, 83 id. 21; *Trow v. C. R. Co.*, 24 Vt. 187.

The question of contributory negligence has more uniformly been left to the jury, in the case of injury to infants, inasmuch as the degree of care required is that which can be expected of one of immature understanding; hence such cases should not be confused with those where the conduct of an adult is involved. *Byrne v. N. Y. Central &c. Co.*, 83 N. Y. 620; *Dowling v. The N. Y. Central &c. R. Co.*, 90 id. 670; *Connolly v. Knickerbocker Ice Co.*, 114 id. 107; *Stone v. Dry Dock &c. R. Co.*, 115 id. 111. See "Contributory Negligence, Infants," p. 704.

See, however, *Thompson v. Buffalo R. Co.*, 145 N. Y. 196.

The question was not for the jury, where expert horsemen testify that a runaway team can be guided, if not stopped, and defendant's coachman, a competent servant, testified that his team became unmanageable and could not be guided. *Cadwell v. Arnheim*, 152 N. Y. 182.

**From opinion.**—"In actions for the recovery of damages, charged to the negligent acts of a defendant, it must appear that there has been some breach of duty." \* \* \* "It will not do to submit a question of negligence to a jury, when the facts are equally consistent with the presence or the absence of negligence; or where the jury could do no more than surmise as to the negligence of the defendant." \* \* \* "There was absolutely no evidence on the part of the plaintiff to show that the defendant's servant was negligent in the performance of any duty; unless the opinions of persons who were not witnesses of the occurrence, as to what a driver might have done in such an emergency, can be regarded as such evidence, and that we are not prepared to hold." \* \* \* "To submit the case to the jury, under the evidence, was to invite their speculation upon the question; with nothing in the facts to militate against the truth of the coachman's statements."

In an action for death of a brakeman by reason of failure to provide warnings of a low bridge, the mere evidence that plaintiff, who was standing on top of the car before coming to the bridge, was found thereon, lying insensible, after passing it, was held insufficient to present a question for the jury. *Fitzgerald v. New York &c. R. Co.*, 154 N. Y. 263; rev'g s. c., 88 Hun. 359.

**From opinion.**—"In an action to recover damages for negligence, the burden is upon plaintiff to establish by a fair preponderance of evidence every fact that is essential to his cause of action. It is not enough to show that the defendant

was negligent and that the plaintiff was free from negligence, but it is also necessary to show that the negligence of the defendant caused the injury for which a recovery is sought. The negligence must be connected with the injury by natural and uninterrupted sequence, as cause is connected with effect."

\* \* \* "No evidence was given tending to show any wound or bruise upon his person, or that he died from violence instead of disease." \* \* \* "While it is true that slender evidence is sometimes permitted to become the basis of a finding of fact, it is when it appears that there is no more to be had, and it is allowed under the necessity of the case in order to prevent injustice. No such necessity existed upon the trial under review."

Injury to eyes by an explosion of quick lime stolen by boys, was not, as a matter of law, the proximate result of placing the lime in the street. *Beetz v. Brooklyn*, 10 App. Div. 382.

From opinion.—"Usually the question of proximate cause is one of fact for the jury to answer. But where the facts present a clear case, the question is to be disposed of as one of law by the court. And the law requires that the injury must so directly result from the wrongful act that according to common experience and the usual course of events, it might, under particular circumstances, have reasonably been expected. (*Jex. v. Straus*, 122 N. Y. 293.)"

Lamp trimmer was negligent *per se*, where, seeing a wagon approach within striking distance of the leg wires of the lamp he had lowered to trim, he did not suspend work or give any other warning than that to two previous vehicles, which the driver of the third did not hear. *Campbell v. Wood*, 22 App. Div. 599.

Pedestrian was negligent *per se* in attempting to slowly cross street car tracks without looking out for, or noticing, cars in plain sight, approaching from each direction, until the one on the further track blocked his passage from that on the nearer. *Martin v. Third Ave. R. Co.*, 27 App. Div. 52.

Where an engineer, competent and intelligent, knowing of a dangerous defect in the locomotive, persisted in its use. *Bridges v. Tennessee Coal &c. R. Co.*, 109 Ala. 287.

Where plaintiff went upon a railroad crossing on a dark night without stopping and listening and stood there talking with another till struck. *St. Louis &c. R. Co. v. Martin*, 61 Ark. 549.

Where plaintiff's own testimony clearly shows that he could have avoided injury by the use of reasonable care. *Taylor v. Georgia Marble Co.*, 108 Ga. 807.

When conclusion of negligence necessarily results from the statement of facts. *Chicago &c. R. Co. v. O'Connor*, 119 Ill. 586.

Demurrer to a complaint by a passenger, charging railway company with negligence in maintaining gravel heaps on its right of way, where there was no station, sustained. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.



**From opinion.**—"The duties and liabilities imposed by the relation of carrier and passenger are questions of law, but whether there has been a negligent discharge of a duty so imposed is a question of fact or law upon the same conditions as any other question of negligence. Some of the acts charged as negligent, we think, could not be brought within any of the duties created by the relation, and we apprehend that reasonable minds would not disagree in the conclusion that they were not negligent as applied to the circumstances alleged to exist, and therefore the court might so pronounce them as matter of law. Of this class are charges of negligence in not lighting the railroad grounds where there was no station, merely to illuminate a passing train with its platform changing the depot and business from one side to the other without notifying plaintiff, or allowing gravel piles along the road where there was no station nor the slightest reason to suppose that passengers would fall off or try to get off."

Where the inferences deducible from the complaint necessarily establish negligence it is demurrable. *Smith v. Chicago &c. R. Co.*, 86 Ill. App. 647.

It is only where the facts authorize the finding by the jury that the question is one of fact. It cannot be allowed arbitrarily to declare what is negligence. *Chicago &c. R. Co. v. Maloney*, 99 Ill. App. 623.

When sender of message fails, after being notified, to make address more definite. *Western &c. Tel. Co. v. McDaniel*, 103 Ind. 294.

Where child of seven and a half, bright and able to comprehend the danger, went to sleep after playing on defendant's tracks. *Krenzer v. The Pittsburg &c. R. Co.*, 151 Ind. 587.

Where deceased recklessly stood for two or three minutes in front of a train approaching in full view. *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571.

When there is but one reasonable inference the court must decide. *Gaston v. Bailey*, 24 Ind. App. 24.

Where only one conclusion can be drawn from the facts. *Mabbott v. Illinois C. R. Co.*, (Iowa) 89 N. W. Rep. 1076.

Where it was undisputed that two independent causes produced the injury. *Missouri &c. R. Co. v. Columbia*, (Kan.) 69 Pac. Rep. 338.

Where plaintiff, in putting his glasses in his pocket, stuck his arm out of the car window and was struck by a passing bridge timber, an obvious danger. *Clarke v. Louisville &c. R. Co.*, 101 Ky. 34.

Where the facts are admitted or established by undisputed testimony. *Henderson Trust Co. v. Stuart*, (Ky.) 55 S. W. Rep. 1082; s. c., 48 L. R. A. 49.

Where the jury could draw no other conclusion. *Exchange Bank v. Trimble*, (Ky.) 56 S. W. Rep. 156.

Only when proof of contributory negligence is clear should peremptory instruction be given. *Standard Oil Co. v. Eiler*, (Ky.) 61 S. W. Rep. 8.

Where plaintiff's testimony as to looking and listening is contradicted by the established facts. *Northern C. R. Co. v. Medairy*, 86 Md. 168.

Where plaintiff deliberately stuck his head and shoulders out of the car, looking backwards. *Cummings v. Worcester &c. Street R. Co.*, 166 Mass. 220.

Where motorman failed to stop his car after seeing a fellow workman run to notify plaintiff, who was deaf. *Lyons v. Bay Cities &c. R. Co.*, 115 Mich. 111.

Where traveler, familiar with crossing, failed to stop, look or listen when an approaching train could have been seen and heard. *Stewart v. Michigan C. R. Co.*, 119 Mich. 91.

Where pedestrian passed through gates at a crossing and stood on main track while train on side track passed. *Buckley v. Flint &c. R. Co.*, 119 Mich. 583.

What are proper elements of damages are questions of law. *Camp v. Wabash R. Co.*, (Mo. App.) 68 S. W. Rep. 96.

Deceased, with unobstructed view of track, at crossing, fell from a load of hay and was run over. *Brady v. Chicago &c. R. Co.*, 59 Neb. 233.

Where negligence on part of plaintiff is the only reasonable inference to be drawn from his own testimony. *Neal v. Carolina C. R. Co.*, 126 N. C. 634.

Or the whole evidence. *Halton v. Southern R. Co.*, 127 N. C. 255.

Whether evidence *tends to show* negligence is for the court, though, whether the evidence constitutes negligence, is for the jury. *Omaha Street R. Co. v. Martin*, 48 Neb. 65; *Cincinnati Street R. Co. v. Murray*, 53 Oh. St. 570; s. c., 30 L. R. A. 508.

Where plaintiff got off a car, standing still, on the left side where there was a ditch, when the right was smooth and safe. *Bland v. Roxborough &c. R. Co.*, 13 Pa. Super. Ct. 93.

A servant continued in service, where he was warranted in believing that the defect had been remedied. *Missouri &c. R. Co. v. Nordell*, 20 Tex. Civ. App. 362.

Where the uncontradicted facts are that plaintiff, familiar with a crossing did not make any attempt to look out for a train plainly in sight. *Northern P. R. Co. v. Freeman*, 174 U. S. 379; rev'g, 83 Fed. Rep. 82.

See, also, *Pyle v. Clark*, 75 Fed. Rep. 644.

See, also, "Crossings," *post*, p. 733.

In jumping from a car to an adjoining track on which a train was known to be due. *MacLeod v. Graven*, 73 Fed. Rep. 627.

Where negligence clearly contributed directly to the injury, it is error to leave it to the jury to determine whether it was the proximate cause. *Louisville &c. R. Co. v. Johnson*, 81 Fed. Rep. 679.

Direction for defendant held proper, where a boy of 12 was injured when he caught a turntable and tried to hold it off his brother. *Thomason v. Southern R. Co.*, 113 Fed. Rep. 80.

When but one reasonable conclusion can be drawn from the facts, contributory negligence is for the court, if more than one, it is for the jury. *Hemingway v. Illinois C. R. Co.*, 114 Fed. 843.

Where plaintiff stepped behind one car and in front of another without taking precaution to guard against the latter. *Burgess v. Salt Lake City R. Co.*, 17 Utah, 406.

Where the facts are undisputed. *Pool v. Southern Pac.*, 20 Utah, 210.

Where plaintiff shows in the course of his proof that he is guilty of contributory negligence. *Silcock v. Rio Grande R. Co.*, 22 Utah, 179.

Proximate cause is for the court on uncontradicted testimony. *Schwartz v. Shull*, 45 W. Va. 405.

Where the testimony of a boy of eighteen was that he did not know the effect of putting his finger into the rolls of an ordinary straw cutter, as it was highly improbable. *Roth v. Barrett Man. Co.*, 96 Wis. 615.

Where an employé, familiar with all the surroundings, gets under a descending elevator to put a pail on top of one about to ascend. *Powell v. Ashland Iron & C. Co.*, 98 Wis. 35.

It is for the court to define what constitutes proximate cause, and for the jury to find it. *Deisenrieter v. Kraus-Merkel Malting Co.*, 97 Wis. 279.

Where a boy of seventeen was familiar with the danger incident to removing saw dust with a stick and knew that it could be removed with safety by stopping the saw. *Larson v. Knapp & C. Co.*, 98 Wis. 178.

## 2. WHEN THE QUESTION IS FOR THE JURY.\*

Choice of hazards in a perplexing situation. *Filer v. N. Y. & C. R. Co.*, 49 N. Y. 47; *Probst v. Delemater*, 100 N. Y. 266. See, also, *Bernard v. Rensselaer & C. R. Co.*, 1 Abb. Ct. of App. 131; *Dickens v. N. Y. & C. R. Co.*, id. 504.

A gas company allowed gas to be turned on in an apartment house without inspecting the pipes. A boy of eighteen searched for a gas leak with a lighted candle. *Schmeer v. Gas Light Co.*, 147 N. Y. 529; s. c., 30 L. R. A. 653.

Plaintiff, at the invitation of a conductor, boarded a train moving at the rate of two or three miles an hour, and was thrown by a sudden jerk. Whether in such case, plaintiff having once reached a place of safety, the accident was not caused by reason of the subsequent mismanagement of

\* NOTE.—For further illustrations of facts from which the conclusion of negligence is to be drawn by the jury, see specific headings.

the train. *Distler v. Long Island R. Co.*, 151 N. Y. 424; s. c., 35 L. R. A. 762.

Driver of a hose cart, going to a fire, collided with a truck negligently left in the street. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

Whether negligence of crew is attributable to master temporarily deranged, where it was apparent that he was unfit to command and the mate should have assumed control. *Williams v. Hays*, 157 N. Y. 541; s. c., 43 L. R. A. 253; rev'g s. c., 2 App. Div. 183.

A guest at a hotel retired with his window open, light burning, clothes, &c., conspicuously displayed about the room. *Becker v. Warner*, 90 Hun, 187.

Where one, employed for other work, was killed in explosion of a barrel overcharged with steam, while working around the barrel at direction of the superintendent. *Crowell v. Thomas*, 90 Hun, 193.

Whether an under crossing of a railroad 13 feet 2 inches wide was sufficient. *Windsor v. Delaware &c. Canal Co.*, 92 Hun, 127; s. c. aff'd, 155 N. Y. 645.

Whether it was negligence to fail to see a doctor for two days after getting a cinder in one's eye, when there is no evidence that the delay aggravated the injury, or that the sight could have been saved anyway. *Morrison v. Long Island R. Co.*, 3 App. Div. 205.

Failure to properly light a station platform to show passengers alighting from cars how to step. Getting off in a crowd without looking to see where one is stepping. *Fox v. New York*, 5 App. Div. 349; *Green v. Middlesex Valley R. Co.*, 31 App. Div. 412.

A father left his child of seven on a street crossing for a moment, while assisting his wife to alight, after looking and seeing no car within 150 feet. *Kitchell v. Brooklyn &c. R. Co.*, 6 App. Div. 99.

Driver attempted to cross the track when car was far enough away for the gripman to have stopped. *Smith v. Metropolitan Street R. Co.*, 7 App. Div. 253.

Mother of child seven years and four months old, left unattended on the street for half an hour, had cautioned it to remain in front of the house, but allowed it to remain away for half an hour. *Hyland v. Burns*, 10 App. Div. 386.

Woman, while looking in her pocketbook for change, fell over man in hallway of elevated railway station, posting bills. *Lycett v. Manhattan R. Co.*, 12 App. Div. 326.

Failure to supply a heavy truck with a brake. *Hurley v. New York &c. Brew. Co.*, 13 App. Div. 167.

Conflict of testimony as to signals at a crossing. *Sayer v. King*, 21 App. Div. 624.

One of a group of children, crossing and recrossing track in play in view of car for some distance, was struck and caught up by the fender, but jolted off and run over within the distance in which the car might have been stopped after striking it. *Howell v. Rochester R. Co.*, 24 App. Div. 502.

Failure to stop a car to ascertain the trouble, when flashing or flaming began in the motor box, due to presence of dirt. Passenger jumped from fright, at subsequent burning out of fuse. *Poulsen v. Nassau Electric Co.*, 30 App. Div. 246.

Where the testimony was such that the judge could not tell whether the jury had correctly concluded, their verdict will not be disturbed. *Wilhelm v. Brooklyn &c. R. Co.*, 32 App. Div. 637.

Paying a raised draft, where, by referring to letters of advice from the drawee, the alteration could have been discovered in time to have prevented the payment. *Continental Nat. Bank v. Tradesman Nat. Bank*, 36 App. Div. 112.

Running a car on steep grade at such a speed that it could not be stopped within 40 feet. *Fullerton v. Metropolitan Street R. Co.*, 37 App. Div. 386.

Plaintiff crossed a track after looking both ways as far as he could when the flagman had rolled up his flag and walked towards his shanty. *Manley v. New York &c. R. Co.*, 39 App. Div. 144.

Collapse of warehouse, unaccompanied by an earthquake or the like. *Kaiser v. Latimer*, 40 App. Div. 149.

Where the evidence is conflicting, as to whether cars obstructed the view and whether plaintiff might, notwithstanding, have seen the train approach. *Chapman v. New York &c. R. Co.*, 41 App. Div. 618.

Failure to stop a street car for 75 feet, when it could have been stopped within 25 or 35 feet, with a pedestrian in the fender by contributory negligence. *Green v. Metropolitan Street R. Co.*, 42 App. Div. 160.

Where the danger is known, the evidence is sufficient on the question of contributory negligence to go to the jury. *Boyle v. Degnon-McLean &c. Co.*, 47 App. Div. 311.

See, also, *Knoll v. Third Ave. R. Co.*, 46 App. Div. 527; s. c. aff'd, 168 N. Y. 592; *Morrissey v. Smith*, 67 App. Div. 189.

Chimney had been allowed to remain in a dangerous condition for a year or more. *Kaiser v. Washburn*, 55 App. Div. 159.

Where plaintiff's own testimony, though uncorroborated and contradicted, is the only evidence of lack of contributory negligence. *Steinle v. Metropolitan Street R. Co.*, 69 App. Div. 85.

Extent of intoxication of passenger, conductor's knowledge thereof and condition of place of ejection. *Louisville &c. R. Co. v. Johnson*, 108 Ala. 62; s. c., 31 L. R. A. 372.

Whether one had knowledge of defects which he had every opportunity to observe. *Whatley v. Zenida Coal Co.*, 122 Ala. 118.

On a conflict of evidence, as to whether plaintiff was alone negligent or whether defendant after seeing his peril could have avoided injury by ordinary care. *Memphis &c. R. Co. v. Martin*, 131 Ala. 269.

Use of a light to discover a leak of gas not knowing its presence in large quantities. *Pine Bluff &c. Co. v. Schneider*, 62 Ark. 109; s. c., 33 L. R. A. 366.

Horse tied to a wagon so that it could not move forward without pulling it along by its mouth so as to injure itself. *Johnson v. Stewart*, 62 Ark. 164.

Invalid lady passenger, promised assistance, attempted to alight unassisted. *St. Louis &c. R. Co. v. Baker*, 67 Ark. 531.

A woman ejected from a train attempted to walk three miles to next station. *Sloane v. Southern &c. R. Co.*, 111 Cal. 668; s. c., 32 L. R. A. 193.

Where the evidence is capable of different inferences. *Wahlgren v. Market Street R. Co.*, 132 Cal. 656.

Passenger 60 years of age got down on the steps of a slowly moving car at night. *Denver Tramway Co. v. Reid*, 22 Colo. 349.

Whether duty resting on engineer, when he saw the danger, was properly performed. *Nolan v. N. Y. C. &c. R. Co.*, 53 Conn. 461.

Conduct of defendant in view of things likely to happen. *Dexter v. McCready*, 54 Conn. 171; *Wright v. Georgia R. Co.*, 34 Ga. 330.

A flagman voluntarily placed at a crossing, unnecessarily absent during passing of a train. *Dundon v. New York &c. R. Co.*, 67 Conn. 266.

Gripman failed to replace side platform gates voluntarily maintained by company, after admitting a passenger. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

A threshing machine, operated by an engine in close proximity. *Adair v. Southern &c. Ins. Co.*, 107 Ga. 297.

Failure of a driver to see an electric light wire, the size of a person's little finger, five feet from the ground. *Lloyd v. City &c. R. Co.*, 110 Ga. 165.

Where there is evidence sufficient to overcome presumption of defendant's negligence and yet evidence of its negligence. *Southern R. Co. v. Loughridge*, 114 Ga. 173.

Where the injury occurs in another state, the court should not, in the absence of a statute or ordinance there defining the acts as negligence, at-

tempt to tell the jury what acts do or do not constitute negligence. *Savannah &c. R. Co. v. Evans*, 115 Ga. 315.

A child of two left unattended two or three minutes in a room adjoining a railroad track. *Chicago &c. R. Co. v. Logue*, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

Bank permitted a customer's agent to purchase a draft on a distant city under unusual circumstances. *Lamson v. Illinois Trust &c. Bank*, 166 Ill. 162; aff'g s. c., 62 Ill. App. 377.

Due care in controlling a frightened horse; persistency in ringing bell of locomotive and running at an unlawful rate of speed. *Illinois C. R. Co. v. Keller*, 77 Ill. App. 474.

Where reasonable men may differ in the conclusions drawn from the evidence. *Maxwell v. Durkin*, 86 Ill. App. 257; s. c., 185 Ill. 546.

Where sensible and impartial men may draw different conclusions from the facts, the question is for the jury. *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308.

Where there is a dispute as to facts. *Greenleaf v. Ill. Central R. Co.*, 29 Iowa, 14.

Removal from one car to another of passenger for alleged misconduct. *Marquette v. Chicago &c. R. Co.*, 33 Iowa, 562.

Heavy wrench dropped from platform, fifty feet above where people were standing. *Armbright v. Zion*, 108 Iowa, 338.

One loading a car stepped into a hole in a car floor, which plaintiff testified was covered by debris and which others testified was in plain sight and had been mentioned on the car. *King v. Chicago &c. R. Co.*, 108 Iowa, 748.

An engine run rapidly and without warning past a brakeman standing in a precarious situation. *St. Louis &c. R. Co. v. French*, 56 Kan. 584.

Whether speed of cars and mode of moving them imputed negligence to company. *Louisville &c. R. Co. v. Mahony*, 7 Bush. (Ky.) 235.

Where a brakeman, whose duties required him to be on top of the car, sat thereon, during a long journey with his legs over the side, which were struck by a mail bag suspended too near the track. *Louisville &c. R. Co. v. Milliken*, (Ky.) 51 S. W. Rep. 796; *Owensboro R. Co. v. Hill*, (Ky.) 56 S. W. Rep. 21.

Conduct of parties at time of boiler explosion. *Cumberland &c. R. Co. v. State*, 37 Md. 156.

Brakeman stood between a moving car and side of tunnel, a position he had occupied with safety before changes in tracks had been made. *Baker v. Maryland Coal Co.*, 84 Md. 19.

Failure of master to furnish, and attempt of servant to put terra cotta coping on a wall without, iron ties. *Gibson v. Sullivan*, 164 Mass. 557.

When testimony respecting defendant's negligence is conflicting. *Mynning v. D. L. & C. R. Co.*, 64 Mich. 93.

Where evidence as to death by intoxication was conflicting. *Maier v. Massachusetts & C. Asso.*, 107 Mich. 687.

Defendant lighted a pipe and lay down to sleep upon hay and straw. *Lillibridge v. McCann*, 117 Mich. 84; s. c., 41 L. R. A. 381.

Where the evidence is not free from doubt in the minds of candid and intelligent men, the question is for the jury. *Becker v. Detroit & C. R. Co.*, 121 Mich. 580.

Where evidence was conflicting as to whether plaintiff overloaded scales which broke. *McIntyre v. Detroit Safe Co.*, (Mich.) 89 N. W. Rep. 39.

Under instructions from the court as to what constitutes negligence, conduct of parties susceptible of different interpretations. *Johnson v. Winona & C. R. Co.*, 11 Minn. 296; *Carroll v. Minn. & C. R. Co.*, 14 id. 57.

Question as whether cow got on the track near where she was killed. *Lepp v. St. Louis & C. R. Co.*, 87 Mo. 139.

Whether falling into water was the proximate cause of death, which occurred three days thereafter. *Wiese v. Remme*, 140 Mo. 289.

Negligence of gripman in failing to see a boy's danger, due to his negligence, and stop the car in time to avoid injury. *Baird v. Citizen's R. Co.*, 146 Mo. 265.

Where there was a conflict of testimony as to whether signals were given. *Young v. Missouri & C. R. Co.*, 72 Mo. App. 263.

Case cannot be taken from the jury, where the probative force of the evidence does not exclude all but one reasonable inference. *Linn v. Massillon Bridge Co.*, 78 Mo. App. 111.

Where there is a conflict of evidence as to whether plaintiff looked or not and whether it would have been negligence not to look; the view of the track being partly obstructed. *Chicago & C. R. Co. v. Pollard*, 53 Neb. 730.

Whether due care requires slackening speed, or having a flagman at a grade crossing, where the track is unobstructed for a long distance. *Huntress v. Boston & C. R. Co.*, 66 N. H. 185.

Where conductor seized passenger standing on running board to save himself from stumbling. *Whalen v. Consolidated T. Co.*, 61 N. J. L. 606; s. c., 41 L. R. A. 836.

Where the evidence warrants an inference, the question must go to the jury. *Bliss v. Bergen & C. T. Co.*, 64 N. J. L. 601.

Whether defendant could not have prevented injury, notwithstanding



For various phases of this proposition see the following cases: *Western Gas &c. Co. v. Danner*, 97 Fed. Rep. 882; *Missouri &c. R. Co. v. Byrne*, 100 id. 359; *Nelson v. New Orleans &c. R. Co.*, id. 731; *Neininger v. Cowan*, 101 id. 787; *Mason &c. R. Co. v. Yockey*, 103 id. 265; *Texas &c. R. Co. v. Carlin*, 111 id. 777; *Hemmingway v. Illinois C. R. Co.*, 114 id. 843.

Where uncertainty arises either from a conflict in the evidence or in the conclusions which it is possible to draw therefrom. *Linden v. Anchor Min. Co.*, 20 Utah, 134.

Safety and suitability of a platform for unloading horses. *Chesapeake &c. R. Co. v. American Exch. Bank*, 92 Va. 495.

Jury must base their verdict on all the facts. *Kilpatrick v. Grand Trunk R. Co.*, (Vt.) 52 Atl. Rep. 531.

Whether the failure to stop the engine was through negligence or unavoidable accident, when loss of nut or pin prevented applying air brakes. *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119; s. c., 46 L. R. A. 153.

Where there is a conflict of evidence. *Burian v. Seattle Electric Co.*, 26 Wash. 606; *Foley v. Huntington*, 51 W. Va. 396.

Question of driver's negligence depending on grade of the track, velocity of car, crowded condition of crossing, facilities of driver for seeing &c. *Dahl v. Milwaukee &c. R. Co.*, 62 Wis. 652.

Ambiguous circumstances: situation of deceased when struck by train. *Hoye v. Chicago &c. R. Co.*, 62 Wis. 666.

## II. Choice of Hazards.

Where one, by the negligence of another, is so placed that he must choose on the instant and in the face of grave and impending peril between two hazards, and to make such choice as a person of ordinary prudence might make, his choice cannot constitute contributory negligence. *Twomley v. Central Park &c. R. Co.*, 69 N. Y. 158.

A passenger seeing a serious and inevitable collision attempted to escape and was injured on the platform of the car. This did not constitute contributory negligence. The rule of the company as to passengers on the platform did not preclude recovery. *Buel v. N. Y. C. R. R. Co.*, 31 N. Y. 314.

The law does not require delay in an effort to escape until exact danger shall have been ascertained. Instinctive effort to escape a sudden and impending danger resulting from the negligence of another does not relieve the latter.

A person frightened by an express wagon, driving up suddenly on the walk behind her, without looking around sprang forward, striking

Plaintiff while crossing a street, suddenly found himself confronted with a car passing in front of him, and a rapidly approaching wagon on one side. Having no time for mature consideration he was not negligent in running to the other side ahead of the wagon instead of stepping backward, the wiser course. *Canton v. Simpson*, 2 App. Div. 561.

Plaintiff's horse shied at defendant's steam roller. The bit broke, the horse became unmanageable. Plaintiff's act of jumping out of the buggy in such an emergency was not negligent *per se*. *Halstead v. Warsaw*, 43 App. Div. 39.

"The rule that a person in a position of danger is not responsible for a mistake of judgment in getting out, is subject to the qualification that he must have got into danger without negligence or fault of his own." (*Aiken v. R. R. Co.*, 130 Pa. St. 380; 17 Am. St. Rep. 775.) *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g non-suit.

Passenger in stage coach not guilty of contributory negligence, if, at time of accident, he leaps from coach, and is injured. *Cook v. Parham*, 24 Ala. 21; *Mobile &c. R. Co. v. Ashcraft*, 48 id. 16; *Georgia R. Co. v. Rhodes*, 56 Ga. 645; *So. West. R. Co. v. Paulk*, 24 id. 356; *Stokes v. Saltonstall*, 13 Pet. 181.

Recovery was had by a passenger who, riding in the night time in the last car of defendant's train, jumped from the same in reasonable apprehension that a rear end collision was imminent. *Railway Co. v. Murray*, 55 Ark. 248.

Passenger in stage coach not guilty of contributory negligence if, at time of accident, he leaps from coach, and is injured. *Frink v. Potter*, 17 Ill. 406; *S. P. Galena &c. R. Co. v. Yarwood*, 17 id. 509; *Chicago &c. R. Co. v. Becker*, 76 id. 25; *Toledo &c. R. Co. v. O'Connor*, 77 id. &c. 391; *Coal Co. v. Healer*, 84 id. 126.

No recovery was allowed a person who jumped from a smoking car when he saw the car following was derailed, no reasonable apprehension of danger existing. *Mobile &c. R. Co. v. Klein*, 43 Ill. App. 63.

Boy stealing a ride when struck at by conductor, jumped and fell under car on adjoining track. Error to direct for defendant. *Hagerstrom v. West Chicago Street R. Co.*, 67 Ill. App. 63.

Where, by reason of defendant's negligence the plaintiff is placed in a position in which he is unable to act, contributory negligence is no defense. *Chicago &c. R. Co. v. Becker*, 76 Ill. 25.

Plaintiff standing on the footboard of an engine about to jump the track, jumped from the engine. His act was not imprudent under the circumstances, though had he remained on he would not have been injured. *Chicago &c. R. Co. v. Kinnare*, 76 Ill. App. 394.

Plaintiff saw that the gang plank was gone and that the boat was mov-

ing away from the dock, but thought he could jump to it. It was an error of judgment for which he was accountable. *Atkins v. Lackawanna T. Co.*, 79 Ill. App. 19.

The court cannot say that one course or another taken to avoid injury caused by another's negligence was contributory negligence. *Hawkins v. Johnson*, 105 Ind. 29; *Indiana Car Co. v. Parker*, 100 id. 181; *Indianapolis & C. R. Co. v. Carr*, 35 id. 510.

Where there is no adequate justification for fright, jumping from a car is regarded as reckless. *Woolery v. Louisville & C. R. Co.*, 107 Ind. 381; *Gulf & C. R. Co. v. Wallen*, 65 Tex. 568.

Extraordinary care in a place of danger is not required; but only ordinary care proportionate to the danger. *Goodrich v. Burlington & C. R. Co.*, 97 Iowa, 521.

Driver jumped from his wagon when collision with a train at a crossing was imminent. Recovery was permitted. *Edgerton v. O'Neill*, 4 Kan. App. 73.

Plaintiff has no right to bring injury upon himself needlessly, and if he does, cannot recover for it. *So. Covington & C. R. Co. v. Ware*, 84 Ky. 267.

Plaintiff alighting because horse was made unmanageable by obstacle in the road not contributorily negligent. *Card v. City of Ellsworth*, 65 Me. 547; *Larrabee v. Sewall*, 66 Me. 376; *Sears v. Denins*, 105 Mass. 310; *Lund v. Tyngsboro*, 11 Cush. 563; *Ingalls v. Bills*, 9 Metc. 1.

Plaintiff was not excused for her lack of judgment in a moment of peril from an approaching train, where she could have seen the train coming before she got on the track. *Richfield v. Michigan C. R. Co.*, 110 Mich. 406.

One incapable, by reason of defendant's negligence, of choosing the safest way of escape, is not guilty of contributory negligence, as where the unexpected and rapid approach of cars bewildered deceased. *Mark v. St. Paul & C. R. Co.*, 30 Minn. 493; *Wilson v. Northern & C. R. Co.*, 26 id. 278; *Stevenson v. Chicago & C. R. Co.*, 18 Fed. Rep. 493; *Collins v. Davidson*, 19 id. 83; *B. & O. R. Co. v. McKensh*, 81 Va. 71.

Negligence of a railway company whereby a street car appeared to be in imminent danger of being enclosed within the two guards at the railway crossing when an engine was bearing down upon it, is actionable; and one leaping from the street car is not guilty of contributory negligence. *Kleiber v. Peoples' R. Co.*, 107 Mo. 240.

Person jumping from carriage with runaway horses not guilty of contributory negligence. *Siegrist v. Arnot*, 10 Mo. App. 197; *Dutzi v. Geisel*, 23 id. 676.

Plaintiff, in stepping aside to dodge a board apparently pushed toward

her, injured her knee. Her action was prudent and reasonable under the circumstances as they appeared. *Ellick v. Wilson*, 58 Neb. 584.

Plaintiff, in an attempt to control his team, drew them to one side and against a stump, of which he knew, but had at the moment lost sight of. *Nebraska Teleg. Co. v. Jones*, 60 Neb. 396.

Driver with spirited horse attempted to cross before an approaching train running at high speed at a grade crossing where there was no flagman. His administrator recovered. *Folsom v. Concord &c. R. Co.*, 68 N. H. 454.

Not responsible for error of judgment in choice of hazards in moment of peril. *Pennsylvania R. Co. v. Snyder*, 55 Oh. St. 342.

In case of a danger suddenly arising, a party must have reasonable opportunity to become conscious of the same to avoid it. *Hestonville &c. R. Co. v. Keely*, 102 Pa. St. 115; *Belk v. State*, 125 Ill. 584.

Plaintiff in charge of engine was put in dangerous situation by breaking of governor belt, and was not defeated in an action for injuries received for error of judgment. *Schall v. Cole*, 107 Pa. St. 1; *Penn. R. Co. v. Werner*, 89 id. 59; *Coombs v. Cordage Co.*, 102 Mass. 572.

Although a person is not responsible for error of judgment when, without his own fault, he is placed in a position of danger, he is not thereby relieved from the effect of his own negligence if by it he was brought into such danger. *Aiken v. Penn. &c. R. Co.*, 130 Pa. St. 38; Dictum in *Penn. R. Co. v. Werner*, 89 id. 59; *Chicago &c. R. Co. v. Halsey*, 133 Ill. 248; *Abend v. Terre Haute R. Co.*, 111 id. 203; *Noyes v. Southern &c. R. Co.*, 24 Pac. (Cal.) 927.

Best judgment not required in position of danger. *Cannon v. Pittsburg &c. T. Co.*, 194 Pa. St. 159.

See, also, *Missouri &c. R. Co. v. Rogers*, 91 Tex. 52; rev'g s. c., 40 S. W. Rep. 849.

Where deceased should have had reasonable apprehension of danger but disregarded it, his representative cannot recover. *Nashville &c. R. Co. v. Smith*, 9 Lea (Tenn.) 470.

Person in great pain not held to same reasonableness as if he were well, *R. Co. v. McMannewitz*, 70 Tex. 73.

That a threatened danger was apparent only, was not a defense, where the circumstances reasonably created apprehension. *Bryant v. International &c. R. Co.*, 19 Tex. Civ. App. 88.

See, also, *International &c. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Person not necessarily charged with contributory negligence, because he adopted a course imperiling his safety. *Carroll v. Minn. &c. R. Co.*, 14 Minn. 57; *Cottril v. Chicago &c. R. Co.*, 47 Wis. 634.

No contributory negligence, if passenger in moment of danger attempts to escape and puts himself in greater danger. *Iron R. Co. v. Mowery*, 36 Oh. St. 418; *Gumz v. Chicago &c. R. Co.*, 52 Wis. 672; *Schultz v. Chicago &c. R. Co.*, 44 id. 638.

### III. Voluntary Exposure to Assist Another in Danger.

A person seeing a little child on the railroad track, and a train swiftly approaching, rushed and succeeded in saving the child's life but thereby lost his own. Held, that the question of contributory negligence was for the jury. Such an action to save property would have been *per se* negligent. *Eckert v. L. I. R. Co.*, 43 N. Y. 502. See 17 Ind. 102.

If the owner of property is injured in protecting his property against the effect of the defendant's negligence, he may recover therefor. *Rexter v. Starin*, 73 N. Y. 601.

Plaintiff's testimony was to the effect that at the time of the accident she came to the track to see a train go by, which was then at a station about a half mile distant, and plainly in sight as she approached the track. She found some small children playing about the rails; she told them to get off the track, and they not heeding her warnings, she stepped upon it to make them get out of the way, when her foot was caught between the plank and the rail. Held, that plaintiff was not a trespasser, and was not chargeable with negligence in thus going upon the track.

If she stepped upon the track in the humane effort to save younger children from danger, she was not a trespasser. *Eckert v. L. I. R. Co.*, 43 N. Y. 502. The answer made is that there was no approaching danger and she was merely meddlesome and the contrary theory is pure sentiment. But she saw the train at Roseville; she knew it was coming; she knew that it moved swiftly; and the little children playing on the track were in danger; and whoever saw them would naturally be alarmed for their safety and try to warn them off. *Spooner v. Delaware, Lack. &c. R. Co.*, 115 N. Y. 22.

A father plunged into a canal to save his child that had fallen through an opening in a railing, negligently left unguarded, and was drowned. Recovery was allowed for the loss of the father's life. *Gibney v. State*, 187 N. Y. 1.

Had there been negligence on the part of defendant's car the plaintiff's act in rushing in front of it to save her child would not have been contributory negligence. *Hirschman v. Dry Dock &c. R. Co.*, 46 App. Div. 621.

Boy was not negligent in trying to regain his hat which had blown into a hole above which was a tilted iron grating. *Finnegan v. Biehl*, 61 N. Y. Supp. 1116; s. c. rev'd on another point, 63 id. 147.

Plaintiff was not negligent in attempting to rescue a child in danger of being run over by a train, where there was a chance of her succeeding. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489.

Where defendant has not been negligent as to either, it cannot be held for death of one seeking to save another. *Jackson v. Standard Oil Co.*, 98 Ga. 749.

A mother was not negligent in attempting to save her child, which had come in contact with an electric light wire. *Walters v. Denver &c. Light Co.*, 12 Colo. App. 145.

Engineer facing danger to save passengers not charged with contributory negligence. *Penn R. Co. v. Olney*, 89 Ind. 453.

An incompetent servant closed an opening to a cupola of molten metal so negligently that the metal began to escape; and plaintiff, to avert injury to those about, attempted to close it. It was an act of danger but not of recklessness. *Maryland Steel Co. v. Marney*, 88 Md. 482.

Plaintiff could not recover where he remained in the vicinity of a fire to save property of slight value until his means of escape to safety was cut off. *Berg v. Great Northern R. Co.*, 70 Minn. 272.

Voluntarily exposing one's self to danger constitutes contributory negligence. *Ferguson v. Traction Co.*, 47 Leg. Intel. (Pa.) 494; *Railroad v. Thomas*, id. 223.

But when one voluntarily exposes himself to danger to save another he is not guilty of contributory negligence. *Peyton v. Texas &c. R. Co.*, 41 La. Ann. 861; *Penn. &c. R. Co. v. Langandorff*, 48 Oh. St. 316; *Linnehan v. Sampson*, 126 Mass. 506; *Donahue v. St. Louis &c. R. Co.*, 83 Mo. 560; *Dictum in Gov. St. R. Co. v. Hanlon*, 53 Ala. 70; *Condiff v. Kansas &c. R. Co.*, 25 Pac. (Kas.) 562.

But where plaintiff was injured in putting out fire to save property, in which she had no interest, she did not recover against one negligently setting such fire. *Pike v. Grand Trunk R. Co.*, 39 Fed. Rep. 255. Nor did person going on railway track to save his cattle. *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182, rev'g 79 Hun, 611.

#### IV. Knowledge by the Plaintiff of the Defect or Danger.

Where a person knows of a defective and dangerous place or appliance, he must (1) use the care that a person of ordinary prudence would employ in attempting to use such place or appliance at all; (2) if he does use it he must exercise the reasonable care demanded by the circumstances. The conditions may be so obviously dangerous that the court may impute negligence to the injured person, or as in other cases, such question of negligence may be properly left to the determination of the jury.

One who forgets and uses such defective place to his injury may not be negligent *per se*; and so where one is urged or necessitated by force of cir-

cumstances, and so where the person charged as a wrongdoer; by inducement leads a person to use a defective machine or place to work, or gives assurance of correcting the defect and so when the danger was not appreciated or understood, the use or continued use thereof may not be negligent *per se*.

But if the injured person, using the care required of him under the circumstances, should have known of or seen the danger, he may not recover.

The defendant, whose duty it was to repair a surface pipe, sent an agent who carelessly lighted a match in the cellar and caused an explosion of gas which escaped from the defective pipe, which injured the plaintiff. The defendant was liable, and the fact that the plaintiff's father caused the leak was too remote to constitute contributory negligence. *Lannen v. Albany Gas Light Co.*, 44 N. Y. 459.

Although the captain of a canal boat knew that the gates of a lock were dilapidated, he was not negligent in using the lock to take his boat through, unless the danger was so obvious as to preclude navigation. *Johnson v. Belden*, 47 N. Y. 130; 2 Lansing, 433.

A gas company, in removing a gas meter, left the supply pipe so that it discharged gas into the building. This was negligence. (*Lannen v. Albany Gas Light Co.*, 44 N. Y. 459; *Holden v. Liverpool Gas Co.*, 3 C. B. 1.) The plaintiff for a long time knew that gas had escaped into the cellar, and after the same had been kept closed for five days, he sent a servant into it with a light.

The finding that the plaintiff was negligent was sustained. The fact that the plaintiff had formerly, on numerous occasions, done the same act, was not *per se* proof, that it was safe. *Lanigan v. N. Y. G. L. Co.*, 71 N. Y. 29.

A school teacher knowing of a defect in the floor of a schoolroom, but intent on her duties, was not precluded from recovering. *Bassett v. Fish*, 75 N. Y. 303.

Knowledge of a trench in the street by the plaintiff, for several days, before the accident, did not establish contributory negligence *per se*, but the question was for the jury. It seems that he was not obliged to be conscious of the danger, while driving in the night. *Weed v. Village of Ballston Spa*, 76 N. Y. 329.

A woman, on a dark night, stepped in a hole in a walk, which had long been obviously and notoriously out of order, and dangerous. The woman knew it, but did not know of the hole. The question was for the jury. *Nivan v. City of Rochester*, 76 N. Y. 619.

The plaintiff knew of the general, but not of the precise location of a switch placed too high on a public street, and covered by snow and slush, and was going slowly when he was injured by it. For the jury.

*Wooley v. Grand Street &c. R. Co.*, 83 N. Y. 121; distinguishing *Lowery v. B. C. &c. R. Co.*, 76 id. 28.

Previous knowledge of a location from which a person of ordinary intelligence might apprehend danger imposes greater care, yet the degree of care is for the jury.

There was a hole in the oilcloth on the edge of steps, which the defendant, a lessee, had agreed to repair; the plaintiff, his tenant, did not take hold of the banisters, as she had a cloak about her, although she knew of the hole. Her negligence was for the jury. *Palmer v. Dearing*, 93 N. Y. 7; *Diveny v. City of Elmira*, 50 id. 512.

A plumber, fixing a gas pipe, let the gas escape and killed the plaintiff's horses. The fact, that the plaintiff knew of the escape and danger, was not *per se* evidence of negligence. *Lee v. The Troy C. G. L. Co.*, 98 N. Y. 115.

Defendant, for the purpose of removing certain cases of merchandise from his store, in the city of New York, placed a pair of skids from a truck across the sidewalk to the steps of the store; after they had been there about three minutes, plaintiff came along the sidewalk, and seeing the skids attempted to pass around them by the steps and was injured. In an action to recover damages, held defendant owed no duty to the plaintiff to see that the steps were in an absolutely safe condition for travel; and that she was not entitled to recover. *Welsh v. Wilson*, 101 N. Y. 255.

In an action for injury from falling on the sidewalk, there was evidence to show that the embankment of snow and ice, causing the damage was perfectly visible, and that there was a slight covering of recent snow over the ice. It was not *per se* negligence for the plaintiff to attempt to pass over the same. *Evans v. City of Utica*, 69 N. Y. 166; *Brusso v. City of Buffalo*, 90 id. 679; *McGuire v. Spence*, 91 id. 303; *Bullock v. Mayor &c.*, 99 id. 654. *Pomfrey v. Village of Saratoga Springs*, 104 id. 459, affirming 34 Hun, 607, and judgment for plaintiff.

The plaintiff's intestate was killed by a car kicked on a switch; within ten feet of the track a person could see the car. If the deceased saw it he was negligent; if he did not, he was negligent. *Woodman v. N. Y. L. E. & W. R. Co.*, 106 N. Y. 369; distinguishing *Greany v. Long Island R. Co.*, 101 id. 419.

Defective machinery suddenly started a saw, and injured the plaintiff, who had full knowledge of such defect. The jury should have been charged that the plaintiff could not recover, in case he had such knowledge. *Odell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 323, rev'g judgt for pl'ff; *Powers v. N. Y., L. E. &c. R. Co.*, 98 id. 274; *Monaghan v. N. Y. C. &c. Co.*, 45 Hun, 113.



"M." was employed by the defendants, who were engaged in manufacturing steam heating apparatus, to test the radiators, and see if they were steam tight, which was done, by attaching the radiator to a pipe connected with the steam boiler. One of them exploded, while "M." was hammering upon it, as he had been warned not to do, and he was injured. "M." was negligent and the defendant was not liable. *Moeller v. Brewster*, 131 N. Y. 606.

During the construction of an elevated railroad the defendant used a steam engine and apparatus, placed upon the platform on wheels, which moved along, as the work progressed, upon girders raised upon cross beams. The girders gave way and the platform fell to the ground, and the plaintiff, an employé of the defendant, who had been working upon the platform for some time, was injured. Although the defects were apparent, yet, as the plaintiff, although having knowledge thereof, might not have been advised of the danger that might result therefrom, and, as knowledge thereof might have required some skill or judgment not available to him or to an ordinary observer, it could not be held, as a matter of law, that such consequences were obvious and within the hazards assumed by him. *Davidson v. Cornell*, 132 N. Y. 228.

A chain holding a trap in the bottom of a coal car broke and let the trap down, and "M.," who was standing on the coal, passed through the trap with the coal and was injured. Two weeks before, a link in the chain was broken, and "M." and his co-employés fastened the links with a wire; two days before the accident, it was found that the trap allowed the coal to escape, and to remedy this, boards were put over the trap by the employés, in "M's" presence, and to his knowledge. There were other perfect cars from which "M." had the selection; he had been directed by the train master to see that the traps were all perfectly safe, and to send cars with broken chains to the repair shop and to use none that were imperfect.

The case was improperly submitted to the jury as the defendant's negligence was not shown and plaintiff's negligence was established. *Shields v. N. Y. C. & H. R. R. Co.*, 133 N. Y. 557.

Where the plaintiff was not shown to have exercised any care, but was injured by slipping upon a ridge of ice covered by an inch or two of light snow, that was plainly visible, and formed a dangerous obstruction, she was negligent *per se*. *Weston v. City of Troy*, 139 N. Y. 281.

Building was in process of construction but had a temporary floor and a temporary elevator. At the time plaintiff walked through the building the elevator was at the ground floor, and he walked over its platform and on through the building to the office where he received his pay. In returning over the same route he fell through the open shaft; the elevator

having in the meantime been removed. He knew the elevator was in constant use and was liable to be removed. He could not see and he was not warranted in assuming that it would be still in position on his return. *Kennedy v. Friederich*, 168 N. Y. 379; rev'g s. c., 45 App. Div. 631.

Defendant's watchman was in the habit of discharging fire arms to frighten off poachers on a preserve. It was error to refuse to charge that, if plaintiff knew the watchman's habit and went thereon at night, he could not recover. *Magar v. Hammond*, 171 N. Y. 377; rev'g s. c., 54 App. Div. 532.

The fact that the plaintiff had thrown a log of wood overboard from his vessel, did not make him liable for contributory negligence, in an action against the defendant, for unloosing her from the wharf, and placing her in the stream, where she was injured by the log. *Satterly v. Hallock*, 5 Hun, 178.

Plaintiff's wife, residing for several years on the northeast corner of a street, fell in a hole for such time existing in the sidewalk on the southeast corner of the same street. Contributory negligence was for the jury. *Driscoll v. Mayor*, 11 Hun, 101; aff'g judg't for pl'ff; distinguishing *Durkin v. City of Troy*, 61 Barb. 437, and following *Mosey v. City of Troy*, id. 581.

When a person knows, that a defect exists inside walk, he is bound to use reasonable and proper care to avoid injury. *Koch v. Village of Edgewater*, 14 Hun, 544.

At defendant's bathing ground, the plaintiff's intestate went to the top of a structure to which were fastened ropes for a swing for the bathers, but not intended to dive from, and dived therefrom into water three and one-half feet deep and was killed by striking his head against the smooth bottom. There were men standing up in the water, showing its depth. No liability as the deceased was negligent. *Hinz v. Starin*, 46 Hun, 526.

Proof that the plaintiff knew that the sidewalk was not in repair does not *per se* preclude recovery for injuries received from the use thereof. Under such circumstances the plaintiff was not required to turn from the sidewalk and go around the dangerous place. *Halloway v. Lockport*, 54 Hun, 153.

Although the defendant violated chapter 469, Laws 1884, requiring a warning signal to be placed at a bridge crossing its tracks, yet, a brakeman aware of such violation, and that the bridge was dangerous, did not recover for injury received therefrom. *Fitzgerald v. N. Y. C. & H. R. R. Co.*, 59 Hun, 225; rev'g judg't for pl'ff; following *Williams v. Delaware & C. R. Co.*, 116 N. Y. 632; *Ryan v. L. I. R. Co.*, 51 Hun, 608.

Where a portion of a walk over an excavation was left, and a passenger approaching in the day time, attempted to step across the trench, instead

of walking upon that portion of the walk left and was thereby injured, she was guilty of contributory negligence. *Stevenson v. Equitable Gas Light Co.*, 60 Hun, 77; rev'g judg't for pl'ff; following *Welch v. Wilson*, 101 N. Y. 254; *Pomfrey v. Village of Saratoga Springs*, 104 id. 459; aff'g 34 Hun, 607.

Where the owner of a canal boat voluntarily remained at a dock after he had ascertained that his boat was liable to be injured by the condition of the bottom of the dock, he was negligent and could not recover. *Washington v. Staten Island T. R. Co.*, 68 Hun, 87.

Where a person was crossing a street that had been torn up, to his knowledge, and his attention was diverted for a moment, the question of contributory negligence was for the jury. *Dale v. City of Syracuse*. 71 Hun, 452; s. c. aff'd, 148 N. Y. 550. Citing *Driscoll v. Mayor*, 11 Hun, 101; *Thomas v. Mayor*, 28 id. 110; *Palmer v. Dearley*, 93 N. Y. 10; distinguishing *McCabe v. Buffalo*, 45 N. Y. S. Repr. 456; *Splittort v. State*, 108 N. Y. 205.

The presumption, which a traveler may indulge, that the streets of a city are safe, has no application where the danger is known and obvious.

When a person approaches a point of danger it is his duty to do so with a care and caution commensurate with the dangers of the locality. *Neddo v. The Village of Ticonderoga*, 77 Hun, 524; s. c. aff'd, 148 N. Y. 735.

Plaintiff working on the frame of a building, walked over a beam only three and a half inches wide, directly in front of an elevator shaft which he knew was in constant use as a hoist; was negligent *per se*. *Clancy v. Guaranty Const. Co.*, 25 App. Div. 355.

Plaintiff was negligent in riding with another and not taking precautionary measures upon approaching an obstruction in the street, when he knew driver was so intoxicated as not to see it. *Meenagh v. Buckmaster*, 26 App. Div. 451.

Temporary forgetfulness of a known danger was not *per se* negligence. That plaintiff had worked for a day in plain sight of an uncovered hole in a trestle, did not bind him to an assumption of the risk on a subsequent night. *Boyle v. Degnon-McLean Const. Co.*, 47 App. Div. 311.

Plaintiff could not recover, where he notified the janitor of a building that the bottom of the dumb waiter was rotten, but continued to use it nevertheless for three weeks. *McGuire v. Board*, 58 App. Div. 388; s. c. aff'd, 171 N. Y. 672.

One who knows of a danger from the negligence of another, and undertakes and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. (*Fitzgerald v. Company*, 155 Mass. 155; 31 Am. St. Rep. 537.) *Robinson v. Manhattan R. Co.*, 5 Misc. 209, aff'g nonsuit.

Plaintiff's knowledge that soda was wet and would burn, was a defense to an action for injury from allowing it to get wet. *Curran v. New York Cent. &c. R. Co.*, 30 Misc. Rep. 787.

Where plaintiff, a licensee, knew that the lots were in use by contractors with derricks having guy ropes anchored therein, he assumed the risk in going there in the dark. *McCann v. Thileman*, 36 Misc. 145; rev'g s. c., 35 id. 855.

Where a person injured knew of the defect from whence the injury arose he was held not to have been *per se* negligent in the following instances:

Person knew dangerous condition of a highway. He at night cautiously used a walk known to be defective in width. *Montgomery v. Wright*, 72 Ala. 411; *Turnpike Co. v. Jackson*, 44 Am. Rep. 274.

Defect in walk known to exist but hidden by snow. *Aurora v. Dale*, 90 Ill. 46; *Hutchinson v. Collins*, id. 410.

Knowledge of a danger is an important element but does not necessarily preclude recovery. *Lake Shore &c. R. Co. v. Pinchin*, 112 Ind. 592; *Looney v. McLean*, 129 Mass. 33; *Gilbert v. Boston*, 139 id. 313; *Dewire v. Bailey*, 131 id. 169; *Lawless v. Connecticut R. Co.*, 136 id. 1; *Goodfellow v. Boston &c. R. Co.*, 106 id. 461; *Maloney v. Metropolitan &c. R. Co.*, 104 id. 73; *Lyman v. Amherst*, 107 id. 339; *Frost v. Waltham*, 12 Allen, 85; *Haton v. Ipswich*, 12 Cush. 488; *Reed v. Northfield*, 13 Pick. 94; *Whitford v. Southbridge*, 119 Mass. 564.

Person passed over defendant's track, raised nine inches from the surface, where defect was known. *Evansville &c. R. Co. v. Carvener*, 113 Ind. 5. See, also, *Wilson v. Trafalgar &c. Co.*, 93 Ind. 287; *Turnpike Co. v. Jackson*, 86 id. 111; *Murphy v. Indianapolis*, 83 id. 76; *Turner v. Buchanan*, 82 id. 147; *Toledo &c. R. Co. v. Bramagan*, 75 id. 490; *Rice v. Des Moines*, 40 Iowa, 638; *Walker v. Decatur*, 67 id. 307; *Ross v. Davenport*, 66 id. 548; *Osage City v. Brown*, 27 Kas. 74; *Emporia v. Schmidling*, 33 id. 485. See, also, *South Bend v. Hardy*, 98 Ind. 577; *Nave v. Flack*, 90 id. 205; *Wilson v. Trafalgar Co.*, 83 id. 326; *Huntington v. Breen*, 77 id. 29; *Hartman v. Muscatine*, 70 Iowa, 511; *Munger v. Marshalltown*, 59 id. 763; *Hanlon v. Keokuk*, 7 id. 488.

Going upon a defective walk. *Barnes v. Marcus*, 96 Iowa, 675, 682.

Person having knowledge of a hole in a bridge attempted to cross it. *Prince George's Co. v. Burgess*, 61 Md. 29; *S. P. Kelly v. So. Minnesota R. Co.*, 28 Minn. 98; *Mackenzie v. Northfield*, 30 id. 456; *Estell v. Lake Crystal*, 27 Minn. 243; *Nichols v. Minneapolis*, 33 id. 430; *Lowell v. Watertown*, 58 Mich. 568; *Plattsmouth v. Mitchell*, 20 Neb. 228; *Reed v. Northfield*, 13 Pick. 94; *Haton v. Ipswich*, 12 Cush. 488.

Driving home after signs of unruliness in a horse usually gentle. *Creamer v. McIlvain*, 89 Md. 343; s. c., 45 L. R. A. 531.

Person crossing a bridge without a railing over a deep ravine, on a dark and rainy night. *Loewer v. Sedalia*, 77 Mo. 431.

Engineer knew his air brake was out of order and used it. *Flynn v. Kansas &c. R. Co.*, 78 Mo. 195; *S. P. Buesching v. St. L. Gaslight Co.*, 73 id. 219; *Stoddard v. St. Louis &c. R. Co.*, 65 id. 521; *Keegan v. Kavanaugh*, 62 id. 230; *Conroy v. Iron Works*, id. 35; *Smith v. St. Joseph*, 45 id. 449.

Pedestrian in the night time cautiously used a walk known by him to be defective in width. *Erie v. Schwring*, 10 Harris (Pa.) 384.

Person, because of darkness, walked on dangerous side of road. *Mill-creek Township v. Perry*, 10 Cent. (Pa.) 299.

Person paying toll had the right to presume defect in bridge previously known to exist had been repaired. *Monongahela Bridge Co. v. Bevard*, 10 Cent. (Pa.) 415; *Humphreys v. Armstrong County*, 56 Pa. St. 204.

Person ran on sidewalk in the dark. *Shenandoah v. Erdman*, 11 Cent. (Pa.) 440.

Engineer used machinery which, though dangerous, might have been used safely; it was reasonable to suppose, with extraordinary caution. *Patterson v. Pittsburg &c. R. Co.*, 76 Pa. St. 389; *Altoona v. Lotz*, 7 Atl. Rep. (Pa.) 240.

Person failed to repair sewer gas pipe, and was injured by explosion of gas. *Kibele v. Philadelphia*, 105 Pa. St. 41.

A husband knew of defect in sidewalk where his wife was injured. *Nanticoke v. Warne*, 106 Pa. St. 373.

Choosing more dangerous of two routes. *Mellor v. Bridgeport*, 191 Pa. St. 562.

Servant used a hammer known to him to be defective having been ordered to do so by the foreman on pain of discharge. *East Tennessee &c. R. Co. v. Duffield*, 12 Lea, (Tenn.) 63; *Louisville &c. R. Co. v. Bowler*, 9 Heisk. (Tenn.) 866.

It was for the jury to say whether plaintiff was negligent in going to sleep on a boat at a wharf, only 150 to 300 feet from where blasting operations were going on. *Smith v. Day*, 100 Fed. Rep. 244; s. c., 49 L. R. A. 108; rev'g s. c., 86 Fed. Rep. 62.

One driving, used a road not properly fenced, although there was another and safer road. *Templeton v. Montpelier*, 56 Vt. 328.

Knowledge of defect in highway and possibility of taking another route does not establish, as matter of law, contributory negligence. *McKeigne v. Jamesville*, 68 Wis. 50; *Spearbracker v. Larrabee*, 25 N. W. (Wis.) 555; *Brennan v. Friendship*, 29 id. 902.

Where injured person knew of the defect a recovery was not allowed in the following instances:

Employé entered service with knowledge of dangerous condition of machinery; employer ignorant of the same. *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Fox v. Glastonbury*, 29 id. 204.

Plaintiff, disregarding warnings, ventured too near a blast. *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

Employé used hand-car, which he knew to be in a dangerous condition. *Bell v. Western &c. R. Co.*, 70 Ga. 566; *S. P. Johnson v. Western &c. R. Co.*, 55 id. 133; *Western &c. R. Co. v. Adams*, id. 279; *McDade v. Georgia R. Co.*, 60 id. 119; *Atlanta &c. R. Co. v. Campbell*, 56 id. 586; *Western &c. R. Co. v. Bishop*, 50 id. 465; *Central &c. R. Co. v. Kenney*, 58 id. 485.

One whose duty was to report condition of stove, failed to report, and was injured by overturn of same. *Atlanta &c. R. Co. v. Ray*, 70 Ga. 674.

Plaintiff voluntarily entered a building partially destroyed by fire. *Hutson v. King*, 95 Ga. 271.

Person attempted to cross a known excavation on planks, in the night time, instead of going around it. *Momence v. Kendall*, 14 Ill. App. 229; *S. P. Quincy v. Barker*, 81 id. 30; *Lovenguth v. Bloomington*, 71 id. 238; *Centralia v. Krouse*, 64 id. 19; *Aurora v. Pulfer*, 56 id. 270.

Plaintiff walked up to a steam pipe, (about to explode) after steam and water began to escape. *Mandel v. Wheeler*, 59 Ill. App. 459.

Pedestrian went upon a sidewalk known to be defective, without having exercised special care. *Chicago v. Richardson*, 75 Ill. App. 198.

Plaintiff, finding himself in danger in a blockade of wagons, gave no alarm. *United States Exp. Co. v. McCluskey*, 77 Ill. App. 56.

Person stumbled in the dark over an obstruction known to him to be on the sidewalk. *Gasport v. Evans*, 112 Ind. 133; *S. P. Indianapolis v. Cook*, 99 id. 10; *Bruker v. Covington*, 69 id. 33; *Jonesboro v. Baldwin*, 57 id. 86; *Riest v. Goshen*, 42 id. 339; *Mount Vernon v. Dasonchett*, 2 id. 586.

Plaintiff went up into a building which he knew to be unfinished, and without stairways, and without light or guide. *De Graffenried v. Wallace*, (Ind. Terr.) 53 S. W. Rep. 452.

Woman chose dangerous road at night, when she might have taken a safe one. *Parkhill v. Brighton*, 61 Iowa, 103; *S. P. Fulliam v. Muscatine*, 30 N. W. (Iowa) 861; *McGinty v. Keokuk*, 24 id. 506; *Corlett v. Leavenworth*, 27 Kas. 673.

One having knowledge of dangerous condition must show justification in exposing himself to it. *Coates v. Burlington &c. R. Co.*, 62 Iowa, 486.

A woman stepped off the sidewalk, without cause. *Alline v. LeMars*, 71 Iowa, 654; *Kennedy v. Chicago &c. R. Co.*, 68 id. 559; *McLaury v. McGregor*, 54 id. 717.

Injury occasioned by a fall upon the ice at a place where plaintiff knew walking to be dangerous. *Wilson v. Charlestown*, 8 Allen, 137; *Todd v. Old Colony R. Co.*, 3 id. 18; *Gavett v. Manchester &c. R. Co.*, 16 Gray, 501; *Lucas v. New Bedford &c. R. Co.*, 6 id. 64; *Haton v. Ipswich*, 12 Cush. 488.

Where warehouse was burned by sparks from defendant's engine, owner of the warehouse knowing the danger but using the engine. *Marquette &c. R. Co. v. Spear*, 44 Mich. 169; *Lyon v. Detroit &c. R. Co.*, 31 id. 429.

Where peril was unnecessarily assumed by injured person. *Harris v. Winton*, 64 Mich. 447.

Plaintiff who knew of the existence of a turntable fell into it, on his way home at night. *Early v. Lake Shore &c. R. Co.*, 66 Mich. 349.

Person in day time drove at a rapid rate along a street where there was an accumulation of cobblestones. *McCool v. Grand Rapids* (Mich.) 24 N. W. Rep. 631.

A person knowing there were holes in the ice unnecessarily allowed his cattle to go at large upon it. *LaRiviere v. Pemberton*, (Minn.) 48 N. W. Rep. 406.

Fireman, with knowledge of defective throttle valve, neglected to observe due caution when tending to the machinery. *V. & M. R. Co. v. Wilkins*, 47 Miss. 404.

Plaintiff touched a wire to show his capacity to judge of its proper insulation. *Anderson v. Jersey City Electric Light Co.*, 64 N. J. L. 664.

Plaintiff, a civil engineer, put himself where an explosion of gas, known to him to be escaping, injured him. *Gas Co. v. Robinson*, 99 Pa. St. 1; *Mansfield Coal &c. Co. v. McEnery*, 91 id. 185; *Mulherrin v. D., L. & W. R. Co.*, 81 id. 366; *Ingram v. Lehigh Coal &c. Co.*, 148 Pa. St. 177; *McClafferty v. Fisher*, 1 Cent. (Pa.) 571; *Folsom v. Underhill*, 36 Vt. 580.

Foot passenger attempted to cross high ridge of snow, known to her to exist, when she might have gone around it. *Erie v. Magill*, 101 Pa. St. 616; *Baker v. Fehr*, 1 Ont. (Pa.) 70; *Goshorn v. Smith*, 11 Nor. (Pa.) 435; *McKee v. Bidwell*, 24 P. F. Smith, (Pa.) 218; *Pittsburg &c. R. Co. v. McClurg*, 6 id. 294; *Catawissa R. Co. v. Armstrong*, 2 id. 282; *Penn. R. Co. v. Ogier*, 11 Cas. (Pa.) 60.

A woman without cause stayed on ground where she knew blasting was being done, and was injured by the shock. *Fox v. Borkey*, 126 Pa.

St. 164; D., L. & W. R. Co. v. Cadow, 120 id. 559; Barnes v. Sowden, 119 id. 53.

Driving with timid horse on road known to be undergoing repair. *Snyder v. Penn*, 14 Pa. Super. Ct. 145.

Plaintiff chose a route at night which he knew lead over a hatch, walking without caution and taking his chances of its being closed. *Claus v. Northern S. S. Co.*, 89 Fed. Rep. 646.

With knowledge that an express train was about to pass, horses were left standing alone untied within twenty or thirty feet of the track. *Silcock v. Rio Grande &c. R. Co.*, 22 Utah, 179.

Defective coupling pin caused train to part. Brakeman on rear portion with knowledge of the fact, failed to put on brake which would have avoided the collision. *Richmond &c. R. Co. v. Tribble*, 97 Va. 495.

Brakeman passing along tops of cars touched trolley wire, which he knew hung low. *Danville Street Car Co. v. Watkins*, 97 Va. 713.

Plaintiff knew the existence of a pit in a yard which he was in the habit of crossing, but attempted to cross on a night so dark that he could not see either the pit or the path a safe distance in front of it. *Anderson v. Northern P. R. Co.*, 19 Wash. 340.

In the case of an injury from a roof known to be leaky. *Muth v. Frost*, 68 Wis. 425; *Achtenhagen v. Watertown*, 18 id. 331.

Traveler knew of dangerous character of a stream and had but to ascertain its condition. *Hopkins v. Rush River*, 70 Wis. 10.

Plaintiff knew of the dangerous condition of the fence around a pasture he turned his horse into. *Ray v. Stuckey*, 113 Wis. 77.

### V. Defective People—Intoxicated Persons.\*

A person defective in sight or hearing is not precluded from using the streets, highways and public places, provided he can do so with a reasonable assurance of safety; and whether such person was guilty of negligence contributing to his injury has usually been submitted to the jury. If the injured person were intoxicated, he is precluded from recovering, if his condition contributed to the injury; but he is not usually regarded as *per se* negligent.

#### DEFECTIVE SIGHT AND HEARING.

The plaintiff's organs of sight were affected by a disease, so as to diminish her powers of vision considerably, yet she could distinguish colors, persons and objects having a distinct outline. While passing on a sidewalk, she fell into an excavation. The test of her ability to be abroad was, whether she could walk the streets with "a reasonable assurance of

\* NOTE.—An insane person may be negligent. *Williams v. Hays*, 143 N. Y. 442; see, also, 3 Barb. 647; 65 Hun 477; But see Whart. on Negligence, § 89.



safety," and this was for the jury. The streets and sidewalks are for the benefit of all conditions of people at all times. *Davenport v. Ruckman and the Mayor, &c.*, 37 N. Y. 568.

"E.," plaintiff's intestate, with her husband "J.," were crossing Buffalo river in the night time, in a small scow, which "J." was sculling. when the scow was struck and sunk by a steam-tug belonging to defendant, and "E." was drowned. Plaintiff's evidence tended to show that "J." was nearly blind, but able-bodied and familiar with the management of small boats; that he had been accustomed to cross the river daily, with his wife, at that place and hour, he sculling and she giving directions; that it was usual for persons to be on the water in that kind of water craft; that the night was not so dark but that an object, the size of the scow could be seen one hundred feet away, also that there was a lighted lantern in it; that "J." called to those on defendant's tug; it was not stopped or its speed slackened, but it sheered from its course towards the scow; that if it had kept on in a straight course the collision would not have happened. Held, that the evidence justified a finding of negligence on the part of those managing the tug; that it was their duty to keep a lookout ahead, and it was inferable from the evidence that this was not done; also that the facts that deceased was upon the water in the night time, and in a scow, or that she was with a blind man to propel and turn the scow; did not establish contributory negligence, as a matter of law; but that the question was properly submitted to the jury. *Harris v. Uebelhoer*, 75 N. Y. 169.

#### BLINDNESS.

An old person with defective sight using reasonable care under the circumstances is not negligent in using streets. *Peach v. City of Utica*, 10 Hun, 477; *Davenport v. Ruckman*, 37 N. Y. 568, 573.

It is not negligence *per se* if a blind person, unattended, falls into a hole in the sidewalk left uncovered for the purpose of raising goods from below. *Smith v. Wildes*, 143 Mass. 556; *Salem v. Goller*, 76 Ind. 291; *Sleeper v. Sandown*, 52 N. H. 244.

A person infirm in one sense should be more vigilant in the use of his other senses when in a place of danger. *Fenneman v. Holden*, 75 Md. 1; *Illinois &c. R. Co. v. Buckner*, 28 Ill. 299; *Purl v. St. Louis &c. R. Co.*, 72 Mo. 168; *Zimmerman v. Han. &c. R. Co.*, 71 id. 476; *Ormsbee v. Boston &c. R. Co.*, 14 R. I. 102; *Cleveland &c. R. Co. v. Terry*, 8 Oh. St. 570; *Central R. of N. J. v. Feller*, 84 Pa. St. 226.

A blind person must use a greater degree of diligence than one who can see. *Stewart v. Nashville*, 96 Tenn. 50.

**DEAFNESS.**

Deaf mute crossing defendant's tracks in Rochester on a dark night waited for a freight train to pass, and then stepped on the track when he was struck by an engine running backwards without a light at the rate of twenty miles an hour, which was following the freight train. Plaintiff's and defendant's negligence for jury. *Waldele v. N. Y. C. & H. R. Co.*, 19 Hun, 69. See 95 N. Y. 274.

Deafness does not excuse care at a crossing. See cases, *supra*, beginning with *Fenneman v. Holden*.

A person not sufficiently dull to need a guardian must use the same care as others. *Worthington v. Mencer*, 96 Ala. 310.

**AGE.**

An old person is not bound to use a greater degree of diligence than a young one. *Culbertson v. Holliday*, 50 Neb. 229.

**INTOXICATION.**

In an action for injuries from a defective sidewalk to an intoxicated man, contributory negligence is for the jury. *Healy v. Mayor*, 3 Hun, 708; *Alger v. Lowell*, 3 Allen (Mass.) 402; *Robinson v. Piocher & Co.*, 5 Cal. 460.

An intoxicated man on a dark night crossed a bridge although warned that it was not safe, and although a safe bridge was within a few feet, and was killed. No liability. *Wood v. Incorporated Village of Andes*, 11 Hun, 543.

Plaintiff fell down an embankment in the street. Defendant claimed that he was intoxicated; the rule was "if the jury found that the plaintiff was under the influence of liquor and that the intoxication contributed to bring about the accident, the plaintiff cannot recover. *Lynch v. Mayor*, 47 Hun, 524.

The fact that a person was intoxicated when he sustained an injury is not *per se* evidence of contributory negligence on his part, and the question whether the intoxication of the person injured contributed to the injury sustained should be submitted to the jury for its determination. *Newton v. Central Vt. R. Co.*, 80 Hun. 49.

If jury believe a person was intoxicated, and that he would not have been injured had he been sober, he cannot recover. *Bradley v. Second & C. R. Co.*, 8 Daly, 289; *Ernst v. Hudson R. Co.*, 39 N. Y. 61; *Gonzales v. N. Y. & C. R. Co.*, 38 id. 440; *McCall v. N. Y. & C. R. Co.*, 54 id. 645; *Weber v. N. Y. & C. R. Co.*, 58 id. 451.

Negligence of an intoxicated person standing on platform of a crowded

car with his hands in his pockets was for the jury. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

The care required of an intoxicated person is not greater than that required of a sober one. *Chicago &c. R. Co. v. Drake*, 33 Ill. App. 114.

If the plaintiff's drunkenness contributed to the injury there can be no recovery. *Chicago &c. R. Co. v. Bell*, 70 Ill. 102; *Toledo &c. R. Co. v. Riley*, 47 id. 514; *Illinois &c. R. Co. v. Cragin*, 71 id. 177; *Chicago &c. R. Co. v. Lewis*, 5 Ill. App. 242; *Maguire v. Middlesex R. Co.*, 115 Mass. 239; *Alger v. Lowell*, 3 Allen 402; *Strand v. Chic. &c. R. Co.*, 67 Mich. 380.

But if intoxication causes one to expose himself to a danger, which he could, if sober, have avoided by ordinary prudence, a recovery is precluded. *Woods v. Tipton County*, 128 Ind. 289.

Where the plaintiff, licensed to do so, had sold the defendant liquor, and been injured by his negligence in driving, a recovery was allowed. *Cassady v. Magher*, 85 Ind. 228.

The plaintiff, claiming to have been injured on defective sidewalk, and shown to have been intoxicated, must disprove such intoxication. *Hubbard v. Mason City*, 60 Iowa, 400; *Cramer v. Burlington*, 42 Iowa 315.

It was proper to charge that no recovery could be had if deceased voluntarily so intoxicated himself as to prevent the execution of his task with safety. *Cogdell v. Wilmington &c. R. Co.*, 130 N. C. 313.

Drunkenness is not a defense unless it was proximate cause of the injury. *Davis v. Oregon &c. R. Co.*, 8 Ore. 172; *Buesching v. St. Louis &c. R. Co.*, 6 Mo. App. 85; *Hershey v. Mill Creek*, 8 Cent. (Pa.) 252; *R. Co. v. Bondron*, 92 Pa. St. 475; *Houston &c. R. Co. v. Reason*, 61 Tex. 613; *Cassady v. Stockbridge*, 21 Vt. 391; *Fitzgerald v. Weston*, 52 Wis. 354; see, also, *Burns v. Elba*, 32 id. 605.

Intoxication does not *per se* establish contributory negligence. *Seymer v. Lake*, 66 Wis. 651; *Aurora v. Hillman*, 90 Ill. 61; *Thorp v. Brookfield*, 36 Conn. 320; *Tompkins v. Oswego*, 15 N. Y. Supp. 371.

Whether intoxication contributed to the injury was for the jury. *Rhyner v. Menasha*, 107 Wis. 201.

## VI. Infants.

The usual principles of contributory negligence, when applied to infants are largely modified. The characteristic features of the doctrine in such case are these:

- (1) In New York and some other states it is considered where the child is *non sui juris*, that is, without the discretion or ability to care for his own safety, his parent, guardian or usual protector, in legal theory, shares in the child's responsibility, so that, in a given instance of injury through de-

fendant's negligence, the inquiry is, not entirely, and may be, not at all, whether the child was guilty of contributory negligence, but was the parent, guardian, etc., guilty of negligence contributing to the accident. *Ihl v. 42d Street R. Co.*, 47 N. Y. 317; *Kunz v. The City of Troy*, 104 id. 244; reversing 36 Hun, 615; *Huerzeler v. The Central Cross-Town R. Co.*, 139 id. 490. But in a majority of the states this doctrine is not accepted in an action brought in behalf of the infant himself for injury, but only where the action is by the parent for his own benefit.

- (2) Whenever care is required of a child, he is not bound to exercise the care demanded of an adult of ordinary capacity, but only such care as would naturally be expected of a person of his age; and greater care must be exercised for the protection of children than is requisite in the case of an adult.

An infant may not be altogether exempted from the exercise of care and prudence in approaching a known danger. *Honegsberger v. The Second Ave. R. Co.*, 1 Keyes, 570, rev'g 1 Daly. 89. If the infant be of tender years and *non sui juris*, the negligence is imputable to his parents or guardians. If he be *sui juris*, it is imputable to himself. *Thurber v. Harlem B. M. & F. R. R. Co.*, 60 N. Y. 333. But, as was said by Cowen, J., in a case where the infant was between two and three years of age (*Hartfield v. Roper*, 21 Wend. 620): "When he complains of wrongs to himself, the defendant has a right to insist that he should not have been the heedless instrument of his own injury;" and whenever it affirmatively appears either that the injury was occasioned by the fault of the party injured, or where there is an entire absence of evidence showing that he is free from fault, he cannot recover. *Wendell v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 426.

But if the child, though *non sui juris*, has not committed or omitted an act, which would constitute contributory negligence in a person of years of discretion, an injury by the negligence of another cannot be defended upon the alleged negligence of the parent. *McGarry v. Loomis*, 63 N. Y. 104; *Ihl v. Forty-second St. R. Co.*, 47 id. 317. *Cumming v. The Brooklyn City R. Co.*, 104 id. 669. See, *Sheridan v. Brooklyn City R. Co.*, 36 id. 39; *Kunz v. City of Troy*, 104 id. 244, reversing 36 Hun, 615, and judgment for defendant.

Negligence of parent or person in charge of an infant *non sui juris* is imputable to the infant. *Fitzgerald v. St. Paul &c. R. Co.*, 29 Minn. 336, *Hartfield v. Roper*, 21 Wend. 614.

*Holly v. Boston Gas-Light Co.*, 8 Gray, 123; *Wright v. Malden R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 id. 40; *Brown v. European &c. R. Co.*, 58 Me. 384; *Lafayette &c. R. Co. v. Huffman*, 28 Ind. 287; *Meeks v. Southern Pac. R. Co.*, 52 Cal. 602; *Lynch v. Smith*, 104 Mass. 52; *Gibbons v. Williams*, 135 id. 333; *Colins v. South Boston R. Co.*, 142 id. 301; *Casey v. Smith*, 152 id. 294.

This rule has been followed in Illinois. *City of Chicago v. Major*, 18 Ill. 349; *City of Chicago v. Starr*, 42 id. 174; *Toledo &c. R. Co. v. Grable*, 88 id. 441; *Chi-*

cago City R. Co. v. Robinson, 27 Ill. App. 26, aff'g 127 Ill. 9; Chicago &c. R. Co. v. Logue, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

So in O'Mally v. St. Paul &c. R. Co., 43 Minn. 289; Baltimore R. Co. v. State, 30 Md. 47; Apsey v. Detroit R. Co., 83 Mich. 432; Ewen v. Chicago &c. R. Co., 38 Wis. 613; Hoppe v. Chicago &c. R. Co., 61 id. 357; Phillips v. Duquesne Traction Co., 8 Pa. Super. Ct. 210.

So in an action by a parent. Pittsburg &c. R. Co. v. Vining's Adm'r, 27 Ind. 513. Lafayette &c. R. Co. v. Huffman, 28 Ind. 287; action by a child.

In an action by father, Jeffersonville &c. R. Co. v. Bohen, 40 Ind. 445; 49 id. 154; Slaterry v. O'Connell, 153 Mass. 94.

*Contra*, Shippy v. Ausable, 85 Mich. 280; see, also, Battishill v. Humphreys, 64 id. 503, and cases therein; Westerfield v. Lewis, 43 La. Ann. 63; Newman v. Phillipsburgh &c. R. Co., 50 N. J. L. 446; Gulf &c. R. Co. v. McWhirter, 77 Tex. 356; Jansen v. Siddal, 41 Mo. App. 279; Chicago &c. R. Co. v. Wilcox, 33 id. 450; Ludden v. Columbus &c. R. Co., 7 Oh. N. P. 106.

Contributory negligence for the death of a child was held not to be a defense. Wymore v. Manhaaska Co., 78 Iowa, 396, where a child was killed while riding with his parents; also in Norfolk &c. R. Co. v. Groseclose's Adm'r, 13 S. E. Rep. 454. Cleveland &c. R. Co. v. Crawford, 24 Ohio St. 631, where the parents were killed in a wagon in which they and several of their children, who were beneficiaries, were riding, and it was held that the contributory negligence of the children did not defeat the action. And so in an action which the husband brought, as administrator, for the death of his wife through the negligence of a druggist, it was held that his negligence would not defeat a recovery where there were children benefited in the recovery. Davis v. Guarnieri, 45 Ohio St. 470.

*Question whether child was sui juris is for jury:*

It is usually, although not always so, a question of fact for the jury, whether the child was *sui juris*. Mangam v. Brooklyn R. Co., 38 N. Y. 455.

Fallon v. The Central Park &c. R. Co., 64 N. Y. 13, aff'g 6 Daly, 8; Tucker v. N. Y. C. & H. R. R. Co., 124 N. Y. 308; Muller v. Brooklyn &c. R. Co., 18 App. Div. 177.

As in the case of a boy aged six or seven. Honesburgher v. The Second Ave. &c. R. Co., 33 How. 195.

A child just past seven years of age may not, as matter of law, be held to be *sui juris*, so as to be chargeable with negligence.

In administering civil remedies the law does not fix any arbitrary period, when an infant becomes *sui juris*. When the inquiry is material, it becomes a question of fact for the jury, unless the child is of so very tender years, that the court can safely decide.

It seems, in an action based upon negligence for an injury to an infant, who may or may not have been *sui juris*, when it occurred, and the fact is material upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence showing that the party injured was not, as matter of fact, capable of exercising judgment

and discretion. *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104, reversing 46 Hun, 184.

A girl of nine was *sui juris*; having testified that she knew the danger but thought that the car was far enough away to permit her to pass in safety. *Hicks v. Nassau Electric R. Co.*, 47 App. Div. 479.

Where a child of six years of age fell into an excavation. *Mackey v. Vicksburg*, 64 Miss. 777.

See, also, *Westbrook v. Mobile &c. R. Co.*, 66 Miss. 560; *Meeks v. Southern &c. R. Co.*, 56 Cal. 513.

Age and mental capacity of a boy of 14 are proper elements of consideration for the jury in determining whether he is negligent. *Texas &c. R. Co. v. Phillips*, 91 Tex. 278; *Missouri &c. R. Co. v. Rodgers*, 89 id. 680.

The burden of showing that a child was *non sui juris* is on him or the parent. *Stone v. Dry Dock &c. R. R. Co.*, 115 N. Y. 104.

*Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

Presumption was that a boy of twelve years was *sui juris*. *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

*It is sometimes a question of law:*

Whether the child was *non sui juris* was determined, as a matter of law, in the following cases: *Hartfield v. Roper*, 21 Wend. 615. (Age two years, was not.)

*Ihl v. The Forty-second Street &c. R. Co.*, 47 N. Y. 317, (age three years, was not); *Prendegast v. N. Y. C. &c. R. R. Co.*, 58 id. 652; *McGarry v. Loomis*, 63 id. 106 (age four years, was not); *McMahon v. The Mayor*, 33 id. 642 (age eleven years, was); *Tucker v. New York &c. R. Co.*, 124 id. 308, (boy of twelve, was).

A girl of twelve, ordinarily intelligent, was held *sui juris* as matter of law. *Noonan v. Obermeyer &c. Brew. Co.*, 50 App. Div. 377.

A child of four and a half, held, as matter of law, not capable of contributory negligence. *Crawford v. Southern R. Co.*, 106 Ga. 870.

Nor a child of five. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

Or three and a third. *North Kankakee Street R. Co. v. Blatchford*, 81 Ill. App. 609.

Boy of eleven was *prima facie, sui juris*. *Chicago &c. R. Co. v. Hoffman*, 82 Ill. App. 453; *Cleveland &c. R. Co. v. Heiman*, 16 Oh. C. C. 487.

A bright boy of twelve, in catching his foot in a turntable, while on it at night was negligent *per se*. *Carson v. Chicago &c. R. Co.*, 96 Iowa, 583.

A child of four and a half held *non sui juris* as matter of law. *Kansas City &c. R. Co. v. Herman*, (Kan. App.) 62 Pac. Rep. 543.

So of a child of three and a half. *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

Of less than four. *South Covington &c. R. Co. v. Herrklotz*, (Ky.) 47 S. W. Rep. 265.

Or between two and three. *Toledo &c. Inv. Co. v. Putney*, 10 Oh. C. D., 698.

Child of five was not negligent in running on track in front of car giving no notice of its approach. *Fickler v. Cleveland &c. R. Co.*, 6 Oh. N. P. 36.

Child too young to exercise judgment was not negligent in going on a railway heedless of signals. *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106.

So of a child three years and ten months. *Woekner v. Erie Electric Motor Co.*, 176 Pa. St. 451.

Or one of six. *Walbridge v. Schuylkill &c. R. Co.*, 190 Pa. St. 274.

Under 14, the presumption of incapacity prevails, but is rebuttable. *Phillips v. Duquesne T. Co.*, 8 Pa. Super. Ct. 210.

An infant of sixteen months cannot be guilty of negligence. *Mason v. Southern R. Co.*, 58 S. C. 70.

A child six years old was incapable of contributory negligence. *Central Trust Co. v. Wabash &c. R. Co.*, 31 Fed. Rep. 246.

*Kay v. R. Co.*, 65 Pa. St. 269; *Mascheck v. R. Co.*, 3 Mo. App. 600; *Fink v. Missouri Furnace Co.*, 10 id. 61; *Walters v. Chicago &c. R. Co.*, 41 Iowa, 71; *Indianapolis &c. R. Co. v. Pitzer*, 7 West (Ind.) 396 (child of seven years); *Taylor v. Delaware &c. R. Co.*, 113 Pa. St. 162; *Chicago &c. R. Co. v. Stumps*, 69 Ill. 409; *Dowling v. Allen*, 88 Mo. 293.

Infants between seven and fourteen are presumed guiltless of negligence. *Roanoke v. Shull*, 97 Va. 419.

Negligence not imputed to child of two years and ten months. *Dicken v. Liverpool Salt &c. Co.*, 41 W. Va. 511; see, also *Gunn v. Ohio River R. Co.*, 42 W. Va. 676; s. c., 36 L. R. A. 571.

#### (a). CARE REQUIRED OF PARENTS.

Negligence of parent in permitting child to be out of her sight 15 or 20 minutes in vicinity of street car tracks, was left to the jury. *Fox v. Oakland &c. R. Co.*, 118 Cal. 55.

Parents, however poor, must use the care a reasonably prudent person would use under the circumstances to keep young children out of danger. *Aurora v. Seidelman*, 34 Ill. App. 215.

*Mahew v. Burns*, 103 Ind. 328.

There is no distinction between parents able to employ attendants for their children and those who are not, on the subject of contributory negligence. *Indianapolis R. Co. v. Pitzer*, 109 Ind. 179.

Hagan's Petition, 7 Ont. L. J. 311; *Cumming v. B. C. R. Co.*, 104 N. Y. 669.

The question of the proper selection of a caretaker and of the latter's negligence was for the jury, where a child of three and three-quarters escaped from her unawares, and she failed to go in front of a car to rescue it. *Kroesen v. Newcastle &c. Street R. Co.*, 198 Pa. St. 30.

(b). DEGREE OF CARE REQUIRED FROM AND TOWARD INFANTS.

If the child be *sui juris*, yet he is not bound to exercise the care demanded of an adult of ordinary capacity, but only such care as would naturally be expected of a person of his age, and greater care must be exercised for their protection than is required in the care of an adult.

No one, whether sick, lame, imbecile or vigorous and youthful, is bound to exercise all the skill and all the care that the most capable and ready-witted person could command. Ordinary capacity and ordinary care and attention in protecting themselves, is all that the law requires. This each is bound to give, whatever his age or condition; and if he fails, he cannot call upon others to supply his deficiencies, or to compensate him for losses arising from its absence. *Sheridan v. Brooklyn &c. R. Co.*, 36 N. Y. 43.

The old, the lame and the infirm are entitled to the use of the streets, and more care must be exercised toward them by engineers than toward those who have better powers of motion. The young are entitled to the same rights, and cannot be required to exercise as great foresight and vigilance as those of maturer years. *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 449.

The rule, requiring the absence of contributory negligence, was not established out of any tenderness for the negligent infliction of an injury, but to discourage carelessness; and that, in determining whether the fault exists, the condition of the person whose acts are in question should be considered; and the old, the lame, the infirm or the young are entitled to have their condition and ability, mental and physical, considered in diminution of the degree of care exacted of them; no greater degree of care is required than the capacity of the person allows him to exert. *Mowery v. The Central City R. Co.*, 51 N. Y. 666.

In applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must show himself free from fault, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care



to be reasonably expected in view of his age and condition. *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 252.

This is in harmony with the well established rule, that persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases; and with another principle asserted by courts, that carriers of persons for hire are called upon to care more tenderly and prudently for the aged, the infirm and the partially helpless, than for the vigorous and healthy of their passengers. *Thurber v. Harlem B., M. & C. R. Co.*, 60 N. Y. 336.

*McGovern v. N. Y. C. & C. R. Co.*, 67 N. Y. 417; *Dowling v. N. Y. C. & C. R. Co.*, 90 id. 670; *Stone v. Dry Dock & C. R. Co.*, 115 id. 111, rev'g 46 Hun, 184.

It may be that this evidence would show the want of that care which the law would exact of an adult. But does it show the want of that care which is demanded of an infant of plaintiff's age? She cannot be supposed to have had that knowledge of the speed of trains and the importance of looking again, just before taking the step upon the track, which an adult would have. The law is not so unreasonable as to exact from an infant the same degree of care and prudence in the presence of danger as it exacts from adults. *Byrne v. N. Y. C. & H. R. R. Co.*, 83 N. Y. 621; but see *Thompson v. Buffalo R. Co.*, 145 id. 196.

A boy of eight attempted to cross so near a car that he was struck, upon its suddenly starting ahead. Degree of care required of him was a question for the jury. *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; rev'g s. c., 26 App. Div. 48.

**From opinion.**—"The question of plaintiff's contributory negligence is for the jury, and he is not to be judged by the standard of intelligence and judgment applied to an adult in full possession of his faculties. Judge Andrews said in *McGovern v. N. Y. & C. R. Co.*, (67 N. Y. 421): 'The law is not so unreasonable to expect or require the same degree of care or circumspection in a child of tender years as in an adult.' The child in the case cited was a lad eight years old. The rule as above stated has been repeatedly applied by this court to infants varying in age from six to fifteen years. (*O'Mara v. H. R. R. Co.*, 38 N. Y. 449; *Reynolds v. N. Y. C. & C. R. Co.*, 58 N. Y. 248; *Byrne v. N. Y. C. & C. R. Co.*, 83 N. Y. 621, and cases cited; *Dowling v. N. Y. C. & C. R. Co.*, 90 N. Y. 671; *Moehus v. Herrmann*, 108 N. Y. 353, 354; *Stone v. Dry Dock & C. R. Co.*, 115 N. Y. 109, 110; *Swift v. Staten Island & C. R. Co.*, 123 N. Y. 645, 650)." \* \* \* "The presumption that the plaintiff was *non sui juris* was not met by direct evidence, but the plaintiff was a witness and his testimony, as well as the manner of giving it, gave the jury an opportunity to measure his intelligence, and it was for them to say whether he was in fact *sui juris*, and if they should conclude that he was not, then the further question remained for their consideration whether he exercised that degree of care and caution which should be expected from one of his age, experience and intelligence."

Boy of five was playing near a pile of bricks in the street which ob-

structed his view of an approaching team. Another having thrown his book across the narrow passage left, he ran after it. His negligence was for the jury. *Keller v. Haaker*, 2 App. Div. 245.

It was left to the jury to say what degree of care should be required of a child of just past seven if it found that he was in fact *sui juris*. *Penny v. Rochester R. Co.*, 7 App. Div. 595.

Plaintiff, a boy of sixteen, employed to operate a machine about which he was instructed, was held presumptively *sui juris*, and of sufficient intelligence to comprehend its dangers; and was chargeable with the degree of care required of an adult. *Koehler v. Syracuse &c. Man. Co.*, 12 App. Div. 50.

An instruction that if the child was *sui juris* he was bound to exercise care reasonably to be expected of one of his age, was proper. *Muller v. Brooklyn &c. R. Co.*, 18 App. Div. 177.

A boy of eight to show his ability attempted, as he had done before, to cross a plank set to brace boards placed against the interior of a trench, when he became dizzy and fell. Contractor was not negligent. *Powers v. Creem*, 22 App. Div. 480.

Boy rode on log carrier and turned feed wheel, instead of turning it from the floor of the saw mill. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179.

An infant is required to use prudence in proportion to its capacity. *Birge v. Gardiner*, 19 Conn. 509.

*Daley v. Norwich &c. R. Co.*, 26 Conn. 591; *Pueblo &c. Street R. Co. v. Sherman*, 25 Colo. 114; *Weldon v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 1; *Chicago &c. R. Co. v. Dewey*, 26 Ill. 258; *Chicago &c. R. Co. v. Murray*, 71 id. 601; *Hund v. Geier*, 72 id. 393; *Chicago &c. R. Co. v. Wilcox*, 24 N. E. Rep. (Ill.) 419; *Paducah v. Memphis &c. R. Co.*, 12 Bush. (Ky.) 41; *Collins v. South Boston &c. R. Co.*, 142 Mass. 301; *Mattey v. Whittier*, 140 id. 337; *Messenger v. Dennie*, 141 id. 335 (137 id. 197); *Hunt v. Salem*, 121 id. 294; *Dowd v. Chicopee*, 116 id. 93; *Elkins v. Boston &c. R. R. Co.*, 115 id. 190; *Lynch v. Smith*, 104 id. 52; *Ecliff v. Wabash R. Co.*, 64 Mich. 196; *Chicago &c. R. Co. v. Smith*, 46 id. 504; *Daniels v. Clegg*, 28 id. 32; *Flaherty v. Union R. Co.*, 45 Mo. 70; *Boland v. Missouri R. Co.*, 36 id. 484; *Duffy v. Missouri R. Co.*, 19 Mo. App. 380; *Philadelphia &c. R. Co. v. Spearen*, 47 Pa. St. 30; *Rauch v. Lloyd*, 31 id. 358; *Penn. R. Co. v. Kelley*, 31 id. 372; *Robinson v. Cone*, 22 Vt. 213; *R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

Error to charge in effect, that if a child did not have the capacity to exercise the care of a prudent adult, he was not chargeable with any negligence. *Western &c. R. Co. v. Rogers*, 104 Ga. 224.

The degree of care required of one of tender years, is that required of an ordinarily prudent person of that age under similar conditions. *Norton v. Volzke*, 158 Ill. 402.

See, also, *Illinois C. R. Co. v. Bandy*, 88 Ill. App. 629; *Tulley v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 537; *Baltimore &c. R. Co. v. Cumberland*, 12 App.

D. C. 598; *Riley v. Missouri &c. R. Co.*, 68 Mo. App. 652; *Anderson v. Union &c. R. Co.*, 81 Mo. App. 116; *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682; *Lake Erie &c. R. Co. v. Mackay*, 53 Oh. St. 370; s. c., 39 L. R. A. 757; *Queen v. Dayton Coal &c. Co.*, 95 Tenn. 458; s. c., 30 L. R. A. 82; *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224; *Cleveland &c. R. Co. v. Heiman*, 16 Oh. C. C. 487; *Markey v. Consolidated Traction Co.*, 65 N. J. L. 82; *Roth v. Union Depot Co.*, 13 Wash. 525; s. c., 31 L. R. A. 855; *Dicken v. Liverpool Salt &c. Co.*, 41 W. Va. 511.

Though a child of five is a technical trespasser, yet an owner is liable for leaving dangers which are attractive to children unguarded like an elevator shaft. Child of an employé, playing about the store, was injured by the descending elevator. *Siddall v. Jansen*, 168 Ill. 43; rev'g s. c., 67 Ill. App. 102.

A child of nine passing through space three feet wide between cars of a train obstructing a crossing, was not negligent *per se*. *Lehman v. Eureka &c. Works*, 114 Mich. 260.

- Test is, the capacity of discretion or intelligence to distinguish the presence of danger. *San Antonio Waterworks Co. v. White*, (Tex. Civ. App.) 44 S. W. Rep. 181.

But an instruction; that a girl of 13 was bound to the care usually exercised by the great mass of ordinarily prudent children of her age, was erroneous. *Collins v. Janesville*, 107 Wis. 436.

(c). INSTANCES WHEN RECOVERY WAS OR WAS NOT ALLOWED TO PARENT, OR TO CHILD OR ITS REPRESENTATIVE.

*The following were actions by infant, or in the infant's behalf:*

An infant between three and four years of age escaped into the street through an open window which was four feet above the floor, and was the only means of egress. It went on the defendant's track and was injured by the negligence of the car driver. It was not contributory negligence *per se*, as such a child was not *sui juris*. Question as to the child's being *sui juris* is for the jury. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, rev'g nonsuit.

From opinion.—“In *Darley v. Norwich R. Co.* (26 Conn. 591), it was held, the negligence could not be imputed to a child of such tender years as to be wholly incapable of the exercise of care. In *Robinson v. Cone* (22 Vermont), it was held, that all that could be required of such a child was the exercise of such care as it was capable of. In *Lynch v. Murdin* (41 Eng. Com. Law, 422), it was held, where the defendant's cartman had left his horse and cart standing unattended in the street for half an hour, and children gathered around it for play, and the plaintiff got into the cart, and, while getting out, another lad started the horse, thereby causing the plaintiff to fall, and the cart to run over him, breaking his leg, that the plaintiff could recover. It will be observed, that, in this case, the plaintiff

(seven years old), had done a positive act (getting into the cart), in itself wrongful, and which had directly contributed to the injury, and which would most clearly have barred an action by an adult for a similar injury, yet the court held that he had acted from childish instinct, and that this was not an impediment in the way of a recovery."

The plaintiff, aged twelve, could not find a seat in a car with his mother and was permitted to go into the next car. At a station the plaintiff attempted to go to his mother and was hurt. The mother was not *per se* negligent. *Downs v. N. Y. C. R. R. Co.*, 47 N. Y. 83.

It is not negligence *per se* for parents, on a quiet street, to allow a child of six years to go unattended on the street. Child was injured on sidewalk by timber piled thereon. *Cosgrove v. Ogden*, 49 N. Y. 255.

A child of five years came into the house for a drink, and was there told to go into the back yard, where it had been playing, but it went on the car track in the street, and, after an absence of five minutes, was injured. Contributory negligence was for the jury. *Fallen v. C. P., N. & E. R. R. Co.*, 64 N. Y. 13.

If a child, crossing a track, used the care required of persons *sui juris*, the neglect of the parent in allowing the child abroad is immaterial. The poverty of the mother preventing the proper care of the child is not evidence to rebut evidence of negligence in that regard. *Cumming v. B. C. R. R. Co.*, 104 N. Y. 669; 38 Hun, 362.

A child of two years was in his father's bakery, and while the father went behind the counter for two minutes, the child escaped into the street and was run over by the defendant's car. Nonsuit was error. *Weil v. D. D., E. B. & C. R. Co.*, 119 N. Y. 147.

Defendant's engine ran over a child two and one-half years old. The engine could have been stopped. Defendant liable. The child, with the consent of parents, started to go to grandparents, "just around the corner." *Kenyon v. N. Y. C. & H. R. R. R. Co.*, 5 Hun, 479; s. c. *aff'd*, 76 N. Y. 607.

The negligent driving of a father colliding with a street car, was not imputed to a child 21 months old in the arms of its mother, sitting by his side, in an action by it. *Hennessey v. Brooklyn City R. Co.*, 6 App. Div. 206.

Negligence of a driver of delivery wagon, imputed to infant of four riding with him by consent of its mother, in an action by it. Her consent was not negligence. *Healey v. Ehret*, 42 App. Div. 27.

The negligence of the parents of a child of five, in allowing it to go upon the street at night unattended, was imputed to it. *Lowery v. New York Ice Co.*, 44 App. Div. 657; *aff'g* s. c., 26 Misc. 163.

*In an action by a child for injury the negligence of the parent did not prevent a recovery in the following instances:*

Custodian of a child of five. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

In an action by a girl of four for injuries, negligence of another is not involved. *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283.

A child's leg cut off by grip car. *Chicago &c. R. Co. v. Wilcox*, (Ill.) 24 N. E. Rep. 419.

In an action by infant *non sui juris*, negligence of parent or custodian was not imputable to it. *Evansville v. Senhenn*, 151 Ind. 42.

See, also, *Jeffersonville v. McHenry*, 22 Ind. App. 10; *Union P. R. Co. v. Young*, 57 Kan. 168.

A child of two years of age driving with its parents was killed by the falling of bridge. *Wymore v. Mahaska County*, 78 Iowa, 396.

See *Slater v. Burlington &c. R. Co.*, 71 Iowa, 209.

A child of four or five years, injured while crossing defendant's track. *Westbrook v. Mobile &c. R. Co.*, 66 Miss. 560.

*Lannan v. Albany Gas-Light Co.*, 46 Barb. 264; *Daley v. Norwich &c. R. Co.*, 28 Conn. 591.

Boy of three years crushed by cable car. *Winters v. Kansas &c. R. Co.*, 99 Mo. 509.

*Boland v. Missouri R. Co.*, 36 Mo. 484; see, also, *Stillson v. Han. &c. R. Co.*, 67 id. 671.

Boy of eleven allowed by father to work at dangerous employment. *Huff v. Ames*, 16 Neb. 139.

Child of five run over while playing in the street. *Bisaillon v. Blood*, 64 N. H. 565.

Parent negligently permitted a boy of three to be exposed to danger. *Warren v. Manchester Street R. Co.*, 70 N. H. 352.

A girl of sixteen lawfully riding with her father, injured by concurrent negligence of father and defendant. *Street R. Co. v. Eadie*, 43 Oh. St. 91.

*Bellefontaine &c. R. Co. v. Snyder*, 18 Oh. St. 399.

Child of four sent on an errand by its parents and run over by defendant's car. *Erie &c. R. Co. v. Schuster*, 113 Pa. St. 412.

*Smith v. O'Connor*, 48 Pa. St. 218; *Glassey v. Hestonville &c. R. Co.*, 57 id. 172; *G. H. & H. R. R. Co. v. Moore*, 59 Tex. 64.

Parents failed to get medical aid for a child of fifteen months for four days. *Texas &c. R. Co. v. Beckworth*, (Tex. Civ. App.) 32 S. W. Rep. 809.

A girl of between eleven and twelve was permitted to go near a defect in the highway. *Roanoke v. Shull*, 97 Va. 419.

*And in the following instance it was held, as a matter of law, that it was not negligence in the parent:*

To allow a child physically and mentally able to take care of himself to travel the streets alone. *Barksdull v. New Orleans R. Co.*, 23 La. Ann. 180.

*Karr v. Parks*, 40 Cal. 188.

To allow a child of seven to go to school through city streets alone. *Berry v. Lake Erie &c. R. Co.*, 70 Fed. Rep. 679.

*The following were actions by parents, or child's administrator:*

It is not *per se* negligent to permit a boy of eight years to ride on cars without a protector. Brakeman tried to lift boy on car and he slipped out of his hand and was hurt. *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49.

Where the court had charged that there could be no recovery if the infant was negligent, it was not obliged to charge as to his being *sui juris*, and as to negligence of guardian. *Sheridan v. Brooklyn City & Newtown R. Co.*, 36 N. Y. 39.

Parent was not negligent in allowing the child to cross the track, and the negligence of the child, on account of its age, did not excuse the defendant. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y. 317.

A child three years old, in charge of one nine and one-half years of age, was sent across the street car track. Recovery. *Ihl v. Forty-second Street R. R. Co.*, 47 N. Y. 317.

A mother opened a door to empty a tub, and her child, two years of age, slipped out and got on the defendant's land where cars were stored. The mother looked for him and found him under an engine, dead. The child was not *sui juris* and the negligence of the mother was for the jury. *Prendergast v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 652.

Boy killed at crossing. No recovery was allowed, as he was not shown to have been free from negligence. *Reynolds v. N. Y. C. & H. R. R. R. Co.*, 58 N. Y. 248.

**Although less degree of care is required of an infant than a mature person, yet he is chargeable with some care in approaching a known danger, and absence of negligence must be shown.**

A boy seven years of age ran across a track, in full view of the train, against the warnings of the trainmen. Defendant was not chargeable. *Wendell v. N. Y. C. & H. R. R. R. Co.*, 91 N. Y. 420.

It is not *per se* negligence on the part of a parent or guardian to permit a child *non sui juris* to play in the street. *Kunz v. City of Troy*, 104 N. Y. 344.

Where there is no other place for amusement in a crowded locality, it is not *per se* negligent to allow a bright child of four and a half years to play on the sidewalk unattended, under proper instructions. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, affirming 41 Hun, 404.

Law does not require same care from a boy of eight at a crossing as of an adult. *Tucker v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 308.

*McGovern v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 417; *Stone v. Dry Dock & R. Co.*, 115 id. 104; *Huerzeler v. Central Cross Town R. Co.*, 139 id. 490.

In an action for death of child, while a charge that if the child was so immature as to be *non sui juris* its negligence could not be considered, was correct by itself, it was error to charge, that if there was no negligence on the part of the child, it made no difference how negligent the parents might have been. *Neun v. Rochester R. Co.*, 165 N. Y. 146; rev'g s. c., 28 App. Div. 622.

A girl of eight years waited for a long freight train to pass on one of the several tracks in the city, keeping her eye on the direction the train was moving, and as it passed she stepped on the track and was killed by a caboose that was following a few rods behind. Negligence and contributory negligence for jury. If *deceased had been an adult the court could have said she was guilty of contributory negligence*. *Ryan v. N. Y. C. & H. R. R. Co.*, 37 Hun, 186.

Action was by a father to recover for injuries to a child, about nineteen months old, caused by the latter's being struck by a train while on the track of a railway. The child was left by the father with its mother, who, while attending to her household work, sent the child into the yard, which was near the railroad of the defendant, where the mother's sister was then at work, and the child wandered onto the track about 190 feet distant, and was injured about five minutes after leaving the house. The question of contributory negligence on the part of the plaintiff should have been submitted to the jury. *Meagher v. The Cooperstown & Charlotte Valley R. R. Co.*, 75 Hun, 455.

Where child of three was sent on errand in charge of one of five on a car street, judgment for death of the child was reversed. *Albert v. Albany R. Co.*, 5 App. Div. 544; s. c. aff'd, 154 N. Y. 780.

In an action for the death of a child under five, a mother's negligence in allowing it to go upon the street in the company of her brother of fifteen with instructions as to its care was left to the jury. *Ehrmann v. Nassau Electric R. Co.*, 23 App. Div. 21.

So it was for the jury to say whether the custodian of a child of five, a sister of 24, was negligent in allowing it to cross the street unattended, though within her sight. *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. 585.

It was not negligence *per se* to allow a child of three to play in the street attended only by a sister of six or eight, though also presumably *non sui juris*. *Kennedy v. Hills Bros. Co.*, 54 App. Div. 29.

Contributory negligence of parents held a defence to a statutory action for death of child. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509.

Negligence of parent is immaterial in action by child's administrator if former is to receive no benefit from the recovery. *Murphy v. Derby Street R. Co.*, 73 Conn. 249.

Mother was not negligent *per se* so as to preclude recovery, where her child wandered to the track from depot, where she lived, when her back was turned momentarily. *Chicago &c. R. Co. v. Logue*, 158 Ill. 621; aff'g s. c., 58 Ill. App. 142.

In an action for death a finding, that it was not negligence for parent to allow a child of about seven and a half to go to school with a sister of eleven, though in the neighborhood of railroad crossings, was sustained. *Illinois C. R. Co. v. Bandy*, 88 Ill. App. 629.

Negligence of a mother was imputed in an action by father as child's administrator. *Toner v. South Covington &c. R. Co.*, (Ky.) 58 S. W. Rep. 439.

A father's negligence will not be imputed in an action by child's administrator, though he be indirectly benefited by the recovery. *Warren v. Manchester Street R. Co.*, 70 N. H. 352.

In a statutory action for death of child, contributory negligence of administrator held not a defense.

Contributory negligence of a beneficiary bars recovery for his share but not for share of others. *Wolf v. Lake Erie &c. R. Co.*, 55 Oh. St. 517; s. c., 36 L. R. A. 812; *Ploof v. Burlington T. Co.*, 70 Vt. 509.

*In an action by a parent the negligence of the child or parent prevented a recovery in the following instances:*

Negligence of parent in allowing child of three to play in the street at night unattended and unwarned, where a railway passed the door. *Juskowitz v. Dry Dock &c. R. Co.*, 25 Misc. 64.

A child of seven years was allowed to pick up coal near the railroad track. *Coal &c. Co. v. Brawley*, 83 Ala. 371.

A child of eighteen months, left with one a little older, crawled on the railroad track. *St. Louis &c. R. Co. v. Freeman*, 36 Ark. 41.

Parent permitted his child of six to go alone across railroad tracks. *St. Louis &c. R. Co. v. Dawson*, 68 Ark. 1.

Parents permitted child of eleven to cross railroad track at a dangerous place. *Baltimore &c. R. Co. v. Pletz*, 61 Ill. App. 161.



Where the parent allowed child to play near an excavation of which he had knowledge. *Mayhew v. Burns*, 103 Ind. 328.

*Chicago v. Starr*, 42 Ill. 174.

Parents failed to restore a barrier blown from a dangerous excavation on the premises. *Wiese v. Remme*, 140 Mo. 289.

Parent permitted child to be on the street alone where there were street cars. *Hogan v. Citizen's R. Co.*, 150 Mo. 36.

Girl of twelve attempted to hold up a door, over a cellar stairs while descending them. *Vorrath v. Burke*, 63 N. J. L. 188.

Father sent child of three and a half past a place where there was an opening in a fence protecting the street from a declivity. *Cincinnati v. Gregory*, 3 Oh. N. P. 142.

Father allowed child to stray upon railroad track. *Pa. &c. R. Co. v. James*, 81 Pa. St. 194.

*Glassey v. Hestonville*, 57 Pa. St. 172; dictum in *Huff v. Ames*, 16 Neb. 139.

A child of seven years was allowed to serve water on street cars. *Smith v. Hestonville &c. R. Co.*, 92 Pa. St. 450.

*R. Co. v. Pearson*, 22 P. F. Smith (Pa.) 169; *R. Co. v. Long*, 25 id. 257; *Duff v. Allegheny &c. R. Co.*, 10 Nor. (Pa.) 458.

A child of seven years trespassed upon railroad track without the knowledge of the parent. *Cauley v. Pittsburg &c. R. Co.*, 95 Pa. St. 398.

*Philadelphia &c. R. Co. v. Hummell*, 8 Wright (Pa.) 278. See, also, *Rogers v. Lees*, 140 Pa. St. 475; *Westerburg v. Kinzua*, 142 id. 471.

Where parent allowed child of seven to cross bridge not repaired. *Old City Bridge Co. v. Jackson*, 114 Pa. St. 321.

In an action by father for loss of services and expenses, his contributory negligence defeated a recovery. *Phillips v. Duquesne Traction Co.*, 8 Pa. Super. Ct. 210.

*In an action by a parent, the negligence of the parent or the child was for the jury, or did not prevent recovery, in the following instances:*

Father released the hand of his children, about 2 and 4 respectively, to play about his feet on the street while talking for a moment with a friend. *Coghlan v. Third Ave. R. Co.*, 7 App. Div. 124.

A bright boy of eight and a half was not negligent in being in the middle of the street with roller skates. *Schaffer v. Baker Transfer Co.*, 29 App. Div. 459.

Father's negligence at a railroad crossing, in an action for death of his child in the arms of its mother riding with him. *Lewin v. Lehigh Valley R. Co.*, 52 App. Div. 69.

A child of less than five years, unusually intelligent, fell into an excavation of which she knew. *Rider v. New York*, 18 N. Y. Sup. Ct. (J. & S.) 221.

Where a boy, subject to occasional fits, was permitted to go at large, and was drowned. *Platt &c. Co. v. Dowell*, 30 Pac. (Col.) 68.

Allowing child of four years of age to go upon the street unattended. *Chicago v. Hessing*, 83 Ill. 204.

*Chicago v. Major*, 18 Ill. 349.

A child of four years went upon the street unaccompanied or accompanied by a young child. *Stafford v. Rubens*, 115 Ill. 196.

*Indianapolis v. Emmelman*, 108 Ind. 530.

Where child of tender years went upon railroad track. *Payne v. H. &c. R. Co.*, 70 Iowa, 584.

Where a child of five years went in front of residence to play. *Westerfield v. Lewis*, 43 La. Ann. 63.

A child of twenty months was allowed to go into the street for exercise. *Bliss v. South Hadley*, 145 Mass. 91.

Where a child, left for a moment on the front stoop, escaped to a railroad track. *Rosencrans v. Lindell R. Co.*, 108 Mo. 9.

*Frick v. St. Louis &c. R. Co.*, 75 Mo. 542; *Koons v. St. Louis &c. R. Co.*, 65 id. 592; *O'Flaherty v. Union R. Co.*, 45 id. 70; *Wissner v. St. Paul &c. R. Co.*, 47 Minn. 468; *Creed v. Kendal*, 156 Mass. 291; *Strutzel v. St. Paul &c. R. Co.*, 47 Minn. 543; *Kay v. Penn. R. Co.*, 65 Pa. St. 269; *Philadelphia v. Long*, 75 id. 257.

Child intrusted to elder sister from whom it escaped and ran off unobserved. *Woekner v. Erie &c. Motor Co.*, 182 Pa. St. 182.

Child of two and a half left on door step with hand organ playing and car passing in street. *Karahuta v. Schuylkill-T. Co.*, 6 Pa. Super. Ct. 319.

Father not barred because he "thoughtlessly" permitted a child to go into the street. *Dan v. Citizen's Street R. Co.*, 99 Tenn. 88.

Child was allowed to play where lumber was negligently piled. *Texas &c. R. Co. v. Herbeck*, 60 Tex. 602.

Child riding in carriage between father and uncle held not in the custody of uncle, and his negligence was immaterial. *Taylor &c. R. Co. v. Warner*, (Tex. Civ. App.) 60 S. W. Rep. 442.

A child of four years, two blocks from home, fell into an unguarded tunnel in the street. *Morgan v. Ill. &c. R. Co.*, 5 Dillon (U. S.) 96.

*Marshall v. Murray*, 148 Mass. 91; *Gibbons v. Williams*, 135 id. 333; *Slattery v. O'Connell*, 153 id. 94; *McGeary v. Eastern &c. R. Co.*, 135 id. 363; *Fink v. Missouri &c. R. Co.*, 10 Mo. App. 61.

Child of two years was left, during the absence of parents, in a yard with its brothers and sisters, one of eight years, where a neighbor was

at work, and escaped therefrom and wandered to a railroad track. Parents were not negligent *per se*. *Garner v. Trumbull*, 94 Fed. Rep. 321.

Child of 15 months strayed from yard of house near track. *Bias v. Chesapeake &c. R. Co.*, 46 W. Va. 349.

A child of sixteen months was left with a child of seven years for a few moments and got on the defendant's track, as it had before done. *Hoppe v. Chicago &c. R. Co.*, 61 Wis. 357.

*In the following instances the court held, that although child was sui juris he might recover:*

Child of ten years rolling hoop on the street. *Chicago &c. R. Co. v. Keefe*, 114 Ill. 222.

*Kerr v. Forgue*, 54 Ill. 482.

Where infant knew trespassing on a turntable was wrong but not that turntable was dangerous. *Union Pac. R. Co. v. Dunden*, 37 Kas. 1.

*R. Co. v. Stout*, 17 Wall. (U. S.) 657.

A bright boy of eleven was not, as a matter of law, negligent in going along a dangerous reservoir to fish and play. *Price v. Atchison Water Co.*, 58 Kan. 551.

A boy of fourteen, a trespasser, was killed while uncoupling cars. *Kentucky R. Co. v. Gastineau*, 83 Ky. 119.

*Smith v. O'Connor*, 48 Pa. St. 218.

A boy was injured on railroad track. *O'Connor v. Boston &c. R. Co.*, 135 Mass. 352.

*Lane v. Atlantic Works*, 111 Mass. 136; *Mulligan v. Curtis*, 100 id. 512.

A girl of sixteen, familiar with the spot, was killed at a crossing where the track was visible for a mile, and the headlight of the locomotive was burning. *Copley v. New Haven &c. R. Co.*, 136 Mass. 6.

Boy of ten, crossing street, was not *per se* negligent in stepping on to a rail, still hot from welding, where there was nothing to give notice thereof. *Kane v. West End Street R. Co.*, 169 Mass. 64.

A child of seven sought refuge from cattle upon a railroad trestle. *Cassida v. Oregon R. Co.*, 14 Ore. 551.

*McMillan v. B. & M. R. Co.*, 46 Iowa 231.

Boy of thirteen, who looks both ways before crossing a street, was not negligent *per se* in crossing before a wagon some distance away. *Streifeld v. Shoemaker*, 185 Pa. St. 265.

Nor is a boy of fourteen, who, when half over a crossing, where view was obstructed, retreats before cars passing on tracks ahead of him and is struck by cars passing on tracks behind him. *Steele v. Northern P. R. Co.*, 21 Wash. 287.

*In the following instances the court held that child was sui juris and could not recover:*

A bright boy of thirteen skated over a place in the river from which he knew ice had been cut only a few days before. *Sickles v. New Jersey Ice Co.*, 153 N. Y. 83; rev'g s. c., 80 Hun, 213.

A boy of thirteen stood within two and a half feet of the ends of an open drawbridge knowing that it would close with a considerable jar. *Ward v. New York*, 19 App. Div. 48.

A bright girl of over seven upon seeing a train approaching instead of stepping back ran along the track ahead of it. *McCarthy v. New York &c. R. Co.*, 37 App. Div. 187.

A boy of twelve years working on a dangerous machine, if he did not use care according to his years. *Glover v. Gray*, 9 Ill. App. 329.

A boy of eleven years, trespassed on defendant's track. No recovery unless child was willfully injured, or the railroad might have expected the accident. *Massero v. R. Co.*, 68 Iowa, 602.

See *Benton v. Chicago &c. R. Co.*, 56 Iowa, 496.

A boy of fourteen who knew of the danger and could have avoided it, if he had thought. *Merryman v. Chicago &c. R. Co.*, 85 Iowa, 634.

A bright boy of twelve caught his foot in a turntable while on it at night. *Carson v. Chicago &c. R. Co.*, 96 Iowa, 583.

A boy of four years left with his sister of five, while his sister of ten went into a store, was run over by a team in the street. This did not show absence of negligence. *Stock v. Wood*, 136 Mass. 353.

Although the degree of care required of a child is different from that required of an adult, the same general principles govern. *Collins v. South Boston &c. R. Co.*, 142 Mass. 301.

*Messenger v. Dennie*, 137 Mass. 197.

Boy of thirteen rode on a bicycle headlong into a train at a crossing without looking. *Sewell v. New York &c. R. Co.*, 171 Mass. 302.

A boy of twelve years was presumed to know the peril of riding in front of an engine. *Ecliff v. Wabash &c. R. Co.*, 64 Mich. 196.

*Chicago &c. R. Co. v. Smith*, 46 Mich. 504.

Boy of ten years was injured on a turn table of which he had been warned. *Twist v. Wynona &c. R. Co.*, 39 Minn. 164.

*Murray v. Richmond &c. R. Co.*, 93 N. C. 92; *Brown v. European &c. R. Co.*, 58 Me. 384; *Ludwig v. Pillsbury*, 35 Minn. 256; *Gillespie v. McGowan*, 100 Pa. St. 144.

A youth old enough to appreciate the approach of danger. *Dowling v. Allen*, 88 Mo. 293.

*McMahon v. North Cent. R. Co.*, 39 Md. 438; *Fryers' Case*, 30 id. 47.

An intelligent boy of twelve, heedless of warning, went into a quarry and burned his feet. *Butz v. Cavanaugh*, 137 Mo. 503.

Boy of eleven got caught in machinery while obeying his guardian's directions, both being trespassers. *O'Leary v. Brooks Elevator Co.*; N. Dak. 544; s. c., 41 L. R. A. 677.

Trespassing child of six while picking up coal in coal yard, stepped on hot ashes. *Feehan v. Dobson*, 10 Pa. Super. Ct. 6.

There is a strong presumption that a child of fourteen years has discretion. *Nagel v. Alleghany & Co.*, 88 Pa. St. 35.

Boy of fifteen, who could not swim, waded in a river with knowledge of deep holes therein. *Hunt v. Graham*, 15 Pa. Super. Ct. 42.

A boy of sixteen, frightened by a train, which he had neglected to look for, coming suddenly up behind him while walking beside the track, jumped against a switch stand and was thrown under the train. Judgment in his favor was reversed. *Texas & C. R. Co. v. Walker*, (Tex. Civ. App.) 49 S. W. Rep. 642.

*Whether he was negligent or not was left to the jury in view of his age in the following instances:*

A bright child of six, in crossing a track, failed to look and listen, and turned in obedience to warnings by another too late. *Finn v. Delaware & C. R. Co.*, 42 App. Div. 524.

In a boy of ten, in entering street cars at invitation of motorman. *Little Rock T. & C. Co. v. Nelson*, 66 Ark. 494.

Whether plaintiff, a girl of ten, was negligent in standing near a pile of stones: where one was shaken down upon her by a passing team. *Mahar v. Steuer*, 170 Mass. 454.

Child of eleven lying down on a railroad track. *St. Louis & C. R. Co. v. Shifflet*, (Tex. Civ. App.) 56 S. W. Rep. 697.

The sight and noise of an engine blowing off steam distracted the attention of a boy of fourteen from the danger of a train approaching on opposite side of crossing. *Atchison & C. R. Co. v. Hardy*, 94 Fed. Rep. 294.

Boy of nearly ten and a half drove upon a crossing without stopping and looking. *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370.

## VII Contributory Negligence of Third Person.

The responsibility of a person, injured while riding, through the negligence of the driver, is measured by his relation to the driver, and his opportunity to guard against the result of such negligence. If the driver is a servant of the injured person, the latter is responsible for his negligence; in other

\* NOTE.—See also "Crossings," *post*, p. 733.

**cases the person injured is not relieved from the watchfulness and care that a person of ordinary prudence would use under the circumstances to discover danger and avert the consequences thereof by warning or remonstrating with the driver, or by other means.**

This action was brought to recover for injuries sustained by plaintiff by a collision of defendant's cars with a stage coach, in which she was a passenger. The stage was a public one plying between two villages. The collision occurred at the crossing over a street, at a point of much travel and in a densely built portion of a village.

The court was held to have properly charged the jury that the negligence of the driver must be regarded as the negligence of the plaintiff; that he represented her, and she could not recover in this action if his negligence contributed to produce the injury. *Brown v. N. Y. C. R. R. Co.*, 32 N. Y. 597, aff'g judg't for pl'ff.

**From opinion.**—"Since the trial of the action, the decisions of this court, in *Chapman v. The New Haven R. R. Co.*, 19 N. Y. 341, and *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492, have been published. In the former of these cases, this court held, that a passenger by railroad is not so identified with the proprietors of the train conveying him or their servants, as to be responsible for negligence on their part, and could recover for personal injuries from a collision through negligence of the defendant, although there was such negligence contributing to the collision on the part of the train, conveying him, as would have defeated an action by its owners; and in the latter case, it was held, that the injured passenger could maintain his action against the proprietors of both on the ground of their concurrent negligence. I do not perceive why these cases do not dispose of the question of negligence of the driver in this case. The plaintiff was a passenger in a public stage. *She had no control of its management or direction; and occupied no relation to the driver different from that which passengers occupy to any public carrier of persons.* In principle, there is no difference whatever between her relation to the carrier and that of a passenger on a train of railroad cars. The difference is one of fact merely, growing out of the difference of motive power and the corresponding necessity for more stringent rules and greater vigilance in one case than in the other. But a majority of the judges are of the opinion that the true rule, in a case of this kind, was laid down at the circuit."

The negligence of defendant, whereby plaintiff was injured, being established by evidence and there being no pretense, that plaintiff was guilty of any personal negligence, the negligence of a third party, contributing to the injuries, furnishes no excuse for the negligence of defendant, and no reason why he should not respond in damages. Hence, in such case, the refusal of the judge to charge, that, if the jury should find that the injuries were in part caused by the negligence of a third party, the plaintiff could not recover from defendant, was not error. *Webster v. Hudson R. Co.*, 38 N. Y. 260, aff'g judg't for pl'ff.

See *Platz v. The City of Cohoes*, 89 N. Y. 224-5.

A person was riding with a driver, who had knowledge of the proximity of the track, which they approached rapidly, with the top up and without notice. Within ten feet of the track the driver struck his horses and went on at a gallop. Contributory negligence. *McCall v. N. Y. C. & H. R. R. Co.*, 54 N. Y. 642.

A female who has accepted an invitation to take a ride with a person in every way competent, and fit to manage a horse, is not chargeable with his negligence, and contributory negligence upon his part is no defense to an action by her against a railroad corporation for injuries resulting from a collision.

Accordingly, held, that a charge in such an action, that, if defendant was negligent and the plaintiff was free from negligence herself, she was entitled to recover, although the driver might be guilty of negligence, which contributed to the injury, was proper. *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11, aff'g judg't for pl'ff.

Distinguishing *Beck v. East River F. Co.*, 6 Robt. 82; and limiting *Brown v. N. Y. C. R. Co.*, 32 N. Y. 507.

The plaintiff, not himself negligent, riding gratuitously with another, whom he could not control, and who was not claimed to be an incompetent driver, may recover for injury at a crossing caused partly by the defendant's negligence. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

The injury was caused by the wheels of the wagon, in which plaintiff was riding, running into a hole in the street. The court after it had charged, in substance, that plaintiff could not recover, if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. Held, no error. *Minick v. The City of Troy*, 83 N. Y. 514, aff'g 19 Hun, 253, and judg't for pl'ff.

The plaintiff's intestate, by invitation of the driver, was riding on a highway crossed by defendant's tracks; the wheel went into a hole between the tracks, and the testator was jolted off and killed. The court charged that if there was nothing to indicate that the driver was not a proper man to ride with, the plaintiff would not be affected by the driver's contributory negligence, and, in the absence of such indication, only a wrongful or willful act could affect the recovery. Defendant's counsel requested a charge "that if the driver's negligence was the proximate

cause of the jar the plaintiff cannot recover." The court properly refused to alter its charge. *Masterson v. N. Y. C. & H. R. R. R. Co.*, 84 N. Y. 247, aff'g judg't for pl'ff.

Distinguishing *Cosgrove v. N. Y. C. & H. R. R. R. Co.*, 13 Hun, 329; *Barringer v. N. Y. Central &c. R. Co.*, 18 id. 398.

The plaintiff's intestate and her husband were driving over the crossing and were both killed. The husband's negligence in driving in front of the train, which they both saw, did not constitute contributory negligence on her part. She had a right to suppose that her husband would stop and not cross; that when she saw he was about to make the attempt to cross, as they must have been then very close to the track, she was not bound to jump from the wagon, seize the reins or interfere with the driver; that even if she did not entreat him to stop, but sat silent, it does not follow, as matter of law, that she was negligent, as she might not have had time or might have been paralyzed from fright, and the question was one of fact for a jury. *Hoag v. N. Y. C. & H. R. R. R. Co.*, 111 N. Y. 199, rev'g nonsuit.

It appeared that the plaintiff was riding in a buggy, seated by the side of the driver, who had been hired to carry him; that an approaching train could be seen for some distance from the crossing, the location of which was well known to both; but that neither made any effort, by looking or listening, to discover such approach after they came within two hundred feet of the crossing, held, that plaintiff was properly nonsuited.

The rule requiring a traveler on a highway, on approaching a railroad crossing, to have senses alert to discover and avoid danger from an approaching train, is not relaxed in favor of one, who is being carried in a vehicle owned and driven by another; it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable.

The rule that the negligence of the driver of a vehicle may not be imputed to a passenger in an action to recover damages for injuries alleged to have been occasioned by defendant's negligence, is *only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver, or is separated from him by an inclosure and is without opportunity to discover danger and to inform the driver of it.* *Brickell v. N. Y. C. & H. R. R. R. Co.*, 120 N. Y. 290, aff'g judg't for def't.

Plaintiff was not bound by the acts of a driver of a coach which he and others had hired from a liveryman. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 30 App. Div. 410.

From opinion.—"The plaintiff in the case at bar did not hire or pay the driver or attendant, and had no voice in the selection of either, which was an important element in determining the relation between them. The fact that the



driver may have received from the plaintiff or his associates orders when to go forward and stop, did not make the plaintiff the servant of the defendant. *Johnson v. N. A. S. N. Co.*, 132 N. Y. 576." \* \* \* "*Murray v. Dwight*, 161 N. Y. 301. It is manifest that under the principles established by the decisions of this court the relation of master and servant did not exist between the plaintiff and the driver or helper or either of them."

Wife riding with her husband. *Platz v. Cohoes*, 24 Hun, 101; s. c. aff'd, 89 N. Y. 219.

*Perry v. Lansing*, 17 Hun, 34; *Metcalf v. Baker*, 11 Abb. (N. S.) 431, affirmed 57 N. Y. 662; *Shaw v. Craft*, 37 Fed. Rep. 317; *Louisville & C. R. Co. v. Creek*, 29 N. E. (Ind.) 481; *Miller v. R. Co.*, 27 id. 339; *Knightstown v. Musgrove*, 116 Ind. 121; *Pittsburg & C. R. Co. v. Spencer*, 98 id. 186; *Little v. Hackett*, 116 U. S. 366; *Street R. Co. v. Eadie*, 43 Oh. St. 91; *Battishill v. Humphrey*, 31 N. W. Rep. (Mich.) 894; *Sheffield v. Central Union & C. Co.*, 36 Fed. Rep. 164; *Contra, Carlisle v. Sheldon*, 38 Vt. 440.

A mother and four children were in hired coach, which stopped on the signal of the flagman at the crossing, on account of an approaching train. The flagman then signaled the train to come on, and the driver whipped up the horses and went to the track, and they were struck by the train. Held, that the driver was under the control of the mother, and the children, one of whom was killed, were in joint enterprise with her, and her negligence was theirs. *Callahan v. Sharp*, 27 Hun, 85; s. c. aff'd, 95 N. Y. 672.

From opinion.—"There are cases when one travels in a vehicle over which he has no control, in which he is not responsible for the negligence of the driver. *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Robinson v. N. Y. C. & H. R. R. Co.*, 84 id. 247. But these cases proceed on the ground that the plaintiff had no control of the vehicle or the driver, and had no authority to give directions for their movements.

So it was held that a passenger by railroad has no identity with the proprietors of the train conveying him, sufficient to prevent a recovery against the proprietors of another train for damages resulting from a collision through their negligence, though there was such negligence in the management of the train conveying him as would have defeated an action by its owners (*Chapman v. New Haven R. R. Co.*, 19 N. Y. 341), but this is on the ground that the plaintiff had no control over the train on which he was riding. *Webster v. Hudson R. R. Co.*, 38 N. Y. 262; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 id. 492. These authorities have no application to the present case.

It may be stated for a general rule that where the relation of superior and subordinate exists, the maxim *respondet superior* has application co-extensive with the relation. 'Where a master temporarily lends his servant to another, under whose immediate control he is for the time being, and whose work he is doing, the master will not be responsible for his servant's torts, committed during such temporary employment by another.' (Moak's *Underhill on Torts*, 42)."

Where a mother controlled the driver, his negligence is imputable to her, and her negligence is that of her child of thirteen. *Callahan v. Sharp*, 27 Hun, 85; s. c. aff'd, 95 N. Y. 672.

Whether a boy of ten years of age, crossing a track in a sleigh with his mother and another, and a driver, who was killed, was guilty of contributory negligence in the matter of looking, was for the jury. The action was by his administrator, and the question of the mother's negligence or that of the driver, was not raised. Case reversed on error in charge. *Jones v. U. B. R. R. Co.*, 36 Hun, 115, rev'g judg't for pl'ff.

Plaintiff got into a wagon to ride with a person intoxicated and reckless, who drove upon the track negligently. The court charged that, if the driver was driving towards the crossing at apparently dangerous speed, and it occurred to the plaintiff's mind that it was so, and yet he assented to it, he was a party to it. Error. If the driving was so heedless and careless that the plaintiff, with ordinary care, would perceive it and he failed to do so, he was guilty of negligence. *Smith v. N. Y. C. & H. R. Co.*, 38 Hun, 33.

Plaintiff's intestate, riding in a horse car over the defendant's railway, was killed by defendant's train. Held,

1. Car driver's negligence was not that of plaintiff;
2. No duty on the part of the passenger to look or listen;
3. One sound of the whistle on leaving last station not in compliance with statute.

The point was taken at the close of the trial, that the intestate himself was bound to stop, look or listen for an approaching train, but no obligation of that description was imposed upon him by law. He was a passenger, and as such could reasonably assume that proper care and attention would be devoted to the crossing by those in charge of the car, before an attempt was made to go over it. It was not for him to stop, look or listen, but for the persons who had charge of the vehicle in which he was being carried, and if they failed to do that, as due care requires them to do it, and by reason of that failure and the carelessness of the persons in charge of the engine the accident happened, the defendant itself may be held liable for the consequences. *McCallum v. Long Island R. Co.*, 38 Hun, 569.

The plaintiff and his companions approached a railroad, with music and singing, and he was thereby prevented from hearing the bell, if it was rung. It was the duty of the plaintiff, familiar with the situation and dangers, knowing that the train was due, that it could not be seen and that the only safeguard was the sense of hearing, to refuse to go upon the crossing and, if necessary, to escape from the threatened danger, which he could have done easily. *Koehler v. Rochester & L. O. R. Co.*, 66 Hun, 566.

A person riding in a vehicle with another should, by looking and suggestion, take extraordinary pains to prevent a collision on a four track railway. *Sauerborn v. Hudson R. Co.*, 69 Hun, 429; *aff'd*, 141 N. Y. 553. (See cases cited.)

122 CONTRIBUTORY NEGLIGENCE OF THIRD PERSON.  
The plaintiff was responsible only for her own neglect and the right of recovery cannot be defeated by the negligence of her husband who was driving. *Hennessy v. Brooklyn City R. Co.*, 73 Hun, 569.

Plaintiff asked her son, who owned a team of horses, to drive her to visit relatives. His negligence contributing to the accident did not defeat her recovery. *Weldon v. Third Ave. R. Co.*, 3 App. Div. 370.

Plaintiff was invited to go to a picnic with others, who borrowed the horses and wagons, selecting one of their number to drive. Driver's negligence was not imputed to plaintiff. *Kessler v. Brooklyn &c. R. Co.*, 3 App. Div. 426.

But the contributory negligence of a servant driver is imputed to the master. *Smith v. New York &c. R. Co.*, 4 App. Div. 493.

Plaintiff, having been invited with her daughters to ride with another, was the latter's guest, and was not chargeable with his negligence. *Stannus v. Newburgh &c. R. Co.*, 6 App. Div. 264.

Plaintiff, a child of four and a half, and *non sui juris*, was riding in a delivery wagon with the consent of two young men driving it. Latter's negligence was imputed to the child. *Metcalfe v. Rochester R. Co.*, 12 App. Div. 147.

From opinion.—“The learned counsel, for the plaintiff insists that the negligence of a driver, not being imputable to an adult, possessed with judgment, and the right of self control, who is riding with the driver it is illogical to impute the negligence of the driver to an infant without judgment and incapable of self control. In reply it may be said this opinion is founded upon precedents and does not assume to discuss the principles on which the precedents are supposed to rest. If the question which seems to be settled in this state, is to be re-examined and the precedents overruled, it should be done, by the court of last resort.” (Precedents discussed).

That the deceased and the driver were fellow servants of an ice company, did not prevent recovery for the driver's negligence. *McCormick v. Nassau Electric R. Co.*, 18 App. Div. 333.

See, also, “Master and Servant,” *post*, p. 1386.

Where two policemen are sent with an ambulance to bring in a prisoner, the negligence of the one detailed to drive was not imputed to the other in an action for injuries at a crossing. *Bailey v. Jourdan*, 1 App. Div. 387.

Negligence of a driver was chargeable to another riding with him where they were jointly transacting the business in which they were engaged. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

See, also, *Schron v. Staten Island &c. R. Co.*, 16 App. Div. 111.

Negligence of a driver of a street car, run into by a truck, was not imputed to the conductor. *Hobson v. New York Condensed Milk Co.*, 25 App. Div. 111.

One invited to ride, perceiving that driver is drunk and driving heedlessly without taking any steps to protect himself, is chargeable with the driver's contributory negligence. *Meenagh v. Buckmaster*, 26 App. Div. 451.

Deceased was injured while his host's wagon was crossing defendant's track. Though a guest, he gave the host, who was unfamiliar with the route, frequent directions. No recovery. *Zimmerman v. Union R. Co.*, 28 App. Div. 445.

Plaintiff, a guest of the driver, seeing a car coming admonished him to "ride slow." The words conveyed merely a warning and not an intention to assume control of the driver. *Bergold v. Nassau Electric R. Co.*, 30 App. Div. 438.

Young lady riding with a young gentleman at the latter's invitation, was not precluded from recovery by reason of his negligence. *Schermerhorn v. New York &c. R. Co.*, 33 App. Div. 17.

Contributory negligence of driver not under plaintiff's control or subject to her direction, was not imputed to her. *Kleiner v. Third Ave. R. Co.*, 36 App. Div. 191; *Fisher v. Mt. Vernon*, 41 App. Div. 293.

Plaintiff conducted a school, and to take pupils to and from it, ran a bus, hiring a horse and driver from a liveryman. She was not allowed to recover for a collision with a street car to which driver's negligence contributed. *Reed v. Metropolitan Street R. Co.*, 58 App. Div. 87.

Where deceased was riding with his father in the latter's carriage, he was not chargeable with negligence of latter's driver; having no control over him. *Morris v. Metropolitan Street R. Co.*, 63 App. Div. 78.

While a guest of driver may not be chargeable with the latter's negligence at a railroad crossing, he must use reasonable care for his own protection. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

See, also, *Anderson v. Metropolitan Street R. Co.*, 30 Misc. Rep. 104; *Ulrich v. Toledo &c. Street R. Co.*, 10 Oh. C. C. 635.

Negligence of driver of hose cart was not imputed to a fireman riding thereon. *Birmingham &c. R. Co. v. Baker*, (Ala.) 31 South. Rep. 618.

Negligence of father, driving, is imputable to child of nine. *Kyne v. Wilmington &c. R. Co.*, 13 Cent. (Del.) 391.

Guest, having no control over the driver, was not charged with the latter's negligence. *Farley v. Wilmington &c. R. Co.*, (Del.) 52 Atl. Rep. 543.

Where driver is a servant, his negligence is imputed to the master. *Read v. City &c. R. Co.*, 115 Ga. 366.

Where it does not appear that plaintiff did otherwise than acquiesce in driver's act, such act is held to be his own and he cannot recover. *Brannen v. Kokomo &c. Co.*, 115 Ind. 115.

*Haff v. Minneapolis &c. R. Co.*, 14 Fed. Rep. 558; *Allyn v. R. Co.*, 105 Mass. 79.

Driver's negligence was not imputed to his guest, having no control, and reasonably believing him to be competent. *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 649; *Leavenworth v. Hatch*, 57 Kan. 57; *Noonan v. Consolidated T. R. Co.*, 64 N. J. L. 579; *Ouverson v. Grafton*, 5 N. D. 281.

But where a guest had equal knowledge with the driver that they were going at reckless speed in the dark, and had equal means of discovering the danger, he was equally negligent. *Vincennes v. Thuis*, 28 Ind. App. 523.

Husband, not being under control of wife, his negligence did not prevent her recovery. *Reading v. Telfer*, 57 Kan. 798.

Where driver was competent and plaintiff rode at his invitation. *Cahill v. Cincinnati &c. R. Co.*, 13 Ky. L. R. 714.

*Bennett v. Transportation Co.*, 36 N. J. L. 225; *New York &c. Co. v. Steinbrenner*, 47 id. 161; *State v. Boston &c. R. Co.*, 38 Alb. L. J. (Me.) 269; *Mann v. Weiland*, 81 Penn. St. 243; *Transfer Co. v. Kelly*, 36 Oh. St. 86; *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364; *Danville Turnpike Co. v. Stewart*, 2 Mete. (Ky.) 119; *R. Co. v. Case*, 9 Bush (Ky.) 728; *Hillman v. Newington*, 23 Alb. L. J. (Cal.) 294; *Tompkins v. R. Co.*, 66 Cal. 163; *Noyes v. Boskawen*, 64 N. H. 361; *Follman v. Mankato*, 35 Minn. 522; *Flaherty v. Northern Pac. R. Co.*, 39 id. 328; *Cuddy v. Horn*, 46 Mich. 596; *R. Co. v. Hogeland*, 66 Md. 149; *Beck v. East &c. Co.*, 6 Robt. (N. Y.) 82; *Galveston &c. R. Co. v. Kutack*, 72 Tex. 643; *Nesbit v. Garner*, 75 Iowa, 314; see, however, *McCaffrey v. Delaware &c. Canal Co.*, 16 N. Y. Supp. 495; *Bennett v. N. Y. &c. R. Co.*, 40 N. Y. S. R. 948; *Michigan City v. Boeckling*, 122 Ind. 39. *Contra*, *Thorogood v. Bryan*, 8 C. B. 113; *House v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Pt.* 43 id. 513; *Otis v. Janesville*, 47 id. 422; *Payne v. R. Co.*, 39 La. 523; *Yahn v. Ottuma*, 60 Iowa 429; *Stafford v. Oskaloosa*, 57 id. 749.

Negligence of a third party, contributing with defendant's, adds a remedy; it takes none away. *Whitman &c. Co. v. Wurm*, (Ky.) 66 S. W. Rep. 609; *West Chicago Street R. Co. v. Piper*, 165 Ill. 325; *O'Rourke v. Lindell R. Co.*, 142 Mo. 342.

Negligence of driver employed by stable keeper is not imputable to passenger who hires a hack of the stable keeper and does not control the driver. *Randolph v. O'Riorden*, 155 Mass. 331.

*Noyes v. Boskawen*, 64 N. H. 361; see, *Plumber v. Ossipee*, 59 id. 55; *Elyton Land Co. v. Mingea*, 89 Ala. 521; *Otis v. Thom*, 23 id. 469; *Georgia &c. R. Co. v. Hughes*, 87 id. 610; *Missouri Pac. R. Co. v. Tex. Pac. R. Co.*, 41 Fed. R. 316; *Becke v. Missouri Pac. R. Co.*, 102 Mo. 544; *Hunt v. R. Co.*, 14 Mo. App. 160; *Keitel v. R. Co.*, 28 id. 657; *Dickson v. Missouri Pac. R. Co.*, 104 Mo. 491; *East Tennessee &c. R. Co. v. Markens*, 14 Law. Rep. Annot, 281; *Bunting v. Hogsett*, 139 Penn. St. 353; *Carlisle v. Brisbane*, 113 id. 544; see, *Dean v. Penn. R. Co.*, 129 id. 514; *Nesbit v. Garner*, 75 Iowa, 315; *Larkin v. Burlington &c. R. Co.*, 52 N. W. (Iowa) 480; *Brannen v. Kokomo &c. R. Co.*, 115 Ind. 115; *Terre Haute &c. R. Co. v. McMurray*, 98 id. 358; *Albion v. Hetrick*, 90 id. 545.

Plaintiff was riding in a funeral procession with her daughter-in-law. Was not charged with her contributory negligence. *Johnson v. St. Paul &c. R. Co.*, 67 Minn. 260; s. c., 36 L. R. A. 586.

Boys furnished the stage and the girls the lunches for a picnic. The wagon upset on a defective street. Negligence of a boy driving, was not imputed to one of the girls injured. *Koplitz v. St. Paul*, (Minn.) 90 N. W. Rep. 794.

Negligence of husband in not looking at a crossing, not imputed to wife, riding at his invitation. *Finley v. Chicago &c. R. Co.*, 71 Minn. 471.

See, also, *Munger v. Sedalia*, 66 Mo. App. 628; *Ulrich v. Toledo &c. Street R. Co.*, 10 Oh. C. C. 635.

Hirer of a carriage acquiesced in driver's act of negligence. No recovery was allowed. *Illinois C. R. Co. v. McLeod*, 78 Miss. 334.

Negligence of a driver, leaving his wagon on a street car track while he went back to find a lost wheel nut, was not imputed to his nineteen-year-old daughter, asleep in the wagon. *Consolidated T. Co. v. Behr*, 59 N. J. L. 477.

Boy stealing a ride without the driver's knowledge was not chargeable with the latter's negligence. *Cincinnati Street R. Co. v. Wright*, 54-Oh. St. 181; s. c., 32 L. R. A. 340.

See, also, *New York &c. R. Co. v. Kistler*, 16 Oh. C. C. 316; *Wheeling &c. R. Co. v. Suhrivier*, 22 id. 560.

Negligence of driver was not imputable to the father of children riding with him without his consent, express or implied. *Faust v. Philadelphia &c. R. Co.*, 191 Pa. St. 420.

Negligence of a driver was chargeable to his guest, who knew of the danger of the road and acquiesced in driving that way. *Lohman v. McManus*, 9 Pa. Dist. 223.

Mother was not chargeable with her son's negligence in driving an unroadworthy colt without a good harness or brake. *Beardslee v. Columbia*, 5 Lack. Leg. N. 290.

When traveler takes passage with driver known to be drunk, no recovery for injuries is allowed. *Hershey v. Mill Creek*, 8 Cent. (Pa.) 252.

Where plaintiff is a guest of the driver and has no control over his driving, the latter's negligence is not charged to him. *Hydes Ferry &c. Co. v. Yates*, (Tenn.) 67 S. W. Rep. 69; *Missouri &c. R. Co. v. Rogers*, 91 Tex. 52; *Bryant v. International &c. R. Co.*, 19 Tex. Civ. App. 88; *Pyle v. Clark*, 75 Fed. Rep. 644; *Evans v. Lake Erie &c. R. Co.*, 78 Fed. Rep. 782; *Atlantic &c. R. Co. v. Ironmonger*, 95 Va. 625.

Knowledge of the husband as to viciousness of horse is knowledge of his

wife, and she cannot recover if he is negligent. *Huntoon v. Trumbull*, 2 McCrary, (U. S.) 314.

A passenger in a hack exercising no control over conduct of driver, is not affected with his contributory negligence. *Little v. Hockett*, 116 U. S. 366; *Baltimore &c. R. Co. v. Adams*, 10 App. D. C. 97; *Carnie v. Ervin*, 59 Ill. App. 555; *Bradley v. Ohio River R. Co.*, 126 N. C. 735; *Crampton v. Ive*, id. 894.

Where brother was driving sister, both being of mature age, there was no imputed negligence, but latter cannot recover, if she failed to exercise her faculties. *Lapsley v. Union Pac. R. Co.*, 50 Fed. Rep. 172.

*Chicago &c. R. Co. v. Bentz*, 38 Ill. App. 485.

Negligence of a father driving was not attributable to a minor child. *Kowalski v. Chicago &c. R. Co.*, 84 Fed. Rep. 586.

The exercise of diligence by a driver does not inure to the benefit of a guest who was negligent. *Johnson v. Superior &c. R. Co.*, 91 Wis. 233.

Negligence of driver, imputed to one voluntarily riding with him by invitation. *Ritjer v. Milwaukee*, 99 Wis. 190.

Citing *Frideau v. Mineral Point*, 43 Wis. 513; *Otis v. Janesville*, 47 id. 422.

## **CROSSINGS (Railway).**

- I. PRINCIPLES GOVERNING.**
- II. DUTY, AND DEGREE OF CARE REQUIRED.**
  - (a) In general.
  - (b) On the part of the railroad company.
  - (c) On the part of the traveler.
- III. SPEED OF TRAINS.**
  - (a) Negligence.
  - (b) Contributory negligence.
- IV. SIGNALS.**
  - (a) Negligence.
  - (b) Contributory negligence.
  - (c) What signals should be given.
  - (d) When signals should not be given.
  - (e) Sign boards.
  - (f) What further care required.
- V. RUNNING SWITCHES.**
- VI. GATES.**
  - (a) Negligence.
  - (b) Contributory negligence.
- VII. FLAGMAN.**
  - (a) Negligence.
  - (b) Contributory negligence.
- VIII. CUSTOMARY AND PRIVATE WAYS.**
- IX. CONSTRUCTION AND REPAIR OF CROSSINGS.**
  - (a) Negligence.
  - (b) Contributory negligence.

### **I. Principles Governing.**

The right of a train to pass a highway crossing is paramount, yet the company must use care, not necessarily, nor usually the highest degree, but such measure of care as a man of ordinary prudence would use under the circumstances.

Such care may be in the way of slackened speed, signals, lights, warnings from the train, signal bells, flagmen, gates, sign boards at the crossing, or other devices, the choice of which, in the absence of special statutory or municipal directions, is left to the company.

Particularly must they, at the peril of being adjudged *per se* negligent, give such warnings, by whistle, bell, signal post, or otherwise, as the law requires, although even such warning may not fully discharge the company's duty under particular circumstances.



The care due from the company is increased, as the probability of accident increases, as by the location of the crossing in a frequented street, by the presence of obstructions, other trains, noises, wind, storm, darkness, or other condition in the neighborhood of the crossing calculated to divert attention from, obscure or conceal the danger, and of which the company or its servants should have notice.

This consideration, also, includes any peculiarity in operation, as backing trains, the absence of headlights, kicking or switching cars, etc.

It is not negligent to omit to post a flagman or to place gates at a crossing and a jury cannot predicate negligence on the omission of gates or flagmen, or on mere speed of the train, but they may, in a case properly submitted to them, consider the *locus in quo* and all the surroundings, as they existed, the speed and conduct of the train, any ordinances regulating the same appropriate to the occasion, and then determine whether the precautions taken were sufficient.

If the company do employ such agencies, the same care must be taken to so use or operate them, as not to injure or mislead a traveler to his injury, as, for example, by such words or acts of the flagman or gateman, or by such opening or leaving open of the gates, or such absence of the customary flagman, as would be calculated to induce a man of ordinary prudence to believe that it was safe to go upon the track.

Even when the track crosses a walk, road, pathway, not a highway, where people, by the license or acquiescence of the company, are accustomed to go, the company must use the care that ordinary prudence would dictate.

## II. Duty and Degree of Care Required.

The defendant need not use the highest and utmost diligence when its trains approach a crossing. The general rule is that the care of a railroad company, in the operation of its trains, must be proportioned to the danger of accidents, and that when there is great danger there must be corresponding degree of care. In some cases, and under some circumstances, ordinary care may demand a very high degree of vigilance and precaution, but this does not necessarily include all that is physically possible. *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451, rev'g judg't for pl'ff, distinguishing and limiting *Johnson v. Hudson R. R. Co.*, 20 N. Y. 65; *Cook v. N. Y. C. R. Co.*, 1 Abb. Ct. of Appeals Cases, 432; *Fero v. Buff. & S. L. Co.*, 22 N. Y. 209; *Maginnis v. N. Y. C. & H. R. R. Co.*, 52 id. 215. *Cont., &c. Co. v. Stead*, 95 U. S. R. 161; *Fleckenstein v. Dry Dock &c. R. Co.*, 105 N. Y. 655; *Hennessey v. Brooklyn City R. Co.*, 73 Hun, 569.

### (a). IN GENERAL.

A traveler and railway have not equal rights to pass a crossing; the railway company has the paramount but not the exclusive right. *Warner v. N. Y. C. & H. R. R. Co.*, 44 N. Y. 465.

When the circumstances attending the killing of a person at a crossing denote neither contributory negligence nor the absence thereof, there can be no recovery. Freedom from negligence must be proved.

The only witness called by plaintiff, who saw the accident was the

engineer of the train, who testified that he saw the deceased two steps from the south rail of the track and saw him step twice, the second step taking him just over the rail, that he then gave a signal and the engine struck the deceased, that deceased was looking easterly away from the approaching train, and when witness first saw him he was 150 feet distant.

Held, that the evidence not only failed to show due care, but established contributory negligence. *Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330, rev'g judg't for pl'ff.

Plaintiff was negligent, where, having broken down upon the track at about the time he knew a train to be due, he did not look and listen for it or get out of the way, though it could have been seen or heard for about half a mile, but went about deliberately to repair his damage. *Belch v. New York & C. R. Co.*, 90 Hun, 477.

See, also, *Elgin & C. R. Co. v. Duffy*, 191 Ill. 489.

"The law does not exact of an engineer an impossibility. It holds him to this degree of care which I have already defined; that he must exercise that degree of care which a person of ordinary prudence in his calling would exercise under like conditions. The more dangerous the indications the more prudence he must exercise. When the indications are very slight, why then the degree of care may not be so high, but when the indications become a manifestation of approaching danger of collision, his prudence must rise up to that." *Stewart v. Long Island R. Co.*, 54 App. Div. 623.

On a conflict of evidence as to the condition of the crossing, speed of train, giving of signals and range of vision of traveler, the case is for the jury. *Flanagan v. New York & C. R. Co.*, 70 App. Div. 505.

See, also, *Chesapeake & C. R. Co. v. Dupree*, (Ky.) 67 S. W. Rep. 15.

As to the relative duties of railroad companies whose tracks intersect in a highway, see, *New York & C. R. Co. v. Luebeck*, 157 Ill. 595; in joint use of tracks, *Chicago & C. R. Co. v. Martin*, 59 Kan. 437.

Duties of company and traveler are mutual; train has right of way, but same degree of care is required of both. *Indianapolis & C. R. Co. v. McLinn*, 82 Ind. 435.

*Continental & Co. v. Stead*, 95 U. S. 161; *H. & T. & C. R. Co. v. Wilson*, 60 Tex. 142; *Rockford & C. R. Co. v. Hillmer*, 72 Ill. 235; *Texas & C. R. Co. v. Cody*, 166 U. S. 606.

Train has no priority over traveler at a crossing, when it is not moving rapidly but standing still near a crossing. *Allen v. Boston & C. R. Co.*, 94 Me. 402.

Engineer must use ordinary care to discover danger and avoid injury. If he fail in either respect, the company is liable. *Watson v. Erie R. Co.*, 10 Oh. Dec. 454; *Chicago & C. R. Co. v. Pearson*, 82 Ill. App. 605.

Unless the traveler is guilty of negligence. *Texas &c. R. Co. v. Tidwell*, (Tex. Civ. App.) 49 S. W. Rep. 641.

Or trespassing. *Robards v. Wabash R. Co.*, 84 Ill. App. 477.

But the fact that a traveler is negligent or trespassing, does not relieve the railroad company of all duty towards him. It is liable, if, after discovering his danger, it fails to use ordinary care to prevent injury. *International &c. R. Co. v. Dalwigh*, (Tex. Civ. App.) 48 S. W. Rep. 527.

See, also, *Galveston &c. R. Co. v. Eaton*, 44 id. 562; *Dlaithi v. St. Louis &c. R. Co.*, 139 Mo. 291; *Fletcher v. South Carolina &c. R. Co.*, 57 S. C. 205; *Jones v. Probasco*, 18 Tex. Civ. App. 699.

Or ordinary care fails to avoid a danger originally produced by its negligence. *Folsom v. Concord &c. R. Co.*, 68 N. H. 454.

Or, if, though unaware of his danger, the character of its act shows reckless or wanton disregard of the consequences. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489; *Memphis &c. R. Co. v. Martin*, (Ala.) 30 South. Rep. 827.

Such as running a train at high speed without signal around a sharp curve over a concealed crossing. *Elgin &c. R. Co. v. Duffy*, 191 Ill. 489; aff'g s. c., 93 Ill. App. 463.

See, also, *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434.

But a traveler, himself grossly negligent, cannot complain of the gross negligence of the railroad company. *Redson v. Michigan &c. R. Co.*, 120 Mich. 671.

*Carr v. Missouri P. R. Co.*, 58 Kan. 814.

Nor can he recover, if, after discovering result of defendant's negligence, he could have avoided it by exercise of due care. *Briscoe v. Southern R. Co.*, 103 Ga. 224; *Fulcher v. Central &c. R. Co.*, 110 id. 327.

The degree of care, vigilance and foresight required by "ordinary care" is commensurate with the danger. *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123.

*Chicago &c. R. Co. v. Pounds*, (Ind. Terr. App.) 35 S. W. Rep. 249; *R. Co. v. Butler*, 1 West. (Ind.) 110; *Brown v. Milwaukee &c. R. Co.*, 22 Minn. 165; *St. Louis &c. R. Co. v. Knowles*, 6 Kan. App. 790.

It requires more care in the city than in the country. *Koltz v. Winona &c. R. Co.*, 68 Minn. 341.

See, also, *English v. Southern P. R. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155; *McNab v. United R. Co.*, 94 Md. 719; *Chesapeake &c. R. Co. v. Davis*, (Ky.) 60 S. W. Rep. 14; *Lake Shore &c. R. Co. v. Schade*, 15 Oh. C. C. 424.

At an obscured or obstructed crossing, than at a clear one. *Petrie v. New York &c. R. Co.*, 63 App. Div. 473; s. c. aff'd, 171 N. Y. 638.

See, also, *San Antonio &c. R. Co. v. Stollers*, (Tex. Civ. App.) 49 S. W. Rep.

679; *Demaine v. Washington &c. R. Co.*, (Va.) 27 S. E. Rep. 437; *Louisville &c. R. Co. v. Breeden*, (Ky.) 64 S. W. Rep. 667; *id. v. Clark*, 49 *id.* 329.

To the aged and infirm, when their condition is known, than to the strong and healthy. *Green v. Southern P. R. Co.*, 122 Cal. 563.

The private rules of a railroad company are not the measure of ordinary care due travelers on the highway. *Smithson v. Chicago &c. R. Co.*, 71 Minn. 216.

Good faith does not lessen the degree of care required. *Highland Avenue &c. R. Co. v. Swope*, 115 Ala. 287.

See, also, *Weil v. St. Louis &c. R. Co.*, 64 Ark. 535.

Affliction with a disease which would have caused death anyway shortly, affects the question of damages, and not the degree of care due. *Schaidler v. Chicago &c. R. Co.*, 102 Wis. 564.

A concurring cause does not prevent liability for a result to which negligence has contributed. *Louisville &c. R. Co. v. Clark*, 105 Ky. 571.

See, also, *Pratt v. Chicago &c. R. Co.*, 107 Iowa, 287.

Jury decides whether engineer kept a proper lookout for obstructions. *East Tennessee &c. R. Co. v. Bayliss*, 74 Ala. 150.

*Cook v. Central R. Co.*, 67 Ala. 533; see, also, *Montgomery v. Wright*, 72 Ala. 411.

The same care is required in passing places of business which front on a track as though it were a public crossing. *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 47 S. W. Rep. 59.

If plaintiff's negligence were the proximate cause of the injury, defendant's negligence would not excuse it; as where train was running at forbidden speed. *Wabash &c. R. Co. v. Weisbeck*, 14 Ill. App. 525.

Or company was inexcusably negligent in backing a train toward a person traveling on the track. *Chicago &c. R. Co. v. Olson*, 12 Ill. App. 245.

What was reasonable under the circumstances. *Chicago &c. R. Co. v. Hutchinson*, 120 Ill. 587.

*Chicago &c. R. Co. v. Dimick*, 96 Ill. 42; *St. Louis &c. R. Co. v. Manly*, 58 *id.* 300; *Illinois Central R. Co. v. Goddard*, 72 *id.* 568; *Chicago &c. R. Co. v. Damerell*, 81 *id.* 450; *Chicago &c. R. Co. v. Hatch*, 79 *id.* 137, case of an infant; *Chicago &c. R. Co. v. Becker*, 84 *id.* 483; *Dimick v. Chicago &c. R. Co.*, 80 *id.* 338; *Chicago &c. R. Co. v. Bell*, 70 *id.* 102; *Chicago &c. R. Co. v. Gretzner*, 46 *id.* 82; *Lake Shore &c. R. Co. v. Sunderland*, 2 Bradw. (Ill.) 307; *Chicago &c. R. Co. v. Gertsen*, 15 Ill. App. 614; *Garland v. Chicago &c. R. Co.*, 8 *id.* 571; *Lewis v. Long Island R. Co.*, 162 N. Y. 52; *rev'g s. c.*, 32 App. Div. 627; *Judson v. Central &c. R. Co.*, 158 N. Y. 597; *rev'g s. c.*, 91 Hun. 1; *Chicago &c. R. Co. v. Weeks*, 99 Ill. App. 518; *Lorenz v. Burlington &c. R. Co.*, (Ia.) 88 N. W. Rep. 835; *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323; *Chicago &c. R. Co. v. Pollard*, 53 Neb. 730; *Davis v. Concord &c. R. Co.*, 68 N. H. 247; *Watson v. Erie R. Co.*, 10

Oh. S. & C. P. Dec. 454; *Rangeley v. Southern R. Co.*, 95 Va. 715; *Atlantic & R. Co. v. Rieger*, id. 418; *Brown v. Chicago & C. R. Co.*, 109 Wis. 384.

(b). ON THE PART OF THE RAILROAD COMPANY.\*

1. OBSTRUCTED SIGHT AND HEARING.
2. FRIGHTENING ANIMALS.
3. KNOWLEDGE OF DANGER.
4. AGED, INFANT AND INFIRM.
5. STATUTES.

1. OBSTRUCTED SIGHT AND HEARING.

If the defendant, by piling wood, obstructs the view, so that the approaching train cannot be seen, until the traveler is on the track, and he approaches with due care, and looks for the train as soon as looking would be serviceable, there is no contributory negligence, even though he did not stop his team. In this case the question of the defendant's negligence seemed to be conceded on appeal. *Mackay v. N. Y. C. R. Co.*, 35 N. Y. 75, aff'g judg't for pl'ff.

A railway company may use its land for any lawful purpose, in the prosecution of its business, and, although it may obstruct the view of one approaching the crossing, such obstruction cannot be an independent ground of recovery. Such obstruction may, however, affect the question of negligence and contributory negligence, and statutory signals may not always be enough. *Cordell v. N. Y. C. & H. R. R. R. Co.*, 70 N. Y. 119; s. c., 64 N. Y. 535; 6 Hun, 461.

It is not necessarily the duty of a railroad company to maintain a flagman at crossings nor to remove obstructions to observation, although the absence of the former and the presence of the latter may always be proved upon the trial of an action brought to recover damages resulting from injuries sustained by reason of a collision with a train. *Vanderwater v. N. Y. & C. R. Co.*, 74 Hun, 32.

The railroad company is not, *per se* obliged to prevent or remove obstructions to sight or hearing. *Galveston & C. R. Co. v. Michalke*, 90 Tex. 276.

See, also, *Chicago & C. R. Co. v. Pearson*, 184 Ill. 386; *Chicago & C. R. Co. v. Nelson*, 59 Ill. App. 308; *Missouri & C. R. Co. v. Rogers*, 91 Tex. 52.

Especially where temporary obstruction becomes a practical necessity. *Chicago & C. R. Co. v. Body*, 85 Ill. App. 133.

See, also, *Chicago & C. R. Co. v. Johnson*, 61 Ill. App. 464; *Chicago & C. R. Co. v. Williams*, 56 Kan. 333; *Chicago & C. R. Co. v. Kenyon*, 70 Ill. App. 567; *Eads v. Louisville & C. R. Co.*, (Ky.) 42 S. W. Rep. 1135.

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\*NOTE.—As to the bearing of speed, signals, gates and flagmen on the degree of care required, see those headings, *post*.

But the degree of care required may be largely affected by the existence of such obstructions. *Chicago &c. R. Co. v. Hines*, 56 Kan. 758.

See, also, *Grenell v. Michigan C. R. Co.*, 124 Mich. 141; *Ellis v. Erie R. Co.*, 66 N. J. L. 451; s. c. aff'd, 51 Atl. Rep. 1109; *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16; *San Antonio &c. R. Co. v. Stollers*, (Tex. Civ. App.) 49 S. W. Rep. 679; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418.

Such as permitting weeds to grow up at a crossing. *Rose v. McCook*, 70 Mo. App. 183.

See, also, *St. Louis &c. R. Co. v. Rawley*, 90 Ill. App. 653.

Approaching, without signals or warning, a crossing, obscured by houses and standing cars. *Houston &c. R. Co. v. Byrd*, (Tex. Civ. App.) 61 S. W. Rep. 147.

Backing rapidly over a frequented crossing when sight and sound are obscured by the smoke and noise of another train. *Chicago &c. R. Co. v. Woolridge*, 72 Ill. App. 551.

Obstruction to view of engineer, from natural causes, as rain, relieves from liability. *L. & N. R. Co. v. Melton*, 2 Lea, (Tenn.) 262.

## 2. FRIGHTENING ANIMALS.

It is not an act of negligence at a crossing to make sounds incident to the operation of a railroad, necessary and reasonable in extent. Such as blowing off steam. *Illinois C. R. Co. v. Klein*, 95 Ill. App. 220.

See, also, *Philadelphia &c. R. Co. v. Burkhardt*, 83 Md. 516; *Riley v. New York &c. R. Co.*, 90 id. 53; *Miller v. Railroad*, 128 N. C. 26; *Galveston &c. R. Co. v. Simson*, (Tex. Civ. App.) 54 S. W. Rep. 309; *Beaumont Pasture Co. v. Sabine &c. R. Co.*, 41 id. 190; *O'Dair v. Missouri &c. R. Co.*, 14 Tex. Civ. App. 539; *San Antonio &c. R. Co. v. Peterson*, 20 id. 495; *Lake Shore &c. R. Co. v. Butts*, (Ind. App.) 62 N. E. Rep. 647; *Favor v. Railway Co.*, 114 Mass. 350; *Dewey v. Chicago &c. R. Co.*, 99 Wis. 455; *Walters v. Chicago &c. R. Co.*, 104 id. 251.

But it may become negligent when done unnecessarily and to an unusual extent. *Boothby v. Boston &c. R. Co.*, 90 Me. 313.

See, also, *Chicago &c. R. Co. v. Cummings*, 24 Ind. App. 192; *Texas &c. R. Co. v. Cardwell*, (Tex. Civ. App.) 67 S. W. Rep. 157.

Or while unnecessarily near to the crossing. *Dunn v. Wilmington &c. R. Co.*, 124 N. C. 252.

If there is reasonable ground to apprehend that a team will be frightened by it, ordinary care must be used to prevent it. *Louisville &c. R. Co. v. Penrod*, (Ky.) 66 S. W. Rep. 1013, 1042.

See, also, *Missouri &c. R. Co. v. Cloninger*, (Tex. Civ. App.) 42 S. W. Rep. 632; *Huston &c. R. Co. v. Carruth*, 50 id. 1036; *Folsom v. Concord &c. R. Co.*, 163 N. H. 454.

As where the gauge indicates that steam is excessive and about to escape. *Louisville &c. R. Co. v. Schmidt*, 147 Ind. 638.

But it has been held that it is not necessary to inject water into the boiler to reduce pressure to prevent escape of steam from safety valve. *Wilson v. New York &c. R. Co.*, 41 App. Div. 36.

Conductor signaled a traveler to cross where the engine was near the crossing. As the conductor did not have charge of the engine, defendant was not liable for the consequences of the escape of steam therefrom. *Lindem v. Northern P. R. Co.*, 85 Minn. 391.

No liability attaches for fright from necessarily blowing whistle of locomotive. *Phila. R. Co. v. Slinger*, 78 Penn. St. 219; *Phillips v. N. Y. C. &c. R. Co.*, 84 Hun, 412; but see in connection with last case Penn. R. Co. v. Barnett, 59 Penn. St. 259; *Hall v. Brown*, 54 N. H. 495; *Chicago &c. R. Co. v. Dunn*, 61 Ill. 385; *Farley v. Harris*, 186 Pa. St. 440; *Phila. R. Co. v. Stinger*, 78 Penn. St. 219, yet it must not be done negligently and wantonly.

See Wharton on Negligence, 836.

Nor when it would be apparent to a reasonable person that injury would result. *Penn. R. Co. v. Barnett*, 59 Penn. St. 259; *Hill v. Railroad Co.*, 55 Me. 438; *Toledo &c. R. Co. v. Harmon*, 47 Ill. 298; *Sneesby v. Railroad Co.*, 9 Q. B. 263; *L. R.*, 1 Q. B. D. 42; *Ind. &c. R. Co. v. McBrown*, 46 Ind. 229; *Massoth v. D. & H. C. Co.*, 64 N. Y. 524; 6 Hun. 314.

Whistle blown, without necessity to frighten horses imposes no liability on defendant company. But, when done pursuant to a duty, though with a malicious purpose, the liability is established. *International &c. R. Co. v. Yarbrough*, (Tex. Civ. App.) 39 S. W. Rep. 1096.

Or where, seeing plaintiff in close proximity to the train, several sharp blasts are given though without the intention of frightening the horses. *Texas &c. R. Co. v. Moseley*, (Tex. Civ. App.) 58 S. W. Rep. 48.

Or where it could have known by the exercise of reasonable care that it would frighten them. *Gulf &c. R. Co. v. Singer*, (Tex. Civ. App.) 40 S. W. Rep. 1004; *Houston &c. R. Co. v. Abrahams*, id. 1034; *Chicago &c. R. Co. v. Yorty*, 158 Ill. 321.

A railroad company has been held liable for leaving cars within the limits of a crossing where they may be reasonably calculated to frighten ordinarily gentle horses. *Missouri &c. R. Co. v. Jones*, 13 Tex. Civ. App. 376.

See, also, *Galveston v. Michalke*, 90 Tex. 276; *Sherman v. Bridges*, 16 Tex. Civ. App. 64; *San Antonio &c. R. Co. v. Peterson*, 20 id. 495; *Atchison &c. R. Co. v. Morrow*, 4 Kan. App. 199; *Missouri &c. R. Co. v. Clark*, 6 id. 922.

Though it is not a regular public crossing. *Texas &c. R. Co. v. McManus*, 15 Tex. Civ. App. 122.

And for making no effort to stop, upon seeing that a hand car causes fright. *Lake Erie &c. R. Co. v. Juday*, 19 Ind. App. 436.

But not where horses took fright at the body of an animal at a crossing, killed two hours before. *Chicago &c. R. Co. v. Scranton*, 95 Ill. App. 619.

Plaintiff allowed to recover for injuries caused by his horse, frightened by the necessary escape of steam, coming in collision with a car negligently left on a crossing. *Galveston &c. R. Co. v. Simon*, (Tex. Civ. App.) 54 S. W. Rep. 309.

Prohibited operation of a train at a given point, held proximate cause of injury received in attempting to stop horses frightened thereby. *Pittsburg &c. R. Co. v. Hood*, 94 Fed. Rep. 618.

### 3. KNOWLEDGE OF DANGER.

Held, error to charge that, if the engineer, after seeing horses suddenly come upon the track, omitted to do anything which might have averted accident, he was negligent; as it precluded the consideration of the question of the reasonableness of his acts in the view of the sudden emergency and the excitement consequent thereon. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 30 App. Div. 410.

It was held proper to charge that "if the engineer saw the deceased was in danger of being run into when he reached the crossing, provided the speed of his engine was not checked, it was his duty to do all reasonably within his power to prevent the disaster by proper efforts to stop his train as soon as he could." *Bump v. New York &c. R. Co.*, 38 App. Div. 60.

Engineer may presume that traveler will use care. *Ohio &c. R. Co. v. Walker*, 113 Ind. 196.

*Cincinnati &c. R. Co. v. Long*, 112 Ind. 166; *Indiana &c. R. Co. v. Hammock*, 113 id. 11; *Palmer v. Chicago &c. R. Co.*, 112 id. 250; *Indianapolis &c. R. Co. v. Pitzer*, 109 id. 179; *Terre Haute &c. R. Co. v. Graham*, 46 id. 239; 95 id. 286; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *St. Louis &c. R. Co. v. Manly*, 58 Ill. 300; *Chicago &c. R. Co. v. Lee*, 68 id. 576; *Toledo &c. R. Co. v. Jones*, 76 id. 311; *Chicago &c. R. Co. v. Damerell*, 81 id. 450; *Frazer v. South. &c. R. Co.*, 81 Ala. 185; *M. &c. R. Co. v. Blakely*, 59 id. 471.

Engineer not bound to stop train or check its speed because driver of approaching team is reclining. *Indiana &c. R. Co. v. Wheeler*, 115 Ind. 253.

But, where plaintiff's danger is known, though produced by his own negligence, defendant is liable if it fails to use ordinary care to avoid injury. *Cleveland &c. R. Co. v. Klee*, 154 Ind. 430.

See, also, *Pittsburg &c. R. Co. v. Lewis*, (Ky.) 38 S. W. Rep. 482; *Memphis &c. R. Co. v. Lyon*, 62 Ala. 71; *Tanner v. Louisville &c. R. Co.*, 60 Ala. 621.



*Contra*, L. & N. R. Co. v. Milam, 9 Lea, (Tenn.) 223; Cleveland &c. R. Co. v. Miller, 149 Ind. 490; Artenbury v. Southern R. Co., 103 Tenn. 266.

Ordinary care, however, is the measure of defendant's duty. *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386.

See, also, Baltimore &c. R. Co. v. Few, 94 Va. 82.

As a matter of law it is not negligent if an engineer, seeing danger four hundred feet ahead, and doing all in his power, is not able to check his train. *Ex parte Stell*, 4 Hugh. C. C. (U. S.) 157.

Railroad company was held liable, where engineer saw a traveler when within 100 to 200 feet of the crossing and did not look again till within 50 to 70 feet thereof. He could have stopped within 75. *Edwards v. Chicago &c. R. Co.*, (Mo. App.) 67 S. W. Rep. 950.

So, where defendant knew that people were actually engaged in climbing behind the cars, blocking the crossing, though it did not see the plaintiff in particular. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

But it was not liable, where engineer saw deceased, but he would have cleared the crossing in ample time, had not his horse balked. *Glockner v. Wabash R. Co.*, 95 Ill. App. 550.

Conductor held not grossly or willfully negligent in suddenly starting a train after obstructing the highway for some 20 minutes, where he does not know that anyone is crossing between the cars; though he might have, by looking, found out. *Chicago &c. R. Co. v. Surouwieski*, 67 Ill. App. 682.

#### 4. AGED, INFANT AND INFIRM.

Jury decides on negligence where train could have been stopped before striking a child, by exercise of all possible means. *Little Rock &c. R. Co. v. Barker*, 39 Ark. 491.

Memphis &c. R. Co. v. Sanders, 43 Ark. 225.

Railroad is not bound to adopt precautions to prevent children from climbing upon its cars while at crossings. *Haberlau v. Lake Shore &c. R. Co.*, 73 Ill. App. 261.

See, also, Cleveland &c. R. Co. v. Klee, 154 Ind. 430.

Engineer was not negligent in keeping his speed, where a boy of about nine was six or eight feet from the track giving no sign of any intention to cross until the train was almost upon him, the gates being down and the bell ringing. *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208.

Defendant was negligent in backing an engine against cars and sending them over a crossing which it knew school children were at the time accustomed to use. *Gulf &c. R. Co. v. West*, (Tex. Civ. App.) 36 S. W. Rep. 101.

See, also, *St. Louis &c. R. Co. v. Denty*, 63 Ark. 177; *Mason v. Southern R. Co.*, 58 S. C. 70; *Jones v. Harris*, 186 Pa. St. 469.

Where the danger was very slight and the boy was 13 years old, laborers pushing a car were not negligent in assuming that he would get out of the way without warning. *Galveston &c. R. Co. v. Kieff*, (Tex. Civ. App.) 60 S. W. Rep. 543.

See, also, *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73.

Where defendant was not aware of plaintiff's deafness it was not bound to assume that he would not heed its warnings. *Piskorowski v. Detroit &c. R. Co.*, 121 Mich. 498.

##### 5. STATUTES.

While allowing an engine to remain within the limits of a crossing, but not so as to interfere with its use, is not a violation of a statute forbidding obstruction, *Illinois C. R. Co. v. People*, 59 Ill. App. 256; leaving it therein so as to frighten horses, is. *Baltimore &c. R. Co. v. Faith*, 71 Ill. App. 59.

Aside from the statute, willful obstruction for unreasonable time is actionable. *Illinois C. R. Co. v. Commonwealth*, (Ky.) 45 S. W. Rep. 367.

Violation of the statute is *prima facie* negligence. *Todd v. Philadelphia &c. R. Co.*, 201 Pa. St. 558.

But it must be shown that the damage resulted therefrom. *Wabash R. Co. v. Coker*, 81 Ill. App. 660.

Due care is no excuse for violation of a statute. *Chattanooga &c. R. Co. v. Walton*, 105 Tenn. 415.

See, also, *Missouri &c. R. Co. v. Ransom*, 15 Tex. Civ. App. 689; *San Antonio &c. R. Co. v. Bowles*, 88 Tex. 634.

Ordinance requiring lights at city crossings held reasonable. *Cincinnati &c. R. Co. v. Bowling Green*, 57 Oh. St. 336; s. c., 41 L. R. A. 422.

See, also, *Cleveland &c. R. Co. v. Bernard*, 15 Oh. C. C. 588.

Ordinance requiring constant ringing of bell and reduction of speed within city limits held reasonable, though the state statute happens to be less onerous. *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297; *Washington &c. R. Co. v. Lacey*, 94 Va. 460.

##### (c). ON THE PART OF THE TRAVELLER.\*

1. DUTY TO LOOK AND LISTEN.
2. PLACE TO LOOK AND LISTEN.
3. NECESSITY OF STOPPING.

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\* NOTE.—As to the bearing of speed, signals and flagmen on the degree of care required, see those headings, *post*.

4. OBSTRUCTED SIGHT AND HEARING.
5. CARE WHILE CROSSING.
6. OBSTRUCTED CROSSING.
7. CARE OF ANIMALS.
8. KNOWLEDGE OF DANGER.
9. AGED, INFANT AND INFIRM.
10. ACTING IN AN EMERGENCY.

#### 1. DUTY TO LOOK AND LISTEN.

A traveler, before crossing a railroad track, must use the care that a man of ordinary prudence would employ under the circumstances, and especially must he, with vigilance, look in both directions and listen, to discover the approach of a train. Nothing will modify an active and vigorous observance of this rule unless, (1) the traveler be assured a safe crossing by some act of the railway company or its servant, or (2) the obstructions be such as to render looking useless, or (3) the traveler's capacity to use such means of discovering the danger be impaired or destroyed by the circumstances that surround him, or (4) the mental or physical incapacity of the traveler to use the full requisite care, as in the case of infants and defective and aged people, permit a lower degree of vigilance.

Where the evidence necessitates the inference that the traveler, *by the use of the care due from him*, must or should have discovered an approaching train had he actually used such care, he will be deemed to have been negligent.

One driving in a highway across a railroad is guilty of negligence fatal to an action, if he does so without looking for a train which he would have seen, or listening for signals of its approach which he would have heard, in time to have avoided a collision, had he used proper care.

It is also such negligence in one knowing the position of the railroad and the frequent passage of trains, to approach the crossing at such speed, as to be unable to stop his horses before actually getting upon the track. It is error to refuse so to charge, without the qualification, that the defendant must have used proper precautions to notify travelers of the approach of a train. *Wilds v. Hudson River R. Co.*, 24 N. Y. 430, rev'g judg't for pl'ff.

Where deceased was killed in attempting to cross the railroad track within the limits of the public highway, and at a public crossing, if it appear, that deceased would have seen the approaching cars, in season to have avoided them, had he first looked before attempting to cross, it will be presumed, that he did not look; and, by omitting so plain and imperative a duty, he will be deemed to have been guilty of negligence, which precludes a recovery. Nonsuit should have been granted. *Wilcox v. Rome, W. & O. R. Co.*, 39 N. Y. 358, rev'g judg't for pl'ff.

If the injured party, by looking up the track, in the direction of the approaching train, could have seen it, in time to avoid the injury, his omission to do so was negligence, and the refusal of the court thus to instruct the jury was error. *Grippen v. N. Y. C. R. Co.*, 40 N. Y. 34, rev'g judg't for pl'ff.

The caution required of a traveler approaching a crossing is proportioned to the known danger and limited, in a measure, by usual and ordinary signals and evidences of danger. He must look in every direction from which danger may be apprehended and listen for signals of approaching trains. *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451; s. c., 67 id. 587.

A servant, riding with his master, was killed at a crossing. The master testified that he (master) looked both ways and saw no train and the view of the track was intercepted. The defendant gave evidence to the effect that 160 feet from the track the train could be seen for some distance. Contributory negligence was for the jury. It does not necessarily follow that, because a skilled civil engineer can show that the train could be seen from a certain point, that the plaintiff was negligent in not seeing it. *Mossoth v. D. & H. C. Co.*, 64 N. Y. 524, aff'g 6 Hun, 314, and judg't for pl'ff.

There were obstacles intercepting the view of the track from the highway, upon which the deceased was approaching the crossing; and "S.," the employer of the deceased, who was in the wagon with him and was driving, testified that he looked in both directions and did not see the approaching train, which was moving very rapidly. Defendant's testimony tended to show, that from a point on the highway, 150 or 160 feet from the track, a train could have been seen for some distance.

Defendant's counsel requested the court to charge that there being no evidence affirmatively showing that the deceased either looked or listened or did anything to guard against the dangers of the crossing, it was to be presumed that he did not look and was negligent. The request was refused. Held, no error; that the presumption was simply one of fact, and that the question of contributory negligence was properly left to the jury. *Massoth v. Prest. D. & H. Co.*, 64 N. Y. 524, aff'g judg't for pl'ff.

If one injured at a crossing had full chance to see and did not, he is guilty of contributory negligence. *Mitchell v. N. Y. C. & H. R. R. Co.*, 64 N. Y. 655; affirming 2 Hun, 535.

The rule that a traveler must look and listen at a crossing is not inflexibly applied in all cases, regardless of age or other circumstances.

Held, that it was for the jury to determine, whether it was negligent to back an engine, with a tank so piled with coal as to obstruct the

a train having no headlights was approaching from the north on a down grade, without steam and making but little noise; the bell was not rung nor the whistle sounded. Another train was approaching the crossing from the south on another track west of the defendant's; it had a bright headlight, its whistle was sounded and its bell rung, and as it was upon an up grade, the exhaust of the engine made a great noise. Defendant's engine first reached the crossing; a witness standing on the street west of the defendant's track testified that by the aid of the light of a lamp reflected along the street, he saw the form of a man approaching the track, who turned toward the south as he came near the track, when the view was cut off by the approaching train. "S." was found after the trains passed, lying near defendant's track, a few feet south of the line of the street, with a wound on the left side of his head which caused his death.

The evidence authorized the submission to the jury of the question of negligence on defendant's part, and contributory negligence on the part of "S."; the evidence did not show conclusively that "S." was south of the southerly line of the street when struck by the engine; it was not to be assumed that he did not look or listen for a train on defendant's road, as the evidence tended to show that he could neither have seen nor heard the train approaching thereon, and that his attention was necessarily given to the other train. *Smedis v. B'klyn & R. B. R. Co.*, 88 N. Y. 13; affirming 23 Hun, 279, and judg't for pl'ff.

A person, before crossing a railway at dusk, would, had he looked, have seen the train that injured him, although it had no headlight; hence, he was guilty of negligence in not looking. The evidence was, at least as consistent with negligence as care, and said to be, almost, if not quite conclusive of plaintiff's negligence. *Becht v. Corbin*, 92 N. Y. 658.

Lack of contributory negligence may be inferred from the surrounding circumstances, indicating that an accident might have occurred without negligence of the injured one; but, if the cause of the accident is not consistent with the existence of proper care by the plaintiff, there can be no recovery. A person, on a dark and misty night, was killed at a crossing, where there was nothing to prevent the timely discovery of the headlight of an approaching train, and no recovery was allowed. *Tolman v. S. B. & C. R. R. Co.*, 98 N. Y. 198, reversing 31 Hun, 397.

While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. Whether the deceased looked just at the right moment was for the jury. *Greany v. The L. I. R. Co.*, 101 N. Y. 419.

The plaintiff approached the crossing at the rate of ten miles per hour. There was a strong wind and the snow was falling fast. The plaintiff was acquainted with the crossing and the frequency of the

trains. The plaintiff was negligent. *Powell v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 613; affirming 22 Hun, 56.

Inference that a person killed at a crossing was not negligent does not arise from the presumption, that a person exposed to danger will use care and prudence. Where the circumstances point as much to the negligence of the deceased as to its absence, a nonsuit should be granted. (*Cordell v. N. Y. C. & R. Co.*, 75 N. Y. 330; *Hoag v. N. Y. C. & R. Co.*, 111 id. 199; *Bond v. Smith*, 113 id. 378.) The fact that another person in company with the deceased looked and listened but did not hear or see the approaching train does not establish that the deceased would also have failed to hear it, had he looked and listened.

The first track, to which the deceased came, was twenty feet from the street and obstructed by standing cars, but such track was fifty feet distant from one on which the accident occurred, and the track for such a distance could be seen a long distance away. The night was dark and lights were burning in the caboose by which he was struck. The deceased was negligent. *Wiwrowski v. L. S. & M. S. R. Co.*, 124 N. Y. 420, reversing 58 Hun, 40.

The deceased was approaching a double track railroad, and was familiar with the location. A train was passing from the south as he approached, and the flagman shouted to him that one was coming from the north, but, being deaf, he did not hear. The locomotive from the north either had no lighted headlight, or it was practically invisible, but if "D." had looked to the north after crossing the track he would have seen the approaching engine, which struck him.

There was no inference that the absence of the headlight contributed to the accident. The absence of contributory negligence was not shown. *Daniels v. S. I. R. T. R. Co.*, 125 N. Y. 407.

A pedestrian before crossing a railroad track, must, in the absence of circumstances excusing it, look in each direction, and he may not omit this in reliance upon the duty of the railroad company to give reasonable notice of the approach of the train. If the evidence justify opposing inferences respecting the traveler's negligence, the question is for the jury. If the traveler did look for trains, he is not necessarily remediless, because he did not look at the most advantageous time and place. The presence of other dangers, as the raising of the gates at the crossing, giving the assurance that the crossing is safe, and similar circumstances, may be considered in determining whether the traveler discharged his duty. Where a traveler was killed, the rules of law governing recovery are not changed, but slighter evidence of compliance with the duty placed upon a traveler may be sufficient to uphold recovery. *Codrian v. N. Y. & R. Co.*, 125 N. Y. 526; rev'g judgment for pl'ff.

"R.," acquainted with the railway crossing, approached with a small shawl tied or bound over her head and ears. The evidence was that, she appeared to be looking directly in front of her, and there was no evidence that she looked or listened, and the track was free from obstruction for seven hundred feet from a point eight feet from the track where she was killed.

Although "R.'s" attention may have been attracted by a freight train going in the opposite direction, she should have looked both ways before going upon the track. *Codrian v. N. Y., N. H. & H. R. Co.*, 125 N. Y. 526, rev'g judg't for pl'ff.

The plaintiff turned down a lane leading from his premises to the railroad track and trotted his horses to and upon the track where he was struck by a train. The day was clear, and at any point within twenty-five feet of the track he could have seen the train for one-half mile away.

The plaintiff was guilty of contributory negligence. *Cash v. N. Y. C. & H. R. R. Co.*, 125 N. Y. 715, rev'g judg't for pl'ff.

The omission to look both up and down a railroad track before attempting to cross it, is such negligence as prevents a recovery against the railroad company in case of accident.

It is no excuse if the precaution is neglected until too late to avoid an approaching train.

The time was near at hand for the passing of this train, and the plaintiff might have seen it, if she had looked before going on the track. This would have been in season to avert the disaster; and as she failed to take this necessary precaution, but one conclusion can be drawn, and that is, that negligence is established. *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 37. That the plaintiff neither saw nor heard the train is inexplicable. *Haight v. N. Y. Central R. Co.*, 7 Lansing, 11.

Where a healthy milkman in a covered wagon was crossing defendant's railway at 6:30 A. M. in January, at a familiar point, free from obstruction, and was struck by a train, whose approach could be seen, and was heard by others, there was no proof of absence of contributory negligence. *Glendening v. Sharp*, 22 Hun, 78.

Twenty-six feet away from the crossing, plaintiff could have seen defendant's train one hundred and thirty to one hundred and seventy feet away which struck his horse just as he was going on the track.

Plaintiff was negligent. *Bomboy v. N. Y. C. & H. R. R. Co.*, 47 Hun, 425, rev'g judg't for pl'ff.

Where the demonstration cannot be made absolutely certain, that a traveler approaching a crossing would have seen a train had he looked for the same, but is based upon calculations of the speed of the train and the estimated speed of the decedent's team, when approaching the point

of collision, the question of contributory negligence should not be withdrawn from the jury. *Puff v. Lehigh Valley R. Co.*, 71 Hun, 577.

The plaintiff, driving an uncovered buggy, while some distance from a railroad crossing observed two freight trains upon the track furthest from her. She stopped between 170 and 250 feet from the nearest track. After the freight trains went by on the furthest track, the plaintiff testified that everything was all clear as far as she could see; that she listened for a minute or two, and looked both ways to see if any trains were coming. There was no sound given, no bell rung or whistle blown. She started up her horse, which was going on a slow walk, and under her control. While she was approaching the first track she looked up and down and did not hear any warning, and was struck and injured by a train which was going at the rate of forty miles an hour.

It was also shown upon the trial that, sitting in a buggy twenty-five feet from the railroad crossing, the tracks could be seen 1,100 feet; fifty feet away they could be seen for a distance of 1,300 feet, and at a distance of 100 feet from the tracks they could be seen for a distance of 180 feet, and that standing on the crossing the tracks were clear to the eyesight to a whistling post, 1,300 feet away.

Nonsuit was improperly denied. *Slopp v. Fitchburg R. Co.*, 80 Hun, 178.

Where a person was driving very fast and was injured by a train at a street crossing, a nonsuit was affirmed. *Crandall v. Lehigh Valley R. Co.*, 72 Hun, 431; aff'g nonsuit; s. c. aff'd, 151 N. Y. 642.

Citing *Powell v. N. Y. C. & C. R. R. Co.*, 109 N. Y. 613; *Martin v. N. Y. C. & C. R. Co.*, 50 N. Y. S. Repr. 553.

Where a train was in plain sight and a person attempted to cross the track, although it appear that such person apparently looked but did not see the train, although he could have seen and avoided it had he used his eyes, it was held that he did not do what he appeared to do, as there must be some evidence tending to show that the deceased not only turned his head to look, but used his eyes for that purpose. A charge which casts the burden upon the defendant of showing that the injured person did not look is error, and hence a charge "that unless they find that the deceased did not look for the train, the plaintiff is entitled to recover" is erroneous. *Burke v. N. Y. Cent. & C. R. Co.*, 73 Hun, 32, rev'g judgt for pl'ff.

When a man in broad daylight gets in front of a train of cars, whose approach is visible to him from several points upon the highway over which he approached the railroad, and is run over and killed, the conclusion, in the absence of explanatory evidence, is irresistible that his being run over and killed were the result of gross carelessness upon his



part. *Von Ritzinger v. The N. Y. C. & H. R. R. R. Co.*, 83 Hun, 120.

That driver looks and listens does not absolve the party himself from so doing. *Durkee v. Delaware &c. R. Co.*, 88 Hun, 471.

Where there is no evidence to contradict deceased's statement that she looked both ways before crossing, the question of contributory negligence in failing to see it, was for the jury. *Seeley v. New York &c. R. Co.*, 8 App. Div. 402.

A railway crossing, in itself a warning of danger, charges the traveler with the duty of looking and listening and he is presumed to know what the exercise of ordinary care in that respect would have discovered. *Comby v. New York &c. R. Co.*, 25 App. Div. 309; *Hennessey v. Northern C. R. Co.*, 17 id. 162; *Bremiller v. Buffalo &c. R. Co.*, 90 Hun, 226.

See, also, *Spradley v. Alabama M. R. Co.*, 110 Ala. 687; *Central &c. R. Co. v. Foshee*, 125 id. 199; *Gothard v. Alabama R. Co.*, 67 id. 114; *Highland &c. R. Co. v. Feunell*, 111 Ala. 356; *Martin v. Little Rock &c. R. Co.*, 62 Ark. 156; *Little Rock &c. R. Co. v. Blewitt*, 65 id. 235; *Glascock v. Central P. R. Co.*, 73 Cal. 137; *Herbert v. Southern P. R. Co.*, 121 id. 227; *Peck v. New York &c. R. Co.*, 50 Conn. 379; *Knopp v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Cowen v. Merriman*, 17 App. D. C. 186; *Chicago &c. R. Co. v. Bell*, 70 Ill. 102; *Illinois C. R. Co. v. Borders*, 61 Ill. App. 55; *Chicago &c. R. Co. v. Reoth*, 65 id. 461; id. v. *Fell*, 71 id. 89; id. v. *Patrick*, id. 632; *Pennsylvania Co. v. Reidy*, 72 id. 343; *Lake Shore &c. R. Co. v. Foster*, 74 id. 387; *Theobald v. Chicago &c. R. Co.*, 75 id. 208; *Illinois C. R. Co. v. Batson*, 81 id. 142; *Cleveland &c. R. Co. v. Oliver*, 83 id. 64; *Wabash R. Co. v. Jenkins*, 84 id. 511; *Illinois C. R. Co. v. Farrell*, 86 id. 436; *Wabash R. Co. v. Smillie*, 97 id. 7; *Cleveland &c. R. Co. v. Miller*, 149 Ind. 490; *Pittsburg &c. R. Co. v. Frazee*, 150 id. 576; *Chicago &c. R. Co. v. Thomas*, 155 id. 634; *Morford v. Chicago &c. R. Co.*, (Ind.) 63 N. E. Rep. 837; *Chicago &c. R. Co. v. Reed*, id. 878; *Cleveland &c. R. Co. v. Coffman*, 64 id. 233; *Ring v. Chicago &c. R. Co.*, (Iowa) 75 N. W. Rep. 492; *Crawford v. Chicago &c. R. Co.*, 109 Iowa, 433; *Lawrence v. Atchison &c. R. Co.*, 57 Kan. 585; *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323; *State v. Boston &c. R. Co.*, 80 Me. 43; *State v. Maine &c. R. Co.*, 76 id. 357; *Baltimore R. Co. v. State*, 54 Md. 648; *State v. Baltimore R. Co.*, 58 id. 482; *Tully v. Fitchburg R. Co.*, 134 Mass. 40; *Walsh v. Boston &c. R. Co.*, 171 id. 52; *Emery v. Boston &c. R. Co.*, 173 id. 136; *Haas v. Grand Rapids R. Co.*, 47 Mich. 401; *Wyoming v. Detroit R. Co.*, 64 id. 93; *Bannister v. Lake Shore &c. R. Co.*, 113 id. 530; *Bond v. id.* 117 id. 652; *Stewart v. Michigan &c. R. Co.*, 119 id. 91; *Smith v. Minneapolis &c. R. Co.*, 26 Minn. 419; *Judson v. Great Northern R. Co.*, 63 id. 248; *Buran v. Great Northern R. Co.*, 67 id. 434; *Purl v. St. Louis &c. R. Co.*, 72 Mo. 168; *Kelley v. Hannibal &c. R. Co.*, 75 id. 138; *Powell v. Missouri P. R. Co.*, 76 id. 80; *Taylor v. Missouri R. Co.*, 86 id. 457; *Lien v. Chicago &c. R. Co.*, 79 Mo. App. 475; *Omaha &c. R. Co. v. Talbot*, 48 Neb. 627; *Chicago &c. R. Co. v. Featherly*, (Neb.) 89 N. W. Rep. 792; *Gahagan v. Boston &c. R. Co.*, 70 N. H. 441; s. c., 55 L. R. A. 426; *Waldron v. Boston &c. R. Co.*, (N. H.) 52 Atl. 433; *Dotty v. Atlantic City R. Co.*, 64 N. J. L. 710; *Lake Shore &c. R. Co. v. Reynolds*, 23 Oh. C. C. 199; *Baltimore &c. R. Co. v. Stoltz*, 18 id. 93; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430; *Gleim v. Harris*, 181 id. 587; *Hess v. Williamsport &c. R. Co.*, 181 id.

492; *Fox v. Pennsylvania R. Co.*, 195 id. 538; *Baker v. id.* 182 id. 336; *Born v. Philadelphia &c. R. Co.*, 198 id. 409; *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 47 S. W. Rep. 59; *id. v. Knipstein*, 55 id. 754; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Gulf &c. R. Co. v. Merchand*, 24 id. 47; *Schofield v. Chicago &c. R. Co.*, 2 McCrary, 268; *Mobile &c. R. Co. v. Coever*, 112 Fed. Rep. 489; *Kallmerton v. Cowen*, 111 id. 297; *McVey v. Chesapeake &c. R. Co.*, 46 W. Va. 111; *Steinhofel v. Chicago &c. R. Co.*, 92 Wis. 123; *Groesbeck v. Chicago &c. R. Co.*, 93 id. 505; *Lenz v. Whitcomb*, 96 id. 310; *White v. Chicago &c. R. Co.*, 102 id. 489; *Walters v. Chicago &c. R. Co.*, 104 id. 251; *Brown v. Chicago &c. R. Co.*, 109 id. 384.

Ordinary care is all that is required. *Wiedman v. Erie R. Co.*, 66 App. Div. 347.

See, also, *Baker v. Kansas City &c. R. Co.*, 147 Mo. 140.

Where one sense is defective or obscured, more care must be exercised with the other. *Chicago &c. R. Co. v. Pounds*, 82 Fed. Rep. 217.

See, also, *Atchison &c. R. Co. v. Willey*, 60 Kan. 819; *Phillip v. Detroit &c. R. Co.*, 111 Mich. 274; *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; *Gunn v. Wisconsin &c. R. Co.*, 70 Wis. 203; *Seefeld v. Chicago &c. R. Co.*, id. 216; *Houston &c. R. Co. v. Richards*, 59 Tex. 373.

A traveler may not assume that no train will follow another within the margin of a minute. *Baltimore &c. R. Co. v. Talmage*, 15 Ind. App. 203.

Traveler is not warranted in relying on the fact that by schedule time the train should have passed, as trains may be late. *Tucker v. Chicago &c. R. Co.*, 122 Mich. 149.

See *Payne v. Chicago N. W. R. Co.*, 108 Iowa, 188; *Vincent v. Morgan's &c. R. Co.*, 48 La. Ann. 933; *Guhl v. Whitcomb*, 109 Wis. 69.

Plaintiff need not look out for hand cars at night, which were generally prohibited, where he uses due care in looking for trains. *Mott v. Detroit &c. R. Co.*, 120 Mich. 127.

Plaintiff was not negligent in failing to stop, look and listen where he relies on the rule of the company that a train shall stop before reaching a station at which another is standing receiving and discharging passengers. *Betts v. Lehigh Valley R. Co.*, 191 Pa. St. 575; s. c., 45 L. R. A. 261.

Or on the customary permission of a conductor to allow him to cross after the train passed and before it repassed. *Bradley v. Ohio &c. R. Co.*, 126 N. C. 735.

As to reliance on a custom as well as the rules of a company not to make flying switches, see *International &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 996.

As to defendant's failure to follow a custom of having a flagman precede a backing train, *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370.

A footman is not bound to stop, look and listen as persons in wagons

are bound to do. *Zimmerman v. Hannibal &c. R. Co.*, 71 Mo. 476; *Drain v. St. Louis &c. R. Co.*, 10 Mo. App. 531; *Henz v. R. Co.*, 71 Mo. 636; *Turner v. R. Co.*, 74 id. 602; *Hixon v. St. Louis &c. R. Co.*, 80 id. 335.

One cannot rely on the driver's looking and listening. *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640.

See, also, *Smith v. Maine C. R. Co.*, 87 Me. 339; *Toledo &c. R. Co. v. Estherton*, 22 Oh. C. C. 297.

But where the driver stops the passenger may assume that he will exercise ordinary care in that respect and is not chargeable with his negligence. *Pyle v. Clark*, 75 Fed. Rep. 644.\*

Plaintiff failed to see a train approaching in the night and during a storm of rain and sleet, though on a clear day it could have been clearly seen. His negligence was for the jury. *Pennsylvania R. Co. v. Miller*, 99 Fed. Rep. 529.

Although defendant be negligent, traveler must look, otherwise no recovery. *Schofield v. Chicago &c. R. Co.*, 114 U. S. 615.

*R. Co. v. Houston*, 95 U. S. 697; *Pence v. Chicago &c. R. Co.*, 63 Iowa 746; *Schaefer v. Chicago &c. R. Co.*, 62 id. 624; *Laverenz v. Chicago &c. R. Co.*, 56 id. 689; *Artz v. Chicago &c. R. Co.*, 34 id. 276; *Dodge v. B. C. &c. R. Co.*, id. 276; *Union Pac. R. Co. v. Adams*, 33 Kas. 427; *Lesah v. Maine &c. R. Co.*, 77 Me. 85; *State v. Maine &c. R. Co.*, 76 id. 357; *Grows v. Maine &c. R. Co.*, 67 id. 104; *Ayers v. Norfolk &c. Co.*, (Va.) 27 S. E. Rep. 582; *Mesic v. Atlantic &c. R. Co.*, 120 N. C. 489.

## 2. PLACE TO LOOK AND LISTEN.

To cross a track, after reaching it, without looking, is contributory negligence, and it is error to charge the jury to that effect, but with the qualification that, if the deceased acted with ordinary prudence and due care, there being but four seconds of time to cross, the jury might find for the plaintiff. *Hewett v. N. Y. C. R. R. Co.*, 3 Lansing, 83.

*Grippen v. N. Y. Central R. Co.*, 40 N. Y. 37.

The defendant's counsel requested the court to charge, "that a person, who attempts to cross a railroad track, is required to make vigilant use of his eyes and ears in looking and listening to ascertain whether a train is approaching, and if he does not do so, he is guilty of negligence." The court declined so to charge, and charged instead, "that the omission to use eyes and ears is negligence." Held, that it was error to refuse to charge as requested. (*Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451); that the refusal to charge, that the plaintiff was bound to make a "vigilant" use of his senses, to ascertain if there were any signs of the approaching train, was calculated to mislead the jury into the belief that no special vigilance was required.

\* NOTE.—See, also, "Contributory Negligence." *ante*, p. 656.

The defendant's counsel also requested the court to charge, that if the plaintiff was guilty of any fault or negligence whatever, which in any manner contributed to his injury, he could not recover. The court refused so to charge, but charged that, if the plaintiff was guilty of negligence he could not recover. Held, that the refusal to charge as requested was error; that the refusal might induce the jury to believe, that although the plaintiff had been guilty of a "fault," which immediately conduced to the injury, yet, if the fault did not consist of mere negligence, then the plaintiff would be entitled to recover. *Bunn v. D., L. & W. R. Co.*, 6 Hun, 303.

The fact that one can testify that he saw the deceased look both ways and listen, before attempting to cross the railroad tracks on which she was killed, does not necessarily show that she did not do her duty in that regard, and if the facts and surrounding circumstances shown are such as to reasonably indicate or tend to establish that the accident might have occurred without negligence on the part of the deceased, the question of contributory negligence is to be determined by the jury, although there were no eye witnesses to the accident.

It cannot be said, as a matter of law, at what particular point before reaching the railroad tracks the deceased should have looked for an approaching train. *Pitts v. N. Y., L. E. & W. R. Co.*, 79 Hun, 546; s. c. aff'd, 152 N. Y. 623.

The duty of looking and listening when one approaches a crossing of many railroad tracks is not adequately discharged by merely looking as the dangerous point is approached, and then, when it is absolutely reached, going blindly forward. *Fowler v. N. Y. Cent. & H. R. R. Co.*, 74 Hun, 141; s. c. aff'd, 147 N. Y. 717.

Deceased was negligent in crossing without looking where he could have seen the train anywhere within the last 45 feet of his approach to the track. *Collins v. New York & C. R. Co.*, 92 Hun, 563; s. c. aff'd, 154 N. Y. 570.

Deceased's failure to look for the approach of a train during his approach of 22 feet, was negligence. *Henavie v. New York & C. R. Co.*, 10 App. Div. 64.

The traveler must look and listen at such a distance from the crossing as will enable him to cross in reasonable safety before a train at ordinary speed can reach the crossing or traverse the distance commanded by his view. *New York & C. R. Co. v. Kistler*, (Oh. St.) 64 N. E. Rep. 130.

See, also, *Stoltz v. Baltimore & C. R. Co.*, 7 Oh. Dec. 435.

He is not bound to look where it would be useless to do so. *Goodell v. New York & C. R. Co.*, 67 App. Div. 271.

See, also, *Haupt v. New York & C. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594:

*Chicago &c. R. Co. v. Hansen*, 166 Ill. 623; *Cleveland &c. R. Co. v. Bruce*, 63 Ill. App. 233; *Louisville &c. R. Co. v. Patchen*, 66 id. 206; *Atchison &c. R. Co. v. Powers*, 58 Kan. 544; *Dalwigh v. International &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1009; *Southern R. Co. v. Bryant*, 95 Va. 212.

But he must use ordinary care to take advantage of an opportunity to look, where it will be reasonably effective. *Conckling v. Erie R. Co.*, 63 N. J. L. 338.

See, also, *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308; *Winter v. New York &c. R. Co.*, 66 N. J. L. 677; *Nelson v. St. Paul &c. R. Co.*, 76 Minn. 189; *Sandberg v. St. Paul &c. R. Co.*, 80 id. 442; *Nolan v. Central R. &c. Co.*, 67 N. J. L. 124; *Scott v. Wilmington R. Co.*, 96 N. C. 428; *Hecker v. Oregon R. Co.*, (Or.) 66 Pac. Rep. 270.

And looking once, at a distance from the crossing, will not excuse him from using ordinary care to look again before crossing, if opportunity offers. *Atchison &c. R. Co. v. Holland*, 60 Kan. 209.

As where the view is clear within 25 to 50 feet of the crossing. *Tucker v. Chicago &c. R. Co.*, 122 Mich. 149.

See, also, *Engrer v. Ohio &c. R. Co.*, 142 Ind. 618; *Aurelius v. Lake Erie &c. R. Co.*, 19 Ind. App. 584; *Louisville &c. R. Co. v. Survant*, (Ky.) 44 S. W. Rep. 88; *Brandy v. Detroit &c. R. Co.*, 107 Mich. 100; *Vreeland v. Cincinnati &c. R. Co.*, 69 id. 585; *Huggard v. Missouri P. R. Co.*, 134 Mo. 673; *Jones v. Barnard*, 63 Mo. App. 501; *Hunter v. Montana &c. R. Co.*, 22 Mont. 525; *Cantrell v. Erie R. Co.*, 64 N. J. L. 277; *Baltimore &c. R. Co. v. McPeck*, 16 Oh. C. C. 87; *Koester v. Toledo &c. R. Co.*, 20 id. 475; *Hartman v. Harris*, 182 Pa. St. 172; *Mann v. Philadelphia &c. R. Co.*, 1 Daulph. Co. Rep. (Pa.) 51; *McCanna v. New England R. Co.*, 20 R. I. 439; *Gulf &c. R. Co. v. Younger*, (Tex. Civ. App.) 40 S. W. Rep. 423; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Pyle v. Clark*, 75 Fed. Rep. 644; *Chicago &c. R. Co. v. Pounds*, 82 id. 217; *Gilbert v. Erie R. Co.*, 97 id. 747; *Neninger v. Cowan*, 101 id. 787; *Washington &c. R. Co. v. Lacey*, 94 Va. 460; *Koester v. Chicago &c. R. Co.*, 106 Wis. 460.

A pedestrian was not *per se* negligent in failing to look again in a direction in which he had looked when three feet from the track and from which point he could see 105 feet. *Manley v. New York &c. R. Co.*, 18 Misc. 502.

Traveler's negligence was for the jury where he trotted his team to within a rod of the track without stopping or listening. *Eilert v. Green Bay &c. R. Co.*, 48 Wis. 606.

*Urbanek v. Chicago &c. R. Co.*, 47 Wis. 59; *Bohan v. Milwaukee &c. R. Co.*, 58 id. 30; *Hoey v. C. R. Co.*, 67 id. 1; *Roberts v. Chicago &c. R. Co.*, 35 id. 679.

### 3. NECESSITY OF STOPPING.

A traveler upon the highway, in approaching a railroad crossing, is required to make a vigilant use of his eyes and ears, to ascertain if there is an approaching train; and if by such use of these faculties, while approaching, the vicinity of such train may be discovered in time to avoid

a collision, the omission to exercise them is such contributory negligence as will bar a recovery for an injury sustained by a collision.

This rule does not require the traveler to stop, or if he is with a team, to get out and leave his vehicle and go to the track, or stand up and go upon the track in that position, in order to obtain a better view. For jury. *Davis v. N. Y. C. & H. R. R. Co.*, 47 N. Y. 400, rev'g nonsuit.

Failure to stop before crossing a track is not negligence as matter of law, but is a fact for the consideration of the jury. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 32 App. Div. 627.

See, also, *Judson v. Central & C. R. Co.*, 158 N. Y. 597; *Neudoeffer v. Brooklyn & C. R. Co.*, 9 App. Div. 66; rev'g s. c., 91 Hun, 1; *Malott v. Hawkins*, (Ind.) 62 N. W. Rep. 308; *Illinois C. R. Co. v. Mizell*, 100 Ky. 235; *Cincinnati & C. R. Co. v. Wright*, (Ky.) 34 S. W. Rep. 526; *Maryland & C. R. Co. v. Newbuer*, 62 Md. 391; *Bunting v. Central & C. R. Co.*, 14 Nev. 351; *Galveston & C. R. Co. v. Huebner*, (Tex. Civ. App.) 42 S. W. Rep. 1021; *Manley v. Delaware & Canal Co.*, 69 Vt. 101.

Failure to stop was not negligence, where it did not appear but that a pedestrian would have had ample time to cross if he had not caught his foot. *Baltimore & C. R. Co. v. Keck*, 185 Ill. 400; aff'g s. c., 84 Ill. App. 159.

Or where, though he did not stop or look a second time, he continued to listen attentively. *Moore v. Chicago & C. R. Co.*, 102 Iowa, 595.

It was for the jury to say whether boy should have left his horse to go to track and look for approaching train. *Huckshold v. St. Louis & C. R. Co.*, 90 Mo. 548.

*Vickey v. Missouri & C. R. Co.*, 7 Mo. App. 150; *Kennedy v. North Missouri & C. R. Co.*, 36 Mo. 351; *Petty v. Hannibal & C. R. Co.*, 88 id. 306; *Pittsburg & C. R. Co. v. Wright*, 80 Ind. 236. See, however, *Penn. R. Co. v. Beale*, 73 Penn. St. 504.

But in some jurisdictions, failure to stop, look and listen is negligence *per se*. *Reading & C. R. Co. v. Ritchie*, 102 Pa. St. 425.

*Central R. Co. v. Feller*, 84 Pa. St. 226; *Penn. R. Co. v. Weber*, 76 id. 157; *Gerety v. Philadelphia & C. R. Co.*, 81 id. 274; *Penn. R. Co. v. Beale*, 73 id. 504; *Allen v. Penn. R. Co.*, 11 Cent. (Pa.) 207; *Seamans v. Delaware & C. R. Co.*, 174 Pa. St. 421; *Sullivan v. New York & C. R. Co.*, 175 Pa. St. 361; *Decker v. Lehigh Valley R. Co.*, 181 Pa. St. 465; *Coppuck v. Philadelphia & C. R. Co.*, 191 Pa. St. 172; *Wojochoski v. Central R. Co.*, 10 Pa. Super. Ct. 469.

And this duty is not discharged by circling around on a bicycle instead of dismounting. *Robertson v. Pennsylvania R. Co.*, 180 Pa. St. 43.

Nor by stopping twice, when the train could have been seen by stopping a third time within a few feet of the track. *Baker v. Pennsylvania R. Co.*, 15 Lanc. L. Rev. (Pa.) 35.

## 4. OBSTRUCTED SIGHT AND HEARING.

If the view be interrupted to one approaching the track, there is greater reason for care on his part. If, in trying to pass before a train, he tries the question of speed with the train, he does so at his peril.

"W." drove his horses upon a railroad, where it crossed a street, without giving any heed to the signals made, or to the track, until he came very near it, and then seeing a train approaching, he attempted to cross the track in front of the engine, whipping his horses for that purpose, which became restive and uncontrollable, and a collision ensued, by which "W." was killed.

No action lay against the company. (*Spencer v. Utica & Schenectady R. Co.*, 5 Barb. 337; *Steves v. Oswego & Syracuse R. Co.*, 18 N. Y. 422.) *Wilds v. H. R. R. Co.*, 29 N. Y. 315, aff'g nonsuit.

A girl of sixteen years was crossing the tracks, and had crossed the second and stood between the second and third tracks, waiting for a train to pass in front of her; an engine came on the second track, without warning and struck her. Contributory negligence was for the jury. *Haycroft v. L. S. & M. S. R. Co.*, 64 N. Y. 636; affirming 2 Hun, 489.

It is not *per se* negligent for a traveler, when the view of the track is interrupted, not to stop his horses and go forward and look, but it is a question for the jury.

Plaintiff and others, who were riding upon a truck with him, looked and listened for the usual signals and evidences of danger, as they approached the crossing, but neither saw nor heard any; obstructions by buildings and cars standing on tracks, before reaching the one on which the colliding train was approaching prevented plaintiff from seeing it, and other noises prevented hearing it; they looked for the flagman usually stationed at the crossing, but he was absent, and no signal indicated an approaching train. *Dolan v. Prest. &c. D. & H. C. Co.*, 71 N. Y. 285, aff'g judg't for pl'ff.

The deceased approached a double track on which trains from both directions were due. The view to the south was interrupted. The deceased was seen a moment before he was struck looking to the north, from whence the wind was blowing. He was struck by a rapidly moving train from the south.

The railroad track runs north and south, the highway east and west; at the crossing and on both sides thereof there was a cutting for the railroad track; and one also for the highway east of the track, seven or eight feet deep, for a considerable distance, with a board fence, and other obstructions to view on the top of the embankment to the south. "C." approached the crossing from the east, in a one-horse wagon. He was driving at a very slow trot with one hand, holding a pail in the other;

the train, by which he was killed, came from the south at a high rate of speed, and as plaintiff showed, without ringing a bell. "C." was familiar with the crossing, and with the running of trains; he approached the crossing about the time trains were due both ways; the wind at the time was blowing from the north; "C." was seen a moment before he was struck by the engine looking towards the north.

Negligence of the defendant and contributory negligence of "C." were for the jury. *Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72, ordering judg't for pl'ff.

A young woman approaching a double track, waited for the passage of a train towards the west on the nearest track, and then after looking both ways, proceeded on to the second track, where she was killed by an engine running backwards at a high rate of speed. There was a curve just west of the crossing preventing a full view of the tracks in that direction. There was no bell or whistle, and the usual flagman was absent. One "M." testified that notwithstanding the smoke from the passing train, he saw an engine approaching, but it was held that the testimony of "M." was not conclusive evidence, that the deceased could also see and hear, and also that she had a right to rely upon the absence of the usual flagman to warn her of danger, and to assume that proper signals would be given, and that engines would not be moved at such a place at such an unusual rate of speed. *McNamara v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 650, aff'g judg't for pl'ff, distinguishing *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

The plaintiff, a girl of fifteen, testified that before stepping upon the track she looked to the west, and no train was in sight from that direction, and then looking to the east, she saw the train about to start from the station, and that waiting for a moment for the train from that direction to pass, she again started to cross, and was struck by a train from the other direction, which, according to the evidence of the other witness, was running at a high rate of speed. She was unfamiliar with the locality, and presumptively in regard to the time of the arrival and departure of trains. Her attention was attracted by the passing train from the east, and her opportunities to see and hear the train from the west were obstructed by the smoke and noise of the bell and engine starting out; under the circumstances the court declined to hold, as matter of law, that she neglected to exercise that degree of care and caution required of a person of her age, situated as she was. *Swift v. S. I. R. T. R. Co.*, 123 N. Y. 645, aff'g judg't for pl'ff.

Upon the trial of this action, brought to recover damages for the negligent killing of the plaintiff's intestate, while crossing the defendant's tracks, the defendant's counsel excepted to so much of the charge as stated



that the deceased "was not bound to look, when looking or gazing would only show him the small amount of seventy feet of the track." To this the court remarked: "I will say he was not bound, as matter of law, to look, unless you find by looking he could have seen the train or heard it or known of its approach." No error. *Cranston v. N. Y. C. & H. R. Co.*, 39 Hun, 308, aff'g judg't for pl'ff.

*Smedes v. Brooklyn &c. R. Co.*, 88 N. Y. 13.

Plaintiff, familiar with *locus in quo*, approached a railway consisting of four tracks and a switch at about ten o'clock at night; he stopped about twenty feet from the first track for a train to go west on the second track, and then went on the first track, and was struck by an east-bound train, carrying a headlight, and going at the rate of twelve miles an hour. From a point within twenty feet, from where he was struck, the view was unobstructed for from three hundred and sixty-five feet to two miles, but the night was dark and hazy and an engine with a headlight stood near the crossing and there were several switch lights in the vicinity. The train just passed was making considerable noise, and there were several lights in the rear of the caboose. The evidence was conflicting, as to whether a signal was given by the east-bound train. Nonsuit was properly denied. A person with the plaintiff in the above action was killed in the same accident. There was no evidence, as to whether the deceased looked and listened, and his brother, the person described above, looked both ways and said to the decedent "come on," and they went across.

Contributory negligence was for the jury. *Beckwith v. N. Y. C. & H. R. R. Co.*, 54 Hun, 446; s. c. aff'd, 125 N. Y. 759.

Although a traveler cannot, by reason of intervening embankments, see an approaching train before reaching the tracks, yet he is bound, when in a position to see, to look up and down as far as he is able; otherwise he would be negligent. Because a person occasionally sees a flag-man at a crossing he may not assume that his absence denotes safety. *Whalen v. N. Y. C. & H. R. R. Co.*, 58 Hun, 431, aff'g nonsuit, distinguishing *Kellogg v. N. Y. Central &c. R. Co.*, 79 N. Y. 72.

The smoke from tugs in a river, near a railroad crossing, so obstructed the view that a traveler did not see an approaching train by which he was injured.

He was negligent in not waiting until the smoke lifted. *Foran v. N. Y. C. & H. R. R. Co.*, 64 Hun, 510; s. c. aff'd, 147 N. Y. 718, citing *Heaney v. Long Island R. Co.*, 112 N. Y. 122.

Where there is a conflict of evidence, as to whether the view of a person crossing a track was obstructed, the question is for the jury. *Petrie v. N. Y. C. & H. R. R. Co.*, 66 Hun, 282.

The driver of a wagon and horses approaching a railroad crossing in

would have seen the train. *Lewin v. Lehigh Valley R. Co.*, 41 App. Div. 89.

Ordinary care requires greater vigilance at a crossing when sight or hearing is obstructed, as by adjacent structures. *Memphis &c. R. Co. v. Martin*, 117 Ala. 367.

See, also, *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; *Robinette v. Alabama &c. R. Co.*, (Ala.) 31 South. Rep. 18; *Bond v. Lake Shore &c. R. Co.*, 117 Mich. 652; *Baltimore &c. R. Co. v. Stolz*, 18 Oh. C. C. 93; *Blackburn v. Southern R. Co.*, 34 Or. 215.

Or smoke. *Oleson v. Lake Shore &c. R. Co.*, 143 Ind. 405; s. c., 32 L. R. A. 149; *Hovenden v. Pennsylvania R. Co.*, 180 Pa. St. 244.

Or a cloud of dust. *Chicago &c. R. Co. v. Pounds*, 82 Fed. Rep. 217.

Or the glare of the sun. *Osborn v. Detroit &c. R. Co.*, 115 Mich. 102.

Or the noise of neighboring machinery. *Chicago &c. R. Co.*, (Kan.) 60 Pac. Rep. 736; *Vogg v. Missouri P. R. Co.*, 138 Mo. 172.

Especially when a train is known to be due. *Mixsell v. New York &c. R. Co.*, 22 Misc. 73.

See, also, *Chicago &c. R. Co. v. Hansen*, 166 Ill., 623; *Hinken v. Iowa &c. R. Co.*, 97 Iowa, 603; *Green v. Erie R. Co.*, 65 N. J. L. 301; *Grand Trunk R. Co. v. Cobleigh*, 78 Fed. Rep. 784; rev'g s. c., 75 id. 247.

When one sense is obstructed, more vigilance is required with the other. *Chicago &c. R. Co. v. Williams*, 59 Kan. 700; *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88; *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

And, if necessary to be reasonably certain of safety, the traveler must stop to look and listen. *Cincinnati &c. R. Co. v. Duncan*, 143 Ind. 524.

See, also, *Osborn v. Detroit &c. R. Co.*, 115 Mich. 102; *Lan v. Lake Shore &c. R. Co.*, 120 id. 115; *Bond v. Lake Shore &c. R. Co.*, 117 id. 652; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Keyley v. Central R. &c.*, 64 N. J. L. 355; *Dalwigh v. International &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1009; *Schneider v. Chicago &c. R. Co.*, 99 Wis. 378; *Carter v. Central Vermont R. Co.*, 72 Vt. 190.

In a case of obstructed view, where there are complicating circumstances calculated to deceive a person, a traveler is not negligent *per se*. *Artz v. Chicago &c. R. Co.*, 34 Iowa, 153.

*Indianapolis &c. R. Co. v. Keeley*, 23 Ind. 133; *Chicago &c. R. Co. v. Hedges*, 105 id. 398; *Evansville &c. R. Co. v. Lawdenwick*, 15 id. 120; *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *Penn. R. Co. v. Marshall*, 119 id. 399; *Tabor v. Missouri &c. R. Co.*, 46 Mo. 353; *Petty v. Hannibal &c. R. Co.*, 88 id. 306; *Kennayde v. Pacific R. Co.*, 45 id. 255; *Milwaukee &c. R. Co. v. Hunter*, 11 Wis. 160; *Paine v. Grand Trunk R. Co.*, 63 N. H. 623; *Abbett v. Chicago &c. R. Co.*, 30 Minn. 482; *Chicago &c. R. Co. v. Miller*, 46 Mich. 532; *Pittsburg &c. R. Co. v. Burton*, 139 Ind. 380; *Gividen v. Louisville &c. R. Co.*, (Ky.) 32 S. W. Rep. 612; *Tilton v. Boston &c.*

R. Co., 169 Mass. 253; Willet v. Michigan C. R. Co., 114 Mich. 411; Klotz v. Winona &c. R. Co., 68 Minn. 341; Philadelphia &c. R. Co. v. Carr, 99 Pa. St. 505; Schum v. Pennsylvania R. Co., 107 id. 8; Philpott v. id. 175 id. 570; Davidson v. Lake Shore &c. R. Co., 179 id. 227; Knox v. Philadelphia &c. R. Co., (Pa.) 52 Atl. Rep. 90; International &c. R. Co. v. Starling, 16 Tex. Civ. App. 365; St. Louis v. Barker, 77 Fed. Rep. 810; Pennsylvania R. Co. v. Miller, 99 id. 529; New York &c. R. Co. v. Moore, 105 id. 725; Hemingway v. Illinois C. R. Co., 114 id. 843; Peck v. Oregon &c. R. Co., (Utah) 69 Pac. Rep. 153.

Where one stopped at the only eligible place to see and hear, although forty to fifty feet from the track, he was not negligent *per se*. *Cook v. Missouri &c. R. Co.*, 12 Mo. App. 32.

See, also, *Cookson v. Pittsburg &c. R. Co.*, 179 Pa. St. 184.

When obstruction is temporary and traveler is acquainted with the location, he should wait until obstruction is removed. *McCreey v. Chicago &c. R. Co.*, 31 Fed. Rep. 531.

*Merkle v. N. Y. &c. R. Co.*, 49 N. J. L. 473; see, however, *Jewett v. Klein*, 27 N. J. Eq. 550; *Central R. of N. J. v. Feller*, 84 Pa. St. 226.

Where he cannot see without getting out and going ahead he is bound to do so. *Chicago &c. R. Co. v. Thomas*, 155 Ind. 634.

Driver could not see that cars standing near the crossing had an engine attached to them; he was not negligent *per se* in attempting to cross. *Atchison &c. R. Co. v. Shaw*, 56 Kan. 519.

##### 5. CARE WHILE CROSSING.

A person, knowing that the south track was for eastern trains, and the north track for western trains, when about to cross the south track, looked west. He was negligent in not looking east. The fact that the brakeman of a train, divided and standing at the crossing, gave no signal, was immaterial on the question of the plaintiff's negligence. If train at crossing to some extent obstructed his view upon the north track, there was so much greater reason for him to take an observation the moment he had crossed the south track, so as to see whether he could cross the north track with safety, and for not doing so he was chargeable with contributory negligence, which bars his recovery. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 330; *Woodard v. N. Y., L. E. & W. R. Co.*, 106 id. 369; *Davey v. London & S. W. R. Co.*, [L. R.] 11 Q. B. Div. 213; s. c. affirmed in court of appeals, 49 L. T. Rep. [N. S.] 739.) *Young v. N. Y., L. E. & W. R. R. Co.*, 107 N. Y. 505, rev'g judgt for pl'ff.

See, also, *Burke v. Central R. &c.*, 64 N. J. L. 576.

The plaintiff, before stepping upon the first track, looked both ways, but without further looking toward the west, from which direction he knew a train was due, crossed the first and second tracks and walked be-

between the second and third tracks so near the middle that he was struck by said train, the rumble of which was distinctly heard by others in the vicinity.

The plaintiff was negligent and the defendant was not liable. *Scott v. Penn. &c. R. Co.*, 130 N. Y. 679.

A woman on a dark night, in a locality unknown to her, had crossed twenty-four tracks of four railroads, when she saw a train of cars and the headlight of a locomotive proceeding apparently westerly; in fact, but not to her knowledge, it came rapidly towards her and struck her. There was evidence that an approaching train could be seen for a long distance. Question of contributory negligence was for the jury. *Doyle v. Penn. & N. Y. Canal &c. R. Co.*, 139 N. Y. 637.

A traveler able to see track for distance of 200 to 300 feet, with but two box cars between him and a train, backing slowly towards him was killed by the train backing against a car between which and another car he attempted to pass. Contributory negligence. *Krauss v. Wallkill Valley R. Co.*, 69 Hun, 482.

Where plaintiff was not warned that a detached car was following and his attention was diverted to the fireman of the engine as it passed, he was not *per se* negligent in crossing, without looking for anything following it. *Bowen v. New York &c. R. Co.*, 89 Hun, 594.

While plaintiff was waiting for a train obstructing the crossing to pass, another came up between him, obstructing the passage back. While so caught on the track between the two, a third train came along thereon, to avoid which plaintiff attempted to pass between the cars of the train at his back, and was injured by their sudden starting. He was held not to have been negligent *per se* in so doing. *Wall v. New York &c. R. Co.*, 56 App. Div. 599.

Stopping on a crossing to converse, converts one into a trespasser so as to make him guilty of contributory negligence; his right being only for immediate passage. *Tennessee &c. R. Co. v. Hansford*, 125 Ala. 349.

But see *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; s. c. aff'd, 180 Ill. 453.

A person is none the less a trespasser because he is at a crossing, where he sits down upon a track and goes to sleep. *Lyons v. Illinois C. R. Co.*, (Ky.) 59 S. W. Rep. 507.

That a traveler intended to trespass on the railroad's private property after going over the crossing, does not alter its duty to him while on the crossing. *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356.

The care required applies both while approaching and while crossing. *Wabash &c. R. Co. v. Jensen*, 99 Ill. App. 312.

See, also, *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Bonnell v. Delaware &c.*

R. Co., 39 N. J. L. 189; *Kansas &c. R. Co. v. Twombly*, 3 Colo. 125; *Martin v. Pennsylvania &c. R. Co.*, 176 Pa. St. 444.

Contributory negligence was for the jury where the traveler did not look at the instant of stepping on the track. *Plummer v. Eastern R. Co.*, 73 Me. 591.

See, also, *Chicago &c. R. Co. v. Pearson*, 184 Ill. 386; *aff'g s. c.*, 82 Ill. App. 605; *Hoopes v. West Jersey &c. R. Co.*, 65 N. J. L. 89; *Brenninger v. Pennsylvania R. Co.*, 9 Pa. Super. Ct. 461.

But he was held negligent *per se*, where he deliberately stepped between two passing trains in a space 20 inches wide. *McCann v. Chicago &c. R. Co.*, 105 Fed. Rep. 480.

And where he passed lowered gates and stood upon the tracks without looking. *Buckeley v. Flint &c. R. Co.*, 119 Mich. 583.

And where he crossed immediately behind a passing train without waiting and looking to see if the track was otherwise clear. *Central R. &c. v. Smalley*, 61 N. J. L. 277.

See, also, *Hughes v. Delaware &c. Canal Co.*, 176 Pa. St. 254; *Stowell v. Erie R. Co.*, 98 Fed. Rep. 520.

Even though he followed in a covered wagon immediately behind another team that had crossed safely. *Work v. Chicago &c. R. Co.*, 105 Fed. Rep. 874.

Traveler may assume that more care will be used by company where standing cars are near crossing. *Thomas v. Delaware &c. R. Co.*, 19 Blatchf. 533.

A person has not the unqualified right to act on the presumption, that railroad trains and other dangerous agencies will always be operated with the care and vigilance required by law or custom. *Wabash &c. R. Co. v. Central Trust Co.*, 23 Fed. R. 738.

#### 6. OBSTRUCTED CROSSING.

The plaintiff, after dark, waited for a train to pass on the east track, then, starting his horse upon the tracks, he was struck by a train from the west. It was doubtful from his examination whether he looked towards the west. For the jury. *Carr v. N. Y. C. & H. R. R. R. Co.*, 60 N. Y. 633.

Plaintiff was going south from her home upon a highway which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded: she stopped again as she reached the north track: just then the car started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step

or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. Plaintiff testified that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This, there was testimony tending to show, was running at a dangerous rate of speed.

Held, that the question of contributory negligence was properly submitted to the jury. *Greany v. L. I. R. Co.*, 101 N. Y. 419, aff'g judg't for pl'ff.

It is usually negligent to attempt to cross over a freight train standing on a highway crossing; and even if the highway is improperly constructed, prudence would require one to wait a reasonable time for the train to pass on; but it cannot be said as a matter of law that he should remain indefinitely on the highway along which he is journeying, or that he is bound to turn back and seek some other highway crossing.

Where a traveler on a highway applies to a brakeman to learn how long a train standing across the highway is to remain on the crossing, and is told to climb "right across the train," it is for the jury, to determine whether he was guilty of negligence in attempting to cross between the cars and whether the defendant was guilty of negligence in starting the train without first looking to see if any traveler on the highway, whom it had put to an extraordinary and unusual means of crossing the tracks by reason of the long obstruction of the highway, would be in danger.

A brakeman on a railroad train has not necessarily the power to inform the public and bind the railroad company as to the movements of its trains, and it is error for a trial court to charge that if a brakeman, or one operating a train, tells a person that he can safely cross the train, the railroad company is liable for the damages he may sustain while crossing such train, through the sudden movement thereof. *Phillips v. The N. Y. & N. E. R. R. Co.*, 80 Hun. 404.

It was for the jury to say whether plaintiff was negligent in driving into a space between the tracks of two railroads, the farther of which was obstructed by a freight train standing thereon and waiting there for 20 minutes, the horse being gentle and held by the head by the driver. *Laible v. New York & C. R. Co.*, 13 App. Div. 574.

A bright girl of twelve was negligent, where, finding her passage at a crossing obstructed by a freight train, she ran around in front of the locomotive and on across without looking, though she was accustomed to the crossing and the train which struck her was the regular one due at that time. *Leary v. Fitchburg R. Co.*, 53 App. Div. 52.

It was for the jury to say whether danger of passing between stationary cars would have been obvious to one of common prudence. *Baltimore & R. Co. v. Shipley*, 31 Md. 368; *R. Co. v. Fitzpatrick*, 35 id. 32.

A traveler is not a trespasser nor negligent *per se* in going beyond the limits of a crossing to pass around cars obstructing it. *Mayer v. Chicago & C. R. Co.*, 63 Ill. App. 309.

See, also, *St. Louis & C. R. Co. v. Taylor*, 64 Ark. 364; *Brown v. Hannibal & C. R. Co.*, 50 Mo. 461; *Morrissey v. Wiggins Ferry Co.*, 43 id. 380; *International & C. R. Co. v. Locke*, (Tex. Civ. App.) 67 S. W. Rep. 1082.

Nor in passing through an opening in a divided train. *Chicago & C. R. Co. v. Filler*, 195 Ill. 9; *International & C. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

Unless he failed to take precaution to ascertain whether a train is about to pass on the other side. *Keppleman v. Philadelphia & C. R. Co.*, 190 Pa. St. 333.

But a traveler who climbs between the cars of a train obstructing a crossing has been held to be a trespasser. *Littlejohn v. Richmond & C. R. Co.*, 49 S. C. 12.

See, also, *McCollum v. Cleveland & C. R. Co.*, 154 Ind. 97; *Kriuwinski v. Pennsylvania R. Co.*, 65 N. J. L. 392; *Barr v. Southern R. Co.*, 105 Tenn. 544; *Wherry v. Duluth & C. R. Co.*, 64 Minn. 415.

But see *Scott v. St. Louis & C. R. Co.*, 112 Iowa, 54; *San Antonio & C. R. Co. v. Green*, 20 Tex. Civ. App. 5; *Irvin v. Gulf & C. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 661.

Direction of a brakeman to a person to pass between the cars of a train standing on a highway, will not justify him if the danger is obvious. *Lake Shore & C. R. Co. v. Pinchin*, 112 Ind. 592.

*Jefferson R. Co. v. Swift*, 26 Ind. 459; *Penn. R. Co. v. Hoagland*, 78 id. 203; *Lake Erie & C. R. Co. v. Fix*, 88 id. 381; *Terre Haute & C. R. Co. v. Buck*, 96 id. 346; *St. Louis & C. R. Co. v. Cantrell*, 37 Ark. 519; *Fowler v. Baltimore & C. R. Co.*, 18 W. Va. 579; *Hickey v. Boston & C. R. Co.*, 14 Allen, 429; *R. Co. v. Aspell*, 23 Pa. St. 147; *Philadelphia & C. R. Co. v. Boyer*, 97 id. 91; *Indianapolis & C. R. Co. v. Horst*, 93 U. S. 291; *St. Louis & C. R. Co. v. Person*, 4 S. W. R. 755; see, however, *Hanson v. Mansfield & C. R. Co.*, 38 La. Ann. 111.

## 7. CARE OF ANIMALS.

Where a team, driven by a person along a highway, becomes unmanageable or the driver loses control over them, and in consequence they enter upon the tracks of a steam railroad company at a highway crossing,

against the will of a driver, and are run down by a passing railroad train, and the driver killed, the driver is not chargeable with negligence contributing to the accident. *Miller v. The N. Y. C. & H. R. R. Co.*, 81 Hun, 152.

Deceased was negligent in failing to look before getting within a dangerous proximity to the tracks, with his horse, where the train could have been seen when it was a half mile away. *Allen v. New York & C. R. Co.*, 92 Hun, 589.

A traveler with a spirited team was charged with negligence in approaching a crossing without taking the precaution to stop, look and listen. *Towers v. Lake Erie & C. R. Co.*, 18 Ind. App. 684.

See, also, *Gulf & C. R. Co. v. Younger*, (Tex. Civ. App.) 40 S. W. Rep. 423.

Or in going within frightening distance. *Boothby v. Boston & C. R. Co.*, 90 Me. 313.

See, also, *Whitney v. Maine & C. R. Co.*, 69 Me. 208; *Pittsburg & C. R. Co. v. Taylor*, 104 Penn. St. 306; *Louisville & C. R. Co. v. Schmidt*, 81 Ind. 264; *St. Louis & C. R. Co. v. Paine*, 29 Kas. 166; *Lake Shore & C. R. Co. v. Butts*, 28 Ind. App. 289; *Miller v. Wellington & C. R. Co.*, 128 N. C. 26; *San Antonio & C. R. Co. v. Belt*, (Tex. Civ. App.) 59 S. W. Rep. 607; *Texas & C. R. Co. v. Cardwell*, 67 id. 157.

Or in leaving a team unhitched in an adjacent street. *Weingartner v. Louisville & C. R. Co.*, (Ky.) 42 S. W. Rep. 839.

See, also, *Western R. Co. v. Strickland*, 114 Ga. 133; *Silcock v. Rio Grande & C. R. Co.*, 22 Utah, 179.

But negligence was for the jury, where a horse, accustomed to the cars and supposed to be gentle, was driven near them. *Lynch v. Northern P. R. Co.*, 69 Fed. Rep. 86; *Hynes v. San Francisco & C. R. Co.*, 65 Cal. 316.

See, also, *Rusterholtz v. New York & C. R. Co.*, 191 Pa. St. 390; *Tankard v. Roanoke & C. R. Co.*, 117 N. C. 558; *Sherman & C. R. Co. v. Bridges*, 16 Tex. Civ. App. 64.

So, where plaintiff's horses had run away before, and plaintiff had had time to avoid danger, but did not apprehend any. *Turner v. Bachanan*, 82 Ind. 147.

It is often negligence to drive a horse, if known to be frightened by steam cars, near them. *Phil. & C. R. Co. v. Stinger*, 78 Pa. St. 219; but this does not apply to factories when whistling is not necessary. *Knight v. Goodyears' Co.*, 38 Conn. 441.

Negligence in driving a horse into close proximity to the locomotive did not prevent recovery, where the engineer intentionally threw steam upon it. *Texas & C. R. Co. v. Syfan*, 91 Tex. 562.

#### 8. KNOWLEDGE OF DANGER.

The court improperly refused to charge that "if the jury believed



But the traveler must not indulge in nice calculations and chances. It is negligent to hurry to cross ahead of an approaching train without reasonable certainty that it can be done in safety. *Mott v. Detroit &c. R. Co.*, 120 Mich. 127.

See, also, *Herbert v. Southern P. R. Co.*, 121 Cal. 227; *Hopkins v. Southern R. Co.*, 110 Ga. 85; *Southern R. Co. v. Blake*, 101 id. 217; *Chicago &c. R. Co. v. McElhaney*, 87 Ill. App. 420; *Chicago &c. R. Co. v. Williams*, id. 511; *Chicago &c. R. Co. v. Nelson*, 59 id. 308; *Cones v. Cincinnati &c. R. Co.*, 114 Ind. 328; *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295; *Griffin v. Chicago &c. R. Co.*, 68 Iowa, 638; *Louisville &c. R. Co. v. Penrod*, (Ky.) 56 S. W. Rep. 1; *Grows v. Maine &c. R. Co.*, 69 Me. 412; *McNab v. United R. Co.*, 94 Md. 719; *Mahlen v. Lake Shore &c. R. Co.*, 49 Mich. 585; *Rogstad v. St. Paul &c. R. Co.*, 31 Minn. 208; *Olson v. Northern P. R. Co.*, 84 id. 258; *Brinker v. Michigan &c. R. Co.*, 121 id. 283; *Kelly v. Hannibal &c. R. Co.*, 75 Mo. 138; *Drain v. St. Louis &c. R. Co.*, 10 Mo. App. 531; *Burnett v. Easton &c. R. Co.*, 61 N. J. L. 373; *Texas &c. R. Co. v. Fuller*, 13 Tex. Civ. App. 161; *Galveston &c. R. Co. v. Haas*, 19 id. 645; *Gulf &c. R. Co. v. Abendroth*, (Tex. Civ. App.) 55 S. W. Rep. 1122; *Gulf &c. R. Co. v. Wilson*, 59 id. 589; *Washington &c. R. Co. v. Hickey*, 166 U. S. 521; *Holland v. Chicago &c. R. Co.*, 18 Fed. Rep. 243; *McCadden v. Abbott*, 92 Wis. 551.

Plaintiff was negligent, where, seeing a freight train 500 feet away, he waited for another train to pass and then crossed without again looking at the freight train. *Illinois C. R. Co. v. James*, 67 Ill. App. 649.

Plaintiff started to cross, relying on engineer's promise to wait for her. Engineer broke his promise and plaintiff hurried and fell. She was not negligent *per se*. *Plaut v. Railway &c. Co.*, (Minn.) 91 N. W. Rep. 19.

#### 9. AGED, INFANT AND INFIRM.\*

An intelligent boy of thirteen years was last seen one hundred feet from a two-track railroad. He was conversant with the road, trains, &c. He was found in a cattle guard after two trains had passed each other. The evidence did not warrant the finding that the plaintiff was free from negligence, as he could have seen the train by which he was killed 750 feet away, when ten feet from the crossing. *Reynolds v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 248; reversing 2 N. Y. S. C. (T. & C.) 644.

Although the defendant was guilty of negligence in approaching the crossing, yet, as the traveler did not look and listen he could not recover, as the plaintiff's case must show affirmatively that the injured person did his duty, or prove facts from which the same may be inferred. The question at what age an infant is responsible for negligence is one of law.

A boy of twelve years, in the absence of other evidence, would be deemed *sui juris*. A boy, about to cross the four tracks of the defendant, on a day windy and snowy, but not enough to obstruct his view, stopped

\* NOTE.—See, also, "Contributory Negligence—Infants," *ante*, p. 704.

In climbing between cars of a train obstructing a crossing. *Missouri P. R. Co. v. Cooper*, 57 Kan. 185.

And in using the crossing as a playground and standing upon the tracks instead of at the side of the crossing for trains to pass. *Cleveland &c. R. Co. v. Heinman*, 16 Oh. C. C. 487.

But such children have been held not negligent *per se*, where their attention is diverted by other objects, such as another engine. *Atchison &c. R. Co. v. Hardy*, 94 Fed. Rep. 294; *Goodrich v. Burlington &c. R. Co.*, 103 Iowa, 412.

Or where the view is obstructed. *Illinois C. R. Co. v. Jones*, 95 Fed. Rep. 370; *Steele v. Northern P. R. Co.*, 21 Wash. 287.

Or where they followed the example of their elders. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; *Carmer v. Chicago &c. R. Co.*, 95 Wis. 513.

Or where the crossing was 15 to 20 feet, and the train a quarter of a mile, distant, when the attempt to cross was made. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159.

Or where an attempt was made to pass through a narrow gap in a train with apparently no engine attached. *Lehman v. Eureka Iron Works*, 114 Mich. 260.

Plaintiff was not permitted to recover where, owing to his state of intoxication, he was incapable of exercising reasonable care. *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16.

See also, *Johnson v. Illinois C. L. Co.*, 61 Ill. App. 522; *Lane v. Missouri &c. R. Co.*, 132 Mo. 4.

No recovery allowed, where a blind man knew cars were approaching, and that signal sounds from the different engines were misleading to the sense of hearing. *Florida &c. R. Co. v. Williams*, 37 Fla. 406.

Contributory negligence was left to the jury, where deaf, old man suddenly saw cars and thought he could control his horses. *Chicago &c. R. Co. v. Miller*, 46 Mich. 532.

A boy of seven and one-half sat on a track at a public crossing, and went to sleep. Verdict for plaintiff reversed. *Krenzer v. Pittsburg &c. R. Co.*, 151 Ind. 587, 592.

#### O. ACTING IN AN EMERGENCY.

The mother of the plaintiff, an infant, approached the crossing with care, leading her child by the hand. The tracks were numerous, and while she was hesitating whether or not to advance, the child broke away from her and hastened to cross the tracks. The mother was not bound to anticipate such movement on the part of the child, and she could not be said to have been negligent.

Even if the child were *sui juris* she was not negligent, as it was a fair

presumption, from the testimony, that her attempt to cross the track was an effort on her part to escape the threatened peril, and though such decision on her part might have been an error, even an adult is not required by law to decide wisely when an occasion calls for instant action. *Wiley v. L. I. R. Co.*, 76 Hun, 29.

The degree of care required of one in sudden peril is that reasonably to be expected of an ordinarily prudent person so placed. *Baker &c. R. Co. v. Kansas &c. R. Co.*, 147 Mo. 140.

See, also, *Stolz v. Baltimore &c. R. Co.*, 7 Oh. Dec. 435.

Even the ordinarily prudent are not capable of deliberate judgment under such circumstances; it has been held not negligence *per se* for a woman with a skittish horse, when confronted with a rapidly advancing train at a crossing with an obstructed view, to attempt to cross, instead of turning down a steep embankment. *Warren v. Southern &c. R. Co.*, (Cal.) 67 Pac. Rep. 1.

Or for one with a runaway team to pay no attention to looking for an advancing train. *Pratt v. Chicago &c. R. Co.*, 98 Iowa, 563.

Or for an old woman with a child, confused by knowledge of an approaching train and a warning of the sudden escape of a bear, to attempt to cross in front of the train. *Alabama &c. R. Co. v. Lowe*, 73 Miss. 203.

Or for a driver, confronted suddenly with a train hidden from view, to stand up in his wagon, where, had he kept his seat, he would not have been injured. *International &c. R. Co. v. Sein*, 11 Tex. Civ. App. 386.

See, also, *Houston &c. R. Co. v. Pyrd*, (Tex. Civ. App.) 61 S. W. Rep. 147.

Or where a person having looked, saw no train, until his horses' feet were almost on the track, and the train ten feet away, and then he whipped up his horses, and was struck by train. *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526.

The rule does not apply to a trespasser. *Cincinnati &c. R. Co. v. Murphy*, 18 Oh. C. C. 298.

Nor does it apply, where one has made deliberate, though mistaken, calculations to avoid danger. *Sutherland v. Cleveland &c. R. Co.*, 148 Ind. 308.

The danger must be reasonably apparent and not produced by plaintiff's own negligence; no recovery was allowed, where a woman, confused at approach of a train, stepped from a place of safety directly in front of it. *Central &c. R. Co. v. Foshee*, 125 Ala. 199.

See, also, *Haecker v. Chicago &c. R. Co.*, 91 Ill. App. 570.

Or where driver's team, left outside while he went into station, started to run, and he followed them over the crossing without looking for cars. *Collins v. Illinois C. R. Co.*, 77 Miss. 855.

Or where plaintiff's excitement at an approaching train was due to his state of intoxication. *Balser v. Chicago &c. R. Co.*, 7 Oh. N. P. 482.

### III. Speed of Trains.

**Great speed at a crossing is not *per se* negligent, but in connection with other facts may tend to establish negligence.** *Salter v. U. & B. R. Co.*, 88 N. Y. 42.

See "Evidence, Ordinance," *post*. 1166.

#### (a). NEGLIGENCE.

The law not having fixed the rate of speed, at which cars may be run upon a railroad, in and across the streets of a city, it is generally a question of fact, in each case, whether the actual rate was excessive or dangerous. Whether it is so or not will depend, to some extent, upon the safeguards which are adopted to prevent accidents. *Wilds v. Hudson R. Co.*, 29 N. Y. 315, *aff'g* nonsuit.

Speed at a crossing is usually for the jury on question of negligence, but not necessarily, if it is the same as that usually employed in crossing a street without producing injury. *Wilds v. Hudson R. Co.*, 29 N. Y. 315.

Negligence at a crossing cannot be inferred from the speed of a train alone. *Warner v. N. Y. C. R. R. Co.*, 44 N. Y. 465.

Irrespective of any ordinance or law regulating it, excessive rate of speed at a crossing is negligence, and whether it was excessive is for the jury. *Massoth v. D. & H. C. Co.*, 64 N. Y. 524, *aff'g* judg't for pl'ff.

Ordinance restricting speed at street crossings to six miles an hour held *prima facie* reasonable. *Buffalo v. New York &c. R. Co.*, 152 N. Y. 276.

A jury is warranted in finding that defendant was negligent in running its train past streets in a populous city having no safeguards at 20 miles an hour. *Zwack v. New York &c. R. Co.*, 160 N. Y. 362; *aff'g* s. c., 8 App. Div. 483.

See, also, *Waddele v. New York &c. R. Co.*, 4 App. Div. 549; *Noble v. New York &c. R. Co.*, 20 id. 40.

It is not negligent to run a train at 40 or 50 miles an hour in the open country, though at night, when the gates of the crossings are not in operation. *Lamb v. New York &c. R. Co.*, 18 App. Div. 579.

Rate of speed in crossing highway in country may be considered in determining defendant's negligence. *Martin v. N. Y. C. & H. R. R. Co.*, 27 Hun, 532, ordering judg't for pl'ff.

**From opinion.**—"The train has the preference and right of way. But it is bound to give due warning of its approach. \* \* \* Such warning must be

reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot, but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell. This is the principle which should be applied here. Where there is an excessive rate of speed, that may be considered by the jury, not perhaps as being in itself negligence, but as requiring at a crossing a warning which shall be available, and as tending to make the ordinary warning of no effect."

A train on a steam railroad moving at the time of an accident at a highway crossing, at the rate of from eight to ten miles an hour, and giving the usual warnings of its approach, is not running at an unusual or dangerous rate of speed. *Shires v. Fonda, Johnstown & Gloversville Railroad Co.*, 80 Hun, 92.

Absence of statutory regulation does not excuse reckless speed at a much frequented crossing. *Memphis C. R. Co. v. Martin*, 117 Ala. 367.

To have been reckless and wanton in disregarding the consequences in running at high speed over a much frequented crossing, it is not necessary to have had knowledge of the specific peril. *Louisville &c. R. Co. v. Orr*, 121 Ala. 489.

Violation of ordinance regulating speed at crossings is negligence *per se*. *Central &c. R. Co. v. Bond*, 111 Ga. 13.

See, also, *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392; *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178; s. c. aff'd, 193 Ill. 208; *Chicago &c. R. Co. v. Winter*, 175 Ill. 293; aff'g s. c., 65 Ill. App. 435; *Chicago &c. R. Co. v. Gunderson*, 65 Ill. App. 638; *Wabash R. Co. v. Zerwick*, 74 id. 670; *Chicago &c. R. Co. v. Fell*, 79 id. 376; *Lake Shore &c. R. Co. v. Elgert*, 19 Oh. C. C. 177; *Cottrell v. Southern R. Co.*, (Miss.) 32 South Rep. 1; *Chicago &c. R. Co. v. Beaver*, 96 Ill. App. 558; *Chicago &c. R. Co. v. Argo*, 82 id. 667; *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Dull v. Cleveland &c. R. Co.*, 21 id. 571; *Romeo v. Boston &c. R. Co.*, 87 Me. 540; *Prewitt v. Missouri &c. R. Co.*, 134 Mo. 615; *Driver v. Atchison &c. R. Co.*, 59 Kan. 773; *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60; *Washington &c. R. Co. v. Lacey*, 94 Va. 460; *Brown v. Chicago &c. R. Co.*, 109 Wis. 384.

Prohibited rate of speed held to be the proximate cause of injury, though defendant's gates were lowered and the proper signals given and the electric car in which plaintiff was riding, failed to stop but crashed through the gates and on to the track. *Chicago &c. R. Co. v. Mochell*, 193 Ill. 208; aff'g s. c., 96 Ill. App. 178.

See, also, *Chicago &c. R. Co. v. Hines*, 183 Ill. 482.

Actual collision is not necessary, where the violation of the statutory rate of speed was the proximate cause of the injury. *Illinois C. R. Co. v. Crawford*, 68 Ill. App. 355; s. c., aff'd, 169 Ill. 554.

A statute, regulating speed of freight locomotives and cars, construed

to apply to detached engine. *East St. Louis &c. R. Co. v. Reames*, 173 Ill. 582.

Evidence that a crossing was in a thickly populated portion of the place was admissible on the question of negligence in going at excessive speed. *Overtoom v. Chicago &c. R. Co.*, 181 Ill. 323.

But a train is not bound to slacken its speed at a crossing not in a town or a city. *Louisville &c. R. Co. v. Pirschbacher*, 63 Ill. App. 144.

Railroad company was negligent in running its trains over a crossing above 20 miles an hour, where there was a flagman but no gates. *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487.

A speed of twenty-five miles per hour through an unincorporated village is not *per se* negligent. *Garland v. Chicago &c. R. Co.*, 8 Ill. App. 571.

Even an intentional violation of an ordinance as to speed does not constitute willfulness or wantonness. *Jelinski v. Belt R. Co.*, 86 Ill. App. 535.

A company may be negligent though running at a speed permitted by ordinance. *Chicago &c. R. Co. v. Dougherty*, 12 Ill. App. 181.

*Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35.

Horse frightened by train running at unlawful speed, ran away; recovery allowed. *Chicago &c. R. Co. v. People &c.*, 120 Ill. 667.

Rate of speed should be adapted to danger of crossing. *Chicago &c. R. Co. v. Dillon*, 123 Ill. 570.

*Gugenheim v. Lake Shore &c. R. Co.*, 9 West. R. (Mich.) 903; *Wabash &c. R. Co. v. Henks*, 91 Ill. 406; *Meyer v. Midland &c. R. Co.*, 2 Neb. 319.

In the absence of municipal ordinance there is no regulation as to speed beyond the common law degree of reasonableness. *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616.

Railroad does not *per se* perform its duty where it runs 40 miles an hour, without signal, through a town of 1,100 inhabitants, where the view is partially obstructed. *Pratt v. Chicago &c. R. Co.*, 98 Iowa, 563.

Trains must not run at such a speed as to overcome the effect of its signals as a warning. *Louisville &c. R. Co. v. Clark*, 105 Ky. 571.

That the day is not bright and the wind is high does not require slackening of speed. *Vincent v. Morgan's L. R. &c. Co.*, 48 La. Ann. 933.

It has been held grossly negligent to run an engine at 15 or 16 miles an hour past a city crossing, without keeping a lookout ahead; especially where other trains partially drowned and shut off the noise of its bell. *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434.

Jury decided question of negligence when train ran forty miles an hour. *Marcott v. Marquette &c. R. Co.*, 47 Mich. 1.

Wabash &c. R. Co. v. Hicks, 13 Ill. App. 407; P. D. & E. R. Co. v. Miller, 11 id. 377; Reading &c. R. Co. v. Ritchie, 102 Pa. St. 425.

Aside from statutory or municipal regulation, no rate of speed is negligent *per se*. *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80.

*Maher v. R. Co.*, 64 Mo. 267; *Wallace v. R. Co.*, 74 id. 594; *Young v. Hannibal &c. R. Co.*, 79 id. 336; *Frick v. St. Louis &c. R. Co.*, 75 id. 594; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *L. & N. R. Co. v. Milam*, 9 Lea, (Tenn.) 223; *McKonkey v. Chicago &c. R. Co.*, 40 Iowa, 205; *Wasson v. McCook*, 80 Mo. App. 483.

A requested charge, that the jury should not find for the plaintiff unless, in addition to its violation of the ordinance as to speed, it found that it could have stopped in time to avoid injury after discovering deceased, had it been going at a proper rate, held correct. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Not liable for damages to boy sucked under train running at prohibited rate of speed, unless reasonably prudent man would have known that that result would follow such violation of the ordinance. *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666.

An ordinance rate of six miles per hour for agricultural districts held unreasonable. *Zumault v. Kansas City &c. Air Line*, 71 Mo. App. 670.

Speed alone not sufficient ground on which to allege negligence. *B. & M. R. Co. v. Wendt*, 12 Neb. 76.

*Artz v. Chicago &c. R. Co.*, 44 Iowa, 284; *Terre Haute &c. R. Co. v. Clark*, 73 Ind. 168.

No rate is negligence *per se* outside of cities, towns, or villages, however great. *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553; *Omaha &c. R. Co. v. Talbot*, id. 627; *Lake Shore &c. R. Co. v. Schade*, 57 Oh. St. 650.

Instruction that train approaching crossing should be under control, erroneous. *Cohen v. Eureka &c. R. Co.*, 14 Nev. 376.

*Telfer v. Northern R. Co.*, 30 N. J. L. 188; *Madison &c. R. Co. v. Taffe*, 37 Ind. 365, and also, *Lafayette &c. R. Co. v. Adams*, 26 id. 76; *Chicago &c. R. Co. v. Robinson*, 9 Ill. App. 89.

An instruction stating that the question of negligences depends upon whether a prudent person would have run at the speed complained of, under the circumstances, held proper. *Davis v. Concord &c. R. Co.*, 68 N. H. 247.

Unlawful speed evidence of negligence. *Clark v. Boston &c. R. Co.*, 5 N. Eng. R. (N. H.) 48.

*Nutter v. Boston &c. R. Co.*, 60 N. H. 483.

Held gross negligence *per se* to run 20 miles an hour in violation of an ordinance, without signals, and at a much frequented crossing, where the view is obstructed. *Norton v. North Carolina R. Co.*, 122 N. C. 910.

Where the evidence as to the speed of a train is in conflict, the question of plaintiff's negligence must go to the jury. *Frazier v. Southern R. Co.*, 130 N. C. 355.

An engineer is not bound to anticipate that persons at or near the crossing will attempt to cross in front of him. *New York &c. R. Co. v. Kister*, 16 Oh. C. C. 316.

The rate of speed in approaching a crossing must be such as to keep the train in control and enable it to be stopped within a distance sufficient to avert an accident reasonably to be apprehended. *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106.

Sixty miles an hour in an open and sparsely settled country is not *per se* negligence. *Eply v. Lehigh Valley R. Co.*, 3 Pa. Super. Ct. 509.

See, also, *Carman v. Central R. &c.*, 10 Kulp, 87.

Excessive speed, when accompanied with proportionate care does not make a case for the jury. *Custer v. Baltimore &c. R. Co.*, 19 Pa. Super. Ct. 365.

Question of negligence in making a flying switch at the speed of twenty miles an hour is for the jury. *Lehigh &c. Co. v. Lear*, 8 Central R. (Pa.) 107.

Whether a given rate of speed is negligent, is for the jury. *Kirby v. Southern R. Co.*, 63 S. C. 494.

A charge that violation of ordinance in respect to speed or signals would be negligence without pointing out, that, to be actionable, it must have caused the injury complained of, held reversible error. *Missouri &c. R. Co. v. Cardena*, 22 Tex. Civ. App. 300.

See, also, *Chicago &c. R. Co. v. Kennedy*, 2 Kan. App. 693; *Pedigo v. Louisville &c. R. Co.*, (Ky.) 68 S. W. Rep. 462; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Evansville &c. R. Co. v. Welch*, 25 Ind. App. 308.

Running flat cars over city street crossing at night, without light, signal, or warning at prohibited speed, held negligence. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 56 S. W. Rep. 248.

As, in the absence of ordinance, the law does not prescribe a particular rate, it was held error to refuse to charge that a certain rate was not negligence *per se*. *Texas &c. R. Co. v. Short*, (Tex. Civ. App.) 58 S. W. Rep. 56.

Speed should not be so great as to render unavailing the warning of whistle and bell. *Continental &c. Co. v. Stead*, 95 U. S. 161.

Forty miles an hour through a thinly settled country beyond the limits of cities or villages was not negligence. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

Ten miles an hour is not negligence, where it was safe and the law permitted fifteen. *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23.



Forty miles an hour at a country crossing is not negligence *per se* in the absence of statutory regulation. *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157.

Intentional violation of speed ordinance is not such willful negligence as to forfeit the defense of contributory negligence. *Brown v. Chicago &c. R. Co.*, 109 Wis. 384.

(b). CONTRIBUTORY NEGLIGENCE.

While a person approaching a crossing is bound to make all reasonable efforts to see that a careful, prudent man would make in like circumstances, *his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal.*

Plaintiff was going south from her home upon the highway, which crossed the tracks of said road at a station located south of the tracks. As she approached the crossing, a train going east on the south track stopped at the station; its cars reached across the highway, leaving no room to pass. She stopped for awhile, and then proceeded; she stopped again as she reached the north track; just then the train started up. She testified that as she came up to the track, she looked both ways "along the track, and saw no engine," except that of the train at the station. She took a step or two to cross, and as she did so, saw a train coming from the east on the north track, but so close that she could not escape, and she was struck by it and injured. This occurred in what seemed to the witness, not more than a few seconds after she had looked up and down the track. The trains did not usually meet at the station, but the one going east was behind time. Plaintiff testified, that if she had looked earlier, she might have seen the train, but did not think there was any need of looking more than once, and did not think there was any other train due at that time; that she had looked a few seconds before, and then went on. The engine at the station was blowing off steam, and she did not hear any bell or whistle from the approaching train. This, there was testimony tending to show, *was running at a dangerous rate of speed.*

The question of contributory negligence was properly submitted to the jury. *Greony v. L. I. R. Co.*, 101 N. Y. 419, aff'g judg't for pl'ff.

That a train is running at prohibited speed does not absolve a traveler from using proper caution in approaching the place of danger. *Collins v. New York &c. R. Co.*, 92 Hun. 563.

Contributory negligence is a defense in an action for damages due to violation of statute regulating speed. *Jelinski v. Belt R. Co.*, 86 Ill. App. 535.

See, also, *Shirk v. Wabash R. Co.*, 14 Ind. App. 126; *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179; *Reidel v. Philadelphia &c. R. Co.*, 87 Md. 153; *Stahl v. Lake Shore &c. R. Co.*, 117 Mich. 273; *Payne v. Chicago &c. R. Co.*, 136 Mo. 562; *Schneider v. Chicago &c. R. Co.*, 99 Wis. 378.

Excessive speed did not make defendant liable where deceased crossed directly in front of the train without looking. *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208.

See, also, *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Chase v. Maine C. R. Co.*, 167 Mass. 383; *Peterson v. St. Louis &c. R. Co.*, 156 Mo. 552; *Pugh v. Illinois C. R. Co.*, (Miss.) 23 South Rep. 356.

Or where plaintiff saw the train in time but deliberately went on in front of it. *Lake Erie &c. R. Co. v. Pence*, 24 Ind. App. 12.

That those in charge of the street car, in which plaintiff was riding were negligent, was no defense to negligence in running at a prohibited rate of speed. *Chicago &c. R. Co. v. Hines*, 82 Ill. App. 488.

A traveler may assume that a train will not run at a forbidden speed. *Hart v. Devereux*, 41 Oh. St. 565.

*Meek v. Penn. Co.*, 38 Ohio St. 632; see, however, *Calligan v. N. Y. &c. R. Co.*, 59 N. Y. 651.

Unlawful speed was no defense to negligence in either failing to keep a lookout for the train or in driving heedlessly in front of it. *Vant v. Chicago &c. R. Co.*, 101 Wis. 363.

#### IV. Signals.

##### (a). NEGLIGENCE.

It is negligence *per se* to omit signals or other precautions required by statute to be given or employed at the crossing of an authorized public road or street by a railway. In the State of New York the statutory requirement as to signals does not now exist.

Evidence of the absence of statutory signals at public streets permits the jury to impute negligence, and so the running of an engine across frequented thoroughfares, as the streets of a village, by the fireman alone. *O'Mara v. H. R. R. Co.*, 38 N. Y. 445, affirming 18 Hun, 192, and judg't for pl'ff.

The railway company is bound to give only such signals at a crossing as the statute requires; not to give such signals under such circumstances that they may be heard. *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 34.

The duty to give signals when approaching a highway crossing does not extend to one not on a highway but walking on the track. The person stepped from one track to another in front of a moving train without looking, and it was then too late for signals. The defendant was not

negligent and the plaintiff was. *Harty v. Central R. Co. of N. J.*, 42 N. Y. 468.

See *People v. N. Y. C. R. R. Co.*, 25 Barb. 199.

It is negligence *per se* to omit statutory signals where railway crosses a traveled public road or a street, but omission to give signals to warn persons *elsewhere* on the track is for the jury. *Cordell v. N. Y. C. & H. R. R. Co.*, 64 N. Y. 535, reversing 6 Hun, 461, and judg't for pl'ff.

*Benwick v. N. Y. Cent. R. Co.*, 36 N. Y. 132; *Gorton v. Erie R. Co.*, 45 id. 660.

Signals are required at crossings not only to protect travelers from collisions, but also from danger arising *from the fright of horses by passing trains*. If the plaintiff, by the defendant's negligence, is placed in danger, she is required to do only the best she can to avoid injury. The rule was applied, where a woman was driving and was injured by the horses becoming scared off the highway three rods from the crossing and turning around. *Voak v. N. Y. C. & H. R. R. Co.*, 75 N. Y. 320.

Under Railway Act, signals are only required to be given at a *public traveled road*, hence they are not required at crossing of *untraveled part of an alley*. *Byrne v. N. Y. C. & H. R. R. Co.*, 94 N. Y. 12, reversing 28 Hun, 438, and judg't for pl'ff; s. c., 14 id. 322.

Where, in an action to recover damages for injuries received at a crossing through a collision with one of defendant's trains, the contention upon the part of defendant was, that the place at which the accident occurred was not a public highway, but a private crossing, to which said provision of the act of 1854 did not apply, and the court, in its charge, assumed, as matter of law, the existence of the duty, and submitted to the jury the question as to its performance, and defendant's counsel, while excepting to the charge, did not present the question as to the repeal of the provision, but conceded it was in force and only denied its application to the case, held, that it could not be presented as a ground of reversal on appeal. *Lewis v. N. Y., L. E. & W. R. Co.*, 123 N. Y. 496, aff'g judg't for pl'ff.

Plaintiff did not claim on the trial any liability on defendant's part because of a failure to ring the bell or blow the whistle on the approaching train, but the ground of liability was the alleged mismanagement of the gates. Before the trial the provision of the act of 1854 (sec. 7, chap. 282, Laws of 1854), requiring the bell to be rung or whistle sounded upon a locomotive, approaching a highway crossing had been repealed. Chap. 593, L. of 1886. Defendant's counsel requested the court to charge that it was not bound as matter of law to ring the bell or blow the whistle. This request was refused. Held, no error, as it had no bearing upon the issue. *Kane v. N. H. & H. R. Co.*, 132 N. Y. 160, aff'g judg't for pl'ff.

In the absence of a statute imposing upon a railroad company the duty of giving signals, when approaching a crossing, the failure to do so is not *per se* negligence.

Section 39, chap. 140, Laws 1850; sec. 7, chap. 282, Laws 1854, imposing duty to give signal, when approaching crossing, having been repealed (chap. 593, Laws of 1886), sec. 421 of the Penal Code,\* that the engineer of a locomotive, who fails to ring a bell or sound a whistle eighty yards from the crossing, should be guilty of a misdemeanor imposes no duty upon the company. Nevertheless, the failure to give such signals may be considered upon the question of the defendant's negligence in approaching the crossing, with the care and caution, which a railroad company owes to the public.

A person was killed at a farm crossing. It was claimed that this happened because the defendant did not give its usual signals for the highway crossing beyond, and the court erroneously charged that if the accident arose from failure to give such signals for the highway the defendant was liable. *Vanderwater v. N. Y. C. & H. R. R. Co.*, 135 N. Y. 583, reversing 63 Hun, 186, and judg't for pl'ff.

From opinion.—“Of course the companies still owe a duty to the public at such crossings, as elsewhere. That duty is to run their trains with care and caution, and when they cross such roads, it may well be, that the failure to give due warning by whistle or bell, or in some other way, would be held under all the circumstances, to be a failure to manage and run their trains with proper care and caution, for which they would be liable to a party injured, if otherwise entitled to recover. Even when compelled by statute to make such signals, it is not necessarily a defense in all cases to prove that they were made. The making of the signals is the least the company can do, and in a given case it might not be enough. *Harty v. Railroad*, 42 N. Y. 468; *Thompson v. Central Hudson R. R. Co.*, 110 id. 636.”

Charge was correct that, although signals for crossing were not given for the whole distance, required by the statute, yet, the defendant was not liable, if they were given for such distance as fully and fairly to give a traveler sufficient warning. *Cook v. N. Y. C. R. Co.*, 5 Lansing, 401.

Citing *Havens v. Erie R. Co.*, 41 N. Y. 296.

Judgment reversed on the ground that the trial judge gave the jury the impression, that more than statutory signals, were required under

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\*NOTE.—*Penal Code*, “Section 421. A person acting as engineer, driving a locomotive on any railway in this state, who fails to ring the bell, or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities) or to continue the ringing of the bell or sounding such whistle at intervals, until such locomotive and the train to which the locomotive is attached shall have completely crossed such road or street, or any officer or employé of a corporation who shall willfully obstruct, or cause to be obstructed, any farm or highway crossing with any locomotive or car for a longer period than five consecutive minutes, is guilty of a misdemeanor.” (Chap. 358, Laws of N. Y. 1891.)

was rung does not, in itself, establish the fact that the company used reasonable care.

It may be an insufficient defense to such an action to prove compliance with the statutory regulations respecting signals. The giving of such signals does not, under all circumstances, relieve a railroad company from the imputation of negligence. It is bound to use ordinary precautions to avoid collisions.

Upon the trial of such an action proof was given that it was the custom of the railroad company to give warning of trains approaching the crossing, and it could be assumed that the plaintiff's intestate was familiar with such custom.

Held, that evidence that such custom was not followed at the time of the accident was admissible. *Vandewater v. The New York & New England Railroad Company*, 74 Hun, 32.

While there is no longer any statutory requirement that signals by bells or whistle shall be sounded at crossings, railroads are not absolved from all obligation to exercise care and caution at such places and a negligent disregard of that duty may constitute negligence. *Durkee v. Delaware &c. Canal Co.*, 88 Hun, 471.

Where plaintiff's foot was caught in the track so that it could not be gotten out in time, failure to signal train's approach did not permit recovery, as it could not have prevented injury. *Bosco v. Delaware &c. R. Co.*, 91 Hun, 320.

A railroad company is bound to give reasonable warning of the approach of trains to the crossing. *Hickey v. New York &c. R. Co.*, 8 App. Div. 123; *Bailey v. Jourdan*, 18 App. Div. 387.

The warning necessary must be commensurate with the speed, which may be at any rate in the open country, in the absence of special circumstances. *Hunt v. Fitchburg R. Co.*, 22 App. Div. 212.

The question of negligence of an engineer in failing to ring a bell, or whistle, was for the jury, where he knew or ought to have known that the gates remained up when they were usually down. *Edgerley v. Long Island R. Co.*, 46 App. Div. 284.

Negligence and contributory negligence were for the jury where a switching engine suddenly reversed and recrossed a crossing without warning and hit a pedestrian who crossed without looking, after waiting for it to pass. *Berkery v. Erie R. Co.*, 55 App. Div. 489.

Negligence is for the jury where no warning is given at a very dangerous crossing. *Haupt v. New York &c. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594.

Failure to give statutory signals constitutes actionable negligence. *Chicago &c. R. Co. v. Boggs*, 101 Ind. 522.

*Pittsburg &c. R. Co. v. Martin*, 82 Ind. 476; *Cincinnati &c. R. Co. v. Hiltzhauer*, 99 id. 486; *Penn. R. Co. v. Ogier*, 35 Pa. St. 72; *H. & T. &c. R. Co. v. Wilson*, 60 Tex. 142; *R. Co. v. Rice*, 10 Kas. 426; *R. Co. v. Phillipi*, 20 id. 12; *R. Co. v. Wilson*, 28 id. 639. See, however, *Galena &c. R. Co. v. Dill*, 22 Ill. 264; *Bellefontaine R. Co. v. Hunter*, 33 Ind. 335; *Leavenworth &c. R. Co. v. Rice*, 10 Kas. 426; *Chicago &c. R. Co. v. Miller*, 46 Mich. 532; *Bowen v. Gainesville &c. R. Co.*, 95 Ga. 688; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173; *Hunter v. Montana C. R. Co.*, 22 Mont. 525; *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553; *Hutto v. South Bound R. Co.*, 61 S. C. 495; *Davis v. Atlanta &c. R. Co.*, 63 id. 370; *Texas &c. R. Co. v. Brown*, 11 Tex. Civ. App. 503; *Houston &c. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; *Washington &c. R. Co. v. Lacey*, 94 Va. 460; *Suburban R. Co. v. Balkwill*, 195 Ill. 535; aff'g s. c., 94 Ill. App. 454.

Failure to give customary signals is negligence. *Pittsburg &c. R. Co. v. Yundt*, 78 Ind. 37.

*Indianapolis &c. R. Co. v. Hamilton*, 44 Ind. 76; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Bradley v. Boston &c. R. Co.*, 2 Cush. 539; *Linfield v. Old Colony &c. R. Co.*, 10 id. 562; *Webb v. Portland &c. R. Co.*, 57 Me. 117; *Indianapolis &c. R. Co. v. McLin*, 82 Ind. 435; *St. Louis &c. R. Co. v. Dunn*, 78 Ill. 197.

Although not required by statute, signals should be given at crossings. *Loucks v. Chicago &c. R. Co.*, 31 Minn. 526.

*Philadelphia &c. R. Co. v. Stinger*, 78 Pa. St. 219; *Philadelphia &c. R. Co. v. Hagan*, 47 id. 244; *L. & N. R. Co. v. Commonwealth*, 13 Bush. (Ky.) 388; *Roberts v. C. & N. W. R. Co.*, 35 Wis. 679; *Louisville &c. R. Co. v. Ward*, (Ky.) 44 S. W. Rep. 1112; *Louisville &c. R. Co. v. Lyon*, (Ky.) 58 S. W. Rep. 434; *Willett v. Michigan C. R. Co.*, 114 Mich. 411; *Croft v. Chicago &c. R. Co.*, 72 Minn. 47; *Chesapeake &c. R. Co. v. Steele*, 84 Fed. Rep. 93. See, however, *Brown v. Milwaukee &c. R. Co.*, 22 Minn. 165; *Philadelphia &c. R. Co. v. Killips*, 88 Pa. St. 405.

Signals which reasonable precaution requires should be given. *Bradley v. Boston &c. R. Co.*, 2 Cush. 539.

*McCully v. Clark*, 40 Pa. St. 399; *Philadelphia &c. R. Co. v. Killips*, 88 id. 405; *Penn. R. Co. v. Krick*, 47 Ind. 368; *Aurelius v. Lake Erie &c. R. Co.*, 19 Ind. App. 584; *Missouri P. R. Co. v. Moffat*, 56 Kan. 667; *Smith v. Maine C. R. Co.*, 87 Me. 339; *Faust v. Philadelphia &c. R. Co.*, 191 Pa. St. 420; *Houston &c. R. Co. v. Pereira*, (Tex. Civ. App.) 45 S. W. Rep. 767; *Chesapeake &c. R. Co. v. Steele*, 84 Fed. Rep. 93.

No liability unless injuries be attributable to failure to give signals. *R. Co. v. Morgan*, 31 Kas. 77.

*Chicago &c. R. Co. v. Robinson*, 106 Ill. 142; *Toledo &c. R. Co. v. Jones*, 76 id. 311; *Chicago &c. R. Co. v. Harwood*, 90 id. 425; *Georgia &c. R. Co. v. Cook*, 114 Ga. 760; *Missouri P. R. Co. v. Geist*, 49 Neb. 489; *Omaha &c. R. Co. v. Talbot*, 48 id. 627; *Stolz v. Baltimore &c. R. Co.*, 7 Oh. Dec. 435; *Cincinnati &c. R. Co. v. Murphy*, 18 Oh. C. C. 298; *Central &c. R. Co. v. Nycimm*, (Tex. Civ. App.) 34 S. W. Rep. 460; *Houston &c. R. Co. v. Malone*, 37 id. 640; *Galveston &c. R. Co. v. Dyer*, 46 id. 841.

Failure to give statutory signals is negligence *per se* and raises a pre-

sumption that it caused the accident. *Strother v. South Carolina &c. R. Co.*, 47 S. C. 375.

Failure to observe ordinance requiring ringing of bell and stationing a man on top of car, renders company liable for death of child caused by such failure, and negligence of deceased is no excuse. *Bergman v. St. Louis &c. R. Co.*, 4 West. (Mo.) 594; *Eckert v. St. Louis &c. R. Co.*, id. 596; *Donohue v. St. Louis &c. R. Co.*, 6 West. 848; *Karle v. Kansas &c. R. Co.*, 55 Mo. 476; *Meyers v. Chicago &c. R. Co.*, 59 id. 223; *Whalen v. St. Louis &c. R. Co.*, 60 id. 323; *Harlan v. St. Louis &c. R. Co.*, 65 id. 22; *Yarnall v. St. Louis &c. R. Co.*, 75 id. 575; *Duffy v. Mo. Pac. R. Co.*, 19 Mo. App. 380; *Keim v. Union R. Co.*, 90 Mo. 314.

When reasonable and customary signals of its approach are not given by defendant's train, contributory negligence will not avail it. *B. & O. R. Co. v. State &c.*, 33 Md. 542.

*B. & O. R. Co. v. State &c.*, 36 Md. 366; *Richmond &c. R. Co. v. Anderson*, 31 Grattan, (Va.) 812.

Gate was up and the train approached without giving statutory signals. Plaintiff drove down the track to avoid collision. Liability was the same as if the accident had occurred at the crossing. *Bishop v. Southern R. Co.*, 63 S. C. 532.

Omission to give signals in a city is not negligence if the statute excepts cities from such requirement. *Missouri Pac. R. Co. v. Pierce*, 33 Kas. 61.

Statute requiring signals enacted for protection of travelers along a parallel road as well as for those crossing track. *Ranson v. Chicago &c. R. Co.*, 62 Wis. 178.

*People v. N. Y. &c. R. Co.*, 25 Barb. 199; *Wakefield v. C. & P. &c. R. Co.*, 37 Vt. 330; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259. See, however, *East Tennessee &c. R. Co. v. Feathers*, 10 Lea, (Tenn.) 103; *Louisville &c. R. Co. v. Smith*, (Ky.) 53 S. W. Rep. 269.

But not for one using the track as a foot path. *Huff v. Chesapeake &c. R. Co.*, 48 W. Va. 45.

*Louisville &c. R. Co. v. Vittitoe*, (Ky.) 41 S. W. Rep. 269; *Baltimore &c. R. Co. v. Bradford*, 20 Ind. App. 348; *Boyd v. Cross*, 19 Tex. Civ. App. 426; *Schug v. Chicago &c. R. Co.*, 102 Wis. 515.

One on adjacent premises has a right to rely on the usual signals at crossings. *Louisville &c. R. Co. v. Penrod*, (Ky.) 56 S. W. Rep. 1.

One who is driving along parallel to the track held not entitled to rely on statutory signals at crossings. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

Evidence that signals were omitted until immediately before a col-

lision and then given, scaring horses, for the jury. *Philadelphia &c. R. Co. v. Hogeland*, 66 Md. 149.

As to whether violation of a signal ordinance is willful negligence. *Chicago &c. R. Co. v. Murowski*, 179 Ill. 77; aff'g s. c., 78 Ill. App. 661.

Ordinance requiring constant ringing of bells on moving engines within city limits is valid, notwithstanding the fact that it is more onerous than a state statute on the subject. *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297.

A statute prescribing signals at "at least" 80 rods before reaching a crossing construed not to require them "within" that distance. *Houston &c. R. Co. v. O'Neal*, 91 Tex. 671; rev'g s. c., 45 S. W. Rep. 921; *Texas &c. R. Co. v. Scriviner*, (Tex. Civ. App.) 49 S. W. Rep. 649.

So where the engine starts within that distance. *Houston &c. R. Co. v. Patterson*, 20 Tex. Civ. App. 255.

The statutory requirement for the giving of signals and the maintenance of lookouts applies to trains while going by a station or depot grounds. *Mobile &c. R. Co. v. House*, 96 Tenn. 552.

A statute requiring signals at "any public road or street" construed to cover city street crossings. *International &c. N. R. Co. v. Dalwigh*, (Tex. Civ. App.) 48 S. W. Rep. 527; s. c. rev'd on another point, (Tex.) 51 S. W. Rep. 500.

And *de facto* public road crossings. *Galveston &c. R. Co. v. Eaton*, (Tex. Civ. App.) 44 S. W. Rep. 562.

See, also, *Bradley v. Ohio River &c. R. Co.*, 126 N. C. 735.

But does not include an overhead crossing. *Houston &c. R. Co. v. Sgalinski*, 19 Tex. Civ. App. 107.

See, also, *McElroy v. Georgia &c. R. Co.*, 98 Ga. 257; *Cleveland &c. R. Co. v. Halbert*, 179 Ill. 196; rev'g s. c., 75 Ill. App. 592; *Skinner v. New York &c. R. Co.*, 64 N. Y. St. Rep. 325.

The statutory requirements as to signals are intended for the benefit of cattle as well as travelers. *Graybill v. Chicago &c. R. Co.*, (Iowa) 84 N. W. Rep. 946.

*Houston &c. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

They do not apply, where a horse is 400 feet from the crossing when first seen. *Georgia &c. Co. v. Partee*, 107 Ga. 789.

Nor to animals on a crossing not reached from the highway. *Wasson v. McCook*, 80 Mo. App. 483.

Or on the right of way beyond the crossing. *Mills &c. Lumber Co. v. Chicago &c. R. Co.*, 94 Wis. 336.

Recovery is allowed where signals would have prevented the accident. *Downing v. Missouri &c. R. Co.*, 70 Mo. App. 657.



*Kirkpatrick v. Missouri &c. R. Co.*, 71 Mo. App. 263; *Milliga v. Chicago &c. R. Co.*, 79 id. 393.

Statutory requirement of signals at crossings of "any other road or street" construed not to apply to private roads. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

See, also, *Comer v. Shaw*, 98 Ga. 543.

Under Mill & V. (Tenn.) Code, an engineer is not required to signal at a crossing not designated by a sign erected by the road overseers. *Southern R. Co. v. Elder*, 81 Fed. Rep. 791.

Statutory requirement of continuous ringing of bell within 80 yards of a crossing, construed to apply to moving engines anywhere within that distance. *Herring v. Wabash R. Co.*, 80 Mo. App. 562.

But not in a switch yard, though common law may require it. *Lamb v. Missouri &c. R. Co.*, 147 Mo. 171.

But it applies while "kicking" cars. *Baltimore &c. R. Co. v. Wheeler*, 63 Ill. App. 193.

But not while actually passing a crossing. *Kirkpatrick v. Missouri &c. R. Co.*, 147 Mo. 171.

A statute requiring a train, standing within 100 rods from a crossing, to ring a bell 30 seconds before starting, construed to apply to a train standing over a crossing. *Littlejohn v. Richmond &c. R. Co.*, 45 S. C. 181.

Backing on the wrong track with insufficient light at excessive speed and without lookout was negligence. *Sullivan v. New York &c. R. Co.*, 73 Conn. 203.

See, also, *Stanley v. Durham &c. R. Co.*, 120 N. C. 514; *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1; *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640; *Illinois &c. R. Co. v. Mahan*, (Ky.) 34 S. W. Rep. 16; *Green v. Chicago &c. R. Co.*, 110 Mich. 648; *Rothars v. Illinois C. R. Co.*, (Miss.) 25 South. Rep. 665; *Penny v. Missouri &c. R. Co.*, 71 Mo. App. 577; *Purnell v. Raleigh*, 122 N. C. 832; *Dowd v. Delaware &c. R. Co.*, (Pa.) 52 Atl. Rep. 249; *Iron Mountain R. Co. v. Dies*, 98 Tenn. 655; *Malstrom v. Northern P. R. Co.*, 20 Wash. 195; *Steele v. Northern P. R. Co.*, 21 Wash. 287.

Defendant was negligent in backing flat cars at a rapid rate at night over a crossing, without light, signal or warning. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 56 S. W. Rep. 248.

It is negligent to run at night without a headlight. *Baltimore &c. R. Co. v. Alsop*, 71 Ill. App. 54.

A "switched" car is a "running" car within an ordinance requiring a brilliant and conspicuous light on its forward end. *Chicago &c. R. Co. v. O'Neil*, 64 Ill. App. 623.

It is negligent to back a long train over a crossing with only the bell ringing. *Missouri &c. R. Co. v. O'Connell*, (Tex. Civ. App.) 43 S. W. Rep. 66.

See, also, *Demaine v. Washington &c. R. Co.*, (Va.) 27 S. E. Rep. 437.

Defendant's negligence in closing, without warning, an opening between its cars a short distance from the crossing, where the crossing itself had been obstructed for a considerable length of time, was for the jury. *Golden v. Pennsylvania R. Co.*, 187 Pa. St. 635.

Recovery was permitted where deceased's view was obstructed and defendant failed to sound the proper statutory signals. *Simons v. Southern R. Co.*, 96 Va. 152.

Engineer was negligent in failing to signal at a much frequented crossing, where a train has just passed in the opposite direction. *Smeltz v. Pennsylvania R. Co.*, 186 Pa. St. 364.

See, also, *Grenell v. Michigan C. R. Co.*, 124 Mich. 141; *Galveston &c. R. Co. v. Harris*, 22 Tex. Civ. App. 16.

Warning should be given when a train is backing in the dark, when another train is passing at the same time in the same direction. *Chicago &c. R. Co. v. Walsh*, 157 Ill. 672.

See, also, *Crowley v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 434; *Downing v. Morgan's &c. R. Co.*, 104 La. 508.

The fact that a box car standing by the side of the crossing together with contiguous buildings prevent hearing the statutory signals when the wind is unfavorable, does require additional whistling. *Tessmer v. New York &c. R. Co.*, 72 Conn. 208.

Yelling and whistling from detached cars, to become a substitute for the locomotive signals, must not only be heard but known to be a warning. *Baker v. Kansas City &c. R. Co.*, 147 Mo. 140.

The object of the signal is to prevent teams approaching so near the crossing as to become frightened, as well as to prevent collision thereon. *Missouri &c. R. Co. v. Magee*, 92 Tex. 616; aff'g s. c., 49 S. W. Rep. 156.

A statute, requiring two sharp blasts is not satisfied by one long one. *Simons v. Southern R. Co.*, 96 Va. 152.

Testimony of passenger that he heard no whistle was contradicted by positive testimony of four of the train crew. A direction for defendant was sustained. *Knox v. Philadelphia &c. R. Co.*, (Pa. St.) 52 Atl. Rep. 90.

Failure to give the statutory signals was not negligence *per se* as to a person on the track 135 yards beyond the crossing. *Georgia R. &c. Co. v. Clary*, 103 Ga. 639.

Defendant was not excused from signaling though the person in danger be a child so young as to be unable to comprehend its meaning. *Palmer v. Missouri P. R. Co.*, 53 Neb. 611.

Miscarriage from fright at the sudden passing of a train, held the natural and probable consequence of failure to give signals. *St. Louis &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 891.

As to whether failure to signal justifies punitive damages, see *Louisville &c. R. Co. v. Cooper*, (Ky.) 65 S. W. Rep. 795.

(b). CONTRIBUTORY NEGLIGENCE.

Gross negligence in a person injured at a railroad crossing by a passing train will defeat his action for damages, notwithstanding the omission of those running the train to ring the bell or sound the steam whistle as required by law.

With his sense of hearing unobstructed, the plaintiff might have heard the train long before it approached the crossing, and in abundant season to avoid even the possibility of danger. If, for his own comfort and to protect himself against the cold, he had chosen in any degree to deprive himself of the ability to hear, he should have used his eyes so much the more. *Steves v. Syracuse R. Co.*, 18 N. Y. 422, aff'g nonsuit.

A train consisting of engine, tender, and nine cars, was backed on a dark night at the speed of four or five miles an hour, and was about to cross a street, used as a thoroughfare in a populous city, and the man in charge knew that there was no flagman at the crossing; the defendant gave evidence, that the bell sounded in the engine all the time and a man in the rear car swung a lantern to warn plaintiff; on the next west parallel track was a train of nine cars extending to the crossing. Plaintiff saw no lights and heard no signals. Judgment for plaintiff reversed on the charge that "considering the nature of the business in which the defendant was engaged and the hazard attending the running of cars in the streets of a city, and particularly on a dark night, the defendant was bound to exercise the utmost care and diligence, and to use all the means and measures of precaution which the highest prudence could suggest and which it was in its power to employ." (*Johnson v. H. R. R. Co.*, 20 N. Y. 65, distinguished and limited.) *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451, rev'g judg't for pl'ff; s. c., 67 N. Y. 587, where judgment for plaintiff was sustained.

If no statutory signals be given at a crossing, the defendant is negligent. If a traveler stop four or five rods from the crossing to look and listen, and, not hearing a train, goes on, he is not *per se* negligent. Negative testimony, as to the hearing of signals may have the force of positive evidence. *Renwick v. N. Y. C. R. R. Co.*, 36 N. Y. 132.

In an action for injuries to the plaintiff, caused by the alleged negligence of the defendant, a railroad company, in running its trains against the plaintiff's wagon at a crossing, a refusal to charge, that the plaintiff was not relieved from the duty of exercising ordinary prudence in approaching the crossing by the omission of the defendants to give the

required signal on approaching such crossing, was error. *Baxter v. Troy & Boston R. Co.*, 41 N. Y. 502, rev'g judg't for pl'ff.

A man driving rapidly, was killed while approaching a crossing in a storm, where he could usually see the train. No signals were given. For the jury. *Rackford v. N. Y. C. & H. R. R. R. Co.*, 53 N. Y. 634; 6 Lansing, 381.

If a person see an engine and know, in time to avoid it that it is approaching a crossing, the railroad company is not liable for negligence because no signal was given and the usual flagman was absent. The plaintiff, on a dark night, caught his feet between the rail and the plank-ing and the train overtook him. The defendant was held not liable, as a matter of law, but the question of contributory negligence was properly submitted to the jury, who found for plaintiff. *Pakalinsky v. N. Y. C. & H. R. R. R. Co.*, 82 N. Y. 424.

While a person approaching a crossing is bound to make all reasonable efforts to see, that a careful, prudent man would make in like circumstances, his failure to see an approaching train does not of itself discharge the company from liability for negligence on its part in omitting the statutory signal. *Greany v. L. I. R. Co.*, 101 N. Y. 419.

The plaintiff's intestate, an old lady, was crossing six tracks, and she had time to see. The nonsuit was reversed on the ground that the number of tracks, noise of wind, smoke, steam, &c., may have confused her. No signals were given. *Sherry v. N. Y. C. & H. R. R. R. Co.*, 104 N. Y. 652, rev'g nonsuit.

*Wasmer v. Delaware &c. R. Co.*, 80 N. Y. 218; *Beisiegel v. Delaware &c. R. Co.*, 34 id. 622; *Greany v. Long Island R. Co.*, 101 id. 419.

Fact that signal was not given at crossing does not shift burden of proof, so that defendant must disprove that his negligence caused the injury. *Kelsey v. Jewett*, 28 Hun, 51.

Plaintiff, standing on the first track waiting to cross the second track occupied by a train moving away, was struck by a gravel train coming on the first track without signal. Brakeman on the gravel train called to plaintiff to get out of the way, but too late.

Contributory negligence for jury. Witness, who had timed trains, was properly allowed to estimate speed of train. *Northrup v. N. Y., O. & W. R. Co.*, 37 Hun, 295.

*Salter v. Utica &c. R. Co.*, 59 N. Y. 631.

Although the death of the plaintiffs' intestate was caused by a collision with a railway train at a highway crossing, and the defendant was guilty of negligence in failing to give sufficient signals, no inference arises therefrom that the deceased was free from contributory negligence. *Miller v. The New York &c. R. Co.*, 81 Hun, 152.

A bright girl of six crossed a city street crossing without looking; the engine which struck her was approaching without noise and without signal. For the jury. *Finn v. Delaware &c. R. Co.*, 42 App. Div. 524.

While plaintiff, a traveler, is not absolved from all care, she is entitled, where the track is obstructed by the trees and the way is new to her, to be warned of the danger in approaching a crossing. *Henn. v. Long Island R. Co.*, 51 App. Div. 292.

The night was cold and dark and the walk slippery at the crossing. The view in either direction was obstructed by trains on side tracks, one of which was moving with the usual noise incident thereto. The track in the direction from which the express came, without signals, made a sharp turn a short distance above. Plaintiff's negligence was a question for the jury. *Woodworth v. New York &c. R. Co.*, 55 App. Div. 23.

It was for the jury to say, whether plaintiff was negligent, where the view was unobstructed within 25 feet, the night was dark, the automatic gong was still, and the surroundings were noisy and no signals given. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

The fact that a traveler was not aware of the vicinity of an approaching train and that no signal was given, does not assure a safe crossing nor excuse him from using the care and vigilance otherwise due from him:

*Steves v. Oswego & S. R. Co.*, 18 N. Y. 42; *Wilds v. Hudson River Co.*, 24 id. 430; *Wilcox v. Rome & W. R. Co.*, 39 id. 358; *Beisiegel v. N. Y. C. & H. R. R. R. Co.*, 40 id. 9; *Baxter v. Troy & Boston R. Co.*, 41 id. 501; *Havens v. Erie R. Co.*, id. 296. The contrary was held in *Beisiegel v. N. Y. C. & H. R. R. R. Co.*, 34 id. 622; *Ernst v. Hudson R. Co.*, 35 id. 9; but see, s. c., 39 id. 66; *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576; *Watson v. Erie R. Co.*, 8 Oh. N. P. 18; *Miller v. Terre Haute &c. R. Co.*, 144 Ind. 323; *Chicago &c. R. Co. v. Reed*, (Ind. App.) 63 N. E. Rep. 878; *Western &c. R. Co. v. Kehoe*, 83 Md. 434; *Edwards v. Southern R. Co.*, 63 S. C. 271; *Chicago &c. R. Co. v. Pearson*, 82 Ill. App. 605; *Chicago &c. R. Co. v. Nichols*, 74 Ill. App. 197; *Cleveland &c. R. Co. v. Heine*, (Ind. App.) 62 N. E. Rep. 455; *Brinker v. Michigan &c. R. Co.*, 121 Mich. 283; *Gahagan v. Boston &c. R. Co.*, 70 N. H. 441; s. c., 55 L. R. A. 426; *Conkling v. Erie R. Co.*, 63 N. J. L. 338; *Phelps v. New England R. Co.*, 172 Mass. 98; *Judson v. Great Northern R. Co.*, 63 Minn. 248; *McManamee v. Missouri P. R. Co.*, 135 Mo. 440; *Hunter v. Montana C. R. Co.*, 22 Mont. 525; *Swanson v. Central R. &c.*, 63 N. J. L. 605; *Severy v. Chicago &c. R. Co.*, 6 Okla. 153; *Atlantic &c. R. Co. v. Reiger*, 95 Va. 418; *Berkeley v. Chesapeake &c. R. Co.*, 43 W. Va. 11; *Comer v. Shaw*, 98 Ga. 543; *Payne v. Chicago &c. R. Co.*, 108 Iowa, 188; *Walker v. Mercer*, 61 Kan. 736; *State v. Cumberland &c. R. Co.*, 87 Md. 183; *Hern v. New York &c. R. Co.*, 89 Md. 702; *Gilbertson v. Bangor &c. R. Co.*, 89 Me. 337; *Illinois C. R. Co. v. McLeod*, 78 Miss. 334; *Balser v. Chicago &c. R. Co.*, 7 Oh. N. P. 482; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Faust v. Philadelphia &c. R. Co.*, 191 Pa. St. 420; *Griffith v. Pennsylvania R. Co.*, 13 Lanc. L. Rev. 193; *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76; *Walters v. Chicago &c. R. Co.*, 104 Wis. 251.

Traveler may assume that no train is near, if he did not see, nor hear

one, nor hear the sound of a bell. *Donohue v. St. Louis &c. R. Co.*, 91 Mo. 357.

See, also, *Baltimore &c. R. Co. v. Conoyer*, 149 Ind. 524; *St. Louis &c. R. Co. v. Dawson*, (Kan.) 67 Pac. Rep. 521; *Hicks v. New York*, 164 Mass. 424; *Cleveland &c. R. Co. v. Halbert*, 75 Ill. App. 592; *Case v. Chicago &c. R. Co.*, 100 Iowa, 487; *Chicago &c. R. Co. v. Hinds*, 56 Kan. 758; *Kimball v. Friend*, 95 Va. 125; *Rangeley v. Southern R. Co.*, 95 Va. 715; *Pittsburg &c. R. Co. v. Lewis*, (Ky.) 38 S. W. Rep. 482; *Cleveland &c. R. Co. v. Heine*, (Ind. App.) 62 N. E. Rep. 455; *Malott v. Hawkins*, (Ind.) 63 N. E. Rep. 308.

Traveler may assume that usual and proper signals will be given by the railroad company. *Bunting v. Central Pac. R. Co.*, 14 Nev. 351.

See, also, *Harper v. Barnard*, 99 Iowa, 159; *Texas &c. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *Louisville &c. R. Co. v. Williams*, 20 Ind. App. 576; *Kansas City &c. R. Co.*, (Miss.) 32 South. Rep. 3; *Baltimore &c. R. Co. v. Wetmore*, 65 Ill. App. 292; *Hicks v. New York &c. R. Co.*, 164 Mass. 424; *Mayes v. Southern R. Co.*, 119 N. C. 758; *Russell v. Carolina C. R. Co.*, 118 N. C. 1098.

A traveler disregards a warning that a train is approaching at his own risk. *Granger v. Boston*, 146 Mass. 276.

*Wright v. Boston &c. R. Co.*, 129 Mass. 440; *Allyn v. Boston &c. R. Co.*, 105 id. 77; *Butterfield v. Western R. Co.*, 10 Allen 532; *Bancroft v. Boston &c. R. Co.*, 97 Mass. 275; *Burns v. Boston &c. R. Co.*, 101 id. 150; *Hinckley v. Cape May R. Co.*, 120 id. 257; *Shaw v. Boston &c. R. Co.*, 8 Gray 73; *Warren v. Fitchburgh R. Co.*, 8 Allen 227; *Commonwealth v. Fitchburg R. Co.*, 10 id. 189; *Hanson v. Pennsylvania R. Co.*, 62 N. J. L. 391; *Pennsylvania &c. R. Co. v. Morel*, 40 Oh. St. 338; *Galveston &c. R. Co. v. Haas*, 19 Tex. Civ. App. 645; *Gulf &c. R. Co. v. Abenroth*, (Tex. Civ. App.) 55 S. W. Rep. 1122; *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Herbert v. Southern P. Co.*, 121 Cal. 227; *Louisville &c. R. Co. v. Pirschbacher*, 63 Ill. App. 144; *Baltimore &c. R. Co. v. Musgrave*, 24 Ind. App. 295; *Pinney v. Missouri &c. R. Co.*, 71 Mo. App. 577; *Douglas v. Chicago &c. R. Co.*, 100 Wis. 405; *Comer v. Barfield*, 102 Ga. 485.

Plaintiff was allowed to recover, where, after listening, his view being obstructed, he started to cross but suddenly met cars backing without signal over the crossing and was injured in his attempt to escape by quickly driving around them. *Houston &c. R. Co. v. Pereira*, (Tex. Civ. App.) 45 S. W. Rep. 767.

Judgment reversed for admission of evidence of failure to signal where plaintiff saw the train and the signal would not have attracted her attention sooner if it had been given. *Ohio Valley R. Co. v. Young*, (Ky.) 39 S. W. Rep. 415.

### (c). WHAT SIGNALS SHOULD BE GIVEN.

Ringin bell is not a compliance with a statutory duty to keep look-out on rear of cars while switching. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Statute requiring one or two signals is satisfied if either is given. *St. Louis &c. R. Co. v. Pflugmacher*, 9 Ill. App. 300.

*I. C. R. Co. v. Burton*, 69 Ill. 174; *Hover v. Kansas City &c. R. Co.*, 69 Mo. App. 557.

Where the statute requires that a bell be rung or a whistle sounded as a signal, a bell must be substituted for the whistle upon seeing that the former is frightening horses. *Louisville &c. R. Co. v. Smith*, (Ky.) 53 S. W. Rep. 269.

Where a statute requires ringing of bell or sounding of whistle, defendant should have given both signals. *Cathcart v. Hannibal &c. R. Co.*, 19 Mo. App. 113.

*Turner v. Railroad Co.*, 78 Mo. 578; *Van Note v. Hannibal &c. R. Co.*, 70 Mo. 641.

Whether a signal by bell without a whistle is sufficient is for the jury to decide. *Longemecker v. Pennsylvania R. Co.*, 105 Pa. St. 328.

*Railroad Co. v. Stinger*, 28 P. F. Smith (Pa.) 219; *Pennsylvania R. Co. v. Coon*, 111 Pa. St. 430.

#### (d). WHEN SIGNALS SHOULD NOT BE GIVEN.

Although the required signals might scare a team on track, they should be given. *Schaefer v. Chicago &c. R. Co.*, 62 Iowa, 624.

When an animal is in a dangerous situation and liable to injury from fright from a train, company should use care. *Newman v. V. &c. R. Co.*, 64 Miss. 115.

See, also, *Ocheltree v. Chicago &c. R. Co.*, 96 Iowa, 246; *Ward v. Chicago &c. R. Co.*, 97 id. 50; *Pratt v. Chicago &c. R. Co.*, 107 id. 287; *Gulf &c. R. Co. v. Milner*, (Tex. Civ. App.) 66 S. W. Rep. 574; *Southern R. Co. v. Cooper*, 98 Va. 299.

An engineer was negligent in blowing his whistle beneath a highway bridge in constant use. *Mitchell v. Nashville &c. R. Co.*, 100 Tenn. 329; s. c., 40 L. R. A. 426.

Unnecessary and extraordinary use of whistle is negligence. *Philadelphia &c. R. Co. v. Killips*, 88 Pa. St. 405.

*Penn. R. Co. v. Barnett*, 9 P. F. Smith (Pa.) 239; *R. Co. v. Stinger*, 28 id. 219; *Gibbs v. Chicago &c. R. Co.*, 26 Minn. 427; *Billman v. Indianapolis &c. R. Co.*, 76 Ind. 166; *People v. N. Y. &c. R. Co.*, 25 Barb. 199; *Culp v. Atchison &c. R. Co.*, 17 Kas. 475; *Petersburgh &c. R. Co. v. Hite*, 81 Va. 767; *Rogers v. Baltimore &c. R. Co.*, 150 Ind. 397; *Chicago &c. R. Co. v. Parks*, 59 Kan. 709; *Louisville &c. R. Co. v. Shearer*, (Ky.) 59 S. W. Rep. 330; *Everett v. Richmond &c. R. Co.*, 121 N. C. 519; *Southern R. Co. v. Torian*, 95 Va. 453;

That a signal was required by statute did not excuse making it unnecessarily loud. *Beopple v. Illinois C. R. Co.*, 104 Tenn. 420.

That the unnecessary blowing was unintentional was no justification. *Weil v. St. Louis &c. R. Co.*, 64 Ark. 535.

Or that the necessity is one created by the rule of the company and not by statute. *Flynn v. Boston &c. R. Co.*, 169 Mass. 305.

(e). SIGN BOARDS.

Every railroad corporation shall cause boards to be placed, well supported and constantly maintained across each traveled public road or street, where the same is crossed by its road at grade. They shall be elevated so as not to obstruct travel, and to be easily seen by travelers; and on each side shall be painted in capital letters, each at least nine inches in length and of suitable width, the words "Railroad crossing; look out for the cars." But such boards need not be put up in cities and villages, unless required by the officers having charge of the streets. Chap. 565, N. Y. L. 1890.

Violation of statute requiring sign boards is negligence. *Lewis v. Long Island R. Co.*, 162 N. Y. 52; rev'g s. c., 32 App. Div. 627; *Henn v. Long Island R. Co.*, 51 App. Div. 292.

Plaintiff was sufficiently warned by the presence of a sign board, though not the statutory one, which could be read with the ordinary eye 400 feet away. *Wellbrock v. Long Island R. Co.*, 31 Misc. 424.

Railroad company held not relieved of liability at a crossing, recognized by it and travelers at large as public, by posting a sign that persons crossing do so at their own risk. *Chicago &c. R. Co. v. Reith*, 65 Ill. App. 461.

The Iowa Statute makes failure to erect caution boards negligence *per se*. *Field v. Chicago &c. R. Co.*, 14 Fed. Rep. 332.

Want of signal boards will not attach absolute liability where plaintiff's own negligence caused the injury. *Field v. Chicago &c. R. Co.*, 4 *McCrary*, 573.

*Chicago &c. R. Co. v. Robinson*, 8 Ill. App. 140; *Ormsbee v. Boston &c. R. Co.*, 14 R. I. 102; *Penn. R. Co. v. Righter*, 42 N. J. L. 180; *Telfer v. Northern R. Co.*, 1 Vroom. 188; *Haslan v. M. & E. R. Co.*, 4 id. 147; *Payne v. Chicago &c. R. Co.*, 44 Iowa 236; *Payne v. Chicago &c. R. Co.*, 39 id. 523; *Lang v. Holiday Creek R. Co.*, 49 id. 469.

Failure to erect caution board required by statute not actionable negligence, where the injured person was familiar with the crossing and had it in mind at the time. *Haas v. Grand Rapids &c. R. Co.*, 47 Mich. 401.

*Penn. R. Co. v. Beale*, 73 Pa. St. 504; *R. Co. v. Houston*, 95 U. S. 697; *Lake Shore &c. R. Co. v. Miller*, 25 Mich. 274. See, however, *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Telfer v. Northern R. Co.*, 30 N. J. L. 188; *New York &c. R. Co. v. Kistler*, 16 Oh. C. C. 316.



## (f). WHAT FURTHER CARE REQUIRED.

The giving of statutory signals does not always discharge a railroad company from negligence, as where a train is run with undue speed, or in other dangerous manner through a city or village.

Statutory signals for a crossing were not alone sufficient. *Dyer v. Erie R. Co.*, 71 N. Y. 228.

The ringing of a bell for a crossing was not, under the circumstances, conclusive of care. Defendant's negligence was for the jury. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, aff'g judg't for pl'ff.

The giving of statutory signals does not always discharge a railway company from negligence, as where a train was run at undue, improper and highly dangerous speed through a city or village. Question was for the jury. *Thompson v. N. Y. C. & H. R. R. Co.*, 110 N. Y. 636; reversing 31 Hun, 397. See same doctrine in *Harty v. Railroad Co.*, 42 N. Y. 468; *Vandewater v. N. Y. Central R. Co.*, 135 N. Y. 583.

A railroad company has not discharged its whole duty to the public, by simply causing the bell to be rung, or the whistle sounded for the distance required by statute, before crossing a street or highway, and particularly in populous cities and villages. *Zimmer v. N. Y. C. & H. R. R. Co.*, 7 Hun, 552, aff'g judg't for pl'ff.

The plaintiff's intestate, while crossing defendant's tracks, at their intersection with a street in the city of Rochester, on a dark night, was struck by an engine moving backwards, and killed. Upon the trial the justice charged, that it was for the jury to say, whether it was the duty of the company, under the circumstances, to have a light upon the engine, and, as it was moving backwards, upon the rear of it, and if so what kind of a light was required; and then said, "the company was bound to have so much light, and so located, that a person reasonably diligent, and of natural powers of observation, might have been able to discover it." Held, that the charge was correct.

The court also charged, that it was the duty of the engineer "to keep a look-out to see, whether he is running down foot-passengers, who are crossing the railroad track, upon the highways of the city." Held, no error. *Cheney v. N. Y. C. & H. R. R. Co.*, 16 Hun, 415, aff'g judg't for pl'ff.

Where an engine was propelled through a city street two hours after sundown, in the winter, without a headlight and without ringing a bell, the jury was justified in finding the company guilty of negligence. *Donovan v. L. I. R. Co.*, 67 Hun, 73, aff'g judg't for pl'ff.

Plaintiff's intestate was killed at a street crossing by defendant's locomotive engine running backwards at a rapid rate through a city at an early hour in the morning, while it was quite dark, without a light on

the rear end or signal of its approach. Defendant's negligence was for the jury. *Zoliewski v. N. Y. Cent. &c. R. R. Co.*, 1 Misc. 438.

Precaution necessary to be taken not wholly within the discretion of the jury. Statutory signals complied with, satisfy requirements. *Semi v. N. Y. &c. R. Co.*, 9 Daly, 321.

*Terre Haute &c. R. Co. v. Jones*, 11 Ill. App. 322; *Indianapolis &c. R. Co. v. Hamilton*, 44 Ind. 76.

Requirement of due warning satisfied if statutory signals be given. *Lake Shore &c. R. Co. v. Elson*, 15 Ill. App. 80.

*Peoria &c. R. Co. v. Berry*, 15 Ill. App. 155; *Chicago &c. R. Co. v. Dougherty*, 110 Ill. 521; *Chicago &c. R. Co. v. Robinson*, 106 id. 142; *Peoria &c. R. Co. v. Siltman*, 67 id. 72; *Central &c. R. Co. v. Foshee*, 125 Ala. 199; *Tessmer v. New York &c. R. Co.*, 72 Conn. 208.

Compliance with ordinance regulations as to speed and signals do not constitute the sole measure of care, as they do not take away the common law duty of ordinary care under the circumstances peculiar to each case. *Coulter v. Great Northern R. Co.*, 5 N. D. 568.

See, also, *Missouri P. R. Co. v. Moffat*, 56 Kan. 667; *Downing v. Morgan's &c. R. Co.*, 104 La. 508; *Philadelphia &c. R. Co. v. State*, 61 N. J. L. 71; *Pennsylvania R. Co. v. Miller*, 99 Fed. Rep. 529; *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155.

Ordinary care must be used to keep a lookout and discover danger at a crossing. *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60.

See, also, *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Missouri &c. R. Co. v. Bellew*, 22 Tex. Civ. App. 265; *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629; *Felton v. Newport*, 105 Fed. Rep. 332; *Purnell v. Raleigh &c. R. Co.*, 122 N. C. 832; *Bradley v. Ohio River &c. R. Co.*, 126 id. 735; *Mason v. Southern R. Co.*, 58 S. C. 70.

A statute requiring maintenance of a lookout for persons or property on the track, and, upon discovery, an immediate alarm, the use of brakes and every possible means to prevent accident, held to impose absolute liability, where train runs backwards. *Iron Mountain R. Co. v. Dies*, 95 Tenn. 655.

The statute construed not to apply, where a person has gone a reasonably safe distance from the track. But where, on discovering an approaching train, a man on horseback attempted to turn back, when the beast became unmanageable and backed against the train, which could have been stopped when he was first seen, his widow was allowed to recover in a statutory action. *Louisville &c. R. Co. v. Truett*, 111 Fed. Rep. 876.

See, also, *Illinois C. R. Co. v. McCalip*, 76 Miss. 360; *King v. Illinois C. R. Co.*, 114 Fed. Rep. 855.

An engineer must see, what, with reasonable care may be seen. *E. T. &c. R. Co. v. White*, 5 Lea, (Tenn.) 540.

*Frazer v. South &c. R. Co.*, 81 Ala. 185; *A. G. &c. R. Co. v. Jones*, 71 Ala. 487.

Timely warning should be given by engineer of intention to cross a street. *T. & P. R. Co. v. Lowry*, 61 Tex. 149.

See, also, *Texas &c. R. Co. v. Curlin*, 13 Tex. Civ. App. 505.

Knowledge of the practice of passing around the end of trains obstructing the crossing makes it incumbent on the railroad, not only to signal before starting, but to have some one at the end to guard against injury. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424.

Where, owing to a curve and the obstruction of the smoke stack, the engineer cannot keep an adequate lookout alone, it is the duty of the fireman to assist him. *Arrowood v. South Carolina &c. R. Co.*, 126 N. C. 629.

A long continued neglect to maintain a brakeman at the rear end of backing trains does not relieve defendant of liability, where ordinary care requires it. *Galveston &c. R. Co. v. Eitzen*, (Tex. Civ. App.) 39 S. W. Rep. 625.

The engine of a train making a flying switch had passed a crossing when a ten-year-old boy, whose view of the rest of the train was obstructed, and who was not otherwise warned, started to cross and was killed. A finding of gross negligence on part of the defendant was sustained. *Gulf &c. R. Co. v. Letsch*, (Tex. Civ. App.) 55 S. W. Rep. 584; s. c., *aff'd*, 56 *id.* 1134.

It was for the jury to say whether pushing instead of pulling a train was, under the circumstances, negligent notwithstanding expert testimony that it was the only practical way. *Carrow v. Barre R. Co.*, (Vt.) 52 Atl. Rep. 537.

## V. Running Switch.

It is gross and criminal negligence to make a running switch over a crossing in a populous part of a village. *Brown v. N. Y. C. R. Co.*, 32 N. Y. 597; *aff'g s. c.*, 31 Barb. 385.

See *Woodward v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 381.

The plaintiff's intestate waited for the train to pass the crossing on another track, and, then going on the north track, was struck by a locomotive coming suddenly on the same track at the rate of ten or twelve miles per hour, without signals. There was some interruption of the view, and the customary flagman was absent.

The intestate's negligence was for the jury. Competent to show ab-

sence of customary flagman. *Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518.

Traveler passing between parts of a train separated by a few feet, and using his eyesight steadily to apprehend the approach of cars, was struck by a car kicked on one of the tracks.

Contributory negligence for the jury. *Mahar v. G. T. R. Co.*, 19 Hun, 32, citing *Carr v. N. Y. Central & C. R. Co.*, 60 N. Y. 633; *Wood v. Village of Andes*, 11 Hun, 544.

Second half of a detached train ran over traveler; it was negligence in the employés not to have known that the train was detached. *Farley v. Chicago & C. R. Co.*, 56 Iowa, 337.

Whether the use of what is termed "flying switch" is safe and prudent in any given case is for the jury to determine. *White v. Fitchburg R. Co.*, 136 Mass. 321.

*Howard v. St. Paul & C. R. Co.*, 32 Minn. 214; *Lehigh & C. Co. v. Lear*, 8 Cent. R. (Pa.) 107.

Making a flying switch on a public highway without precautionary measures being taken is evidence of gross negligence. *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150.

*Kay v. R. Co.*, 65 Pa. St. 269; *Butler v. R. Co.*, 28 Wis. 487; *Illinois Central R. Co. v. Baches*, 55 Ill. 379; *Chicago & C. R. Co. v. Dignam*, 56 id. 487; *Baltimore & C. R. Co. v. Wheeler*, 63 Ill. App. 193; *Chicago & C. R. Co. v. O'Neil*, 64 id. 623; *Pinney v. Missouri & C. R. Co.*, 71 Mo. App. 577; *Gulf & C. R. Co. v. Letsch*, (Tex. Civ. App.) 55 S. W. Rep. 584; *Alabama & C. R. Co. v. Anderson*, 109 Ala. 299; *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356; *Bradley v. Ohio River & C. R. Co.*, 126 N. C. 735.

Traveler not bound to anticipate company would make a flying switch across and over a public highway. *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150.

See, also, *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642; *Stevens v. Missouri P. R. Co.*, 67 Mo. App. 356.

Wanton and willful recklessness only, held a defense to the statutory action for damage caused by flying switch. *Pulliam v. Illinois C. R. Co.*, 75 Miss. 627.

Plaintiff was struck by a car making a "kicking switch" at high speed without warning. There was considerable surrounding noise at the time. Before he started to cross he saw the car 250 feet away, but did not look again. Verdict for plaintiff was sustained. *Gulf & C. R. Co. v. Holland*, (Tex. Civ. App.) 66 S. W. Rep. 68.

## VI. Gates.

## (a). NEGLIGENCE.

Unless directed so to do by competent authority, a railway company is not required to keep a flagman or gate at a crossing, and negligence cannot be predicated on failure so to do; but if it elect to do so, the jury may consider on the question of negligence of the defendant and the contributory negligence of the plaintiff, the actions, directions, conduct, omission or absence of the flagman, the condition and handling of the gates, and especially whether such gates being open is apparent assurance that a train is not dangerously near, and a consequent invitation to the traveler to cross.\*

The refusal of the court to charge that, "if, notwithstanding the condition of the gates, he might have seen or heard the engine if he had looked or listened, and as he did not, the plaintiff cannot recover," was not error; that the open gate and the absence of the usual signals were direct and explicit assurance that no train or engine was approaching with intent to cross the street, upon which he had a right, to a certain extent, to rely; that the degree of care in such a case was different from that ordinarily required of a traveler approaching a railroad crossing, and it was for the jury to say whether the deceased exercised that ordinary care and prudence which, under the circumstances, it would be natural to expect; that, as matter of law, he was not chargeable with negligence in not seeing the approaching engine, and whether he looked or listened was for the jury to determine, and if they found he did not, whether, under the circumstances, if he had done so, he would have ascertained that the engine was approaching with intent to cross the highway. *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, aff'g judg't for pl'ff.

A railroad company, in operating gates at the crossing, must use care that the travelers are not injured by the gates or cars. If the gate be raised and is motionless, there is an invitation to pass, and the gate should be lowered, if necessary, with due regard to safety. Gate struck pedestrian while passing under it. *Feeney v. L. I. R. Co.*, 116 N. Y. 375.

Defendant's gateman, at crossing, so operated the gate as to scare the plaintiff's horse, so that it ran and the rein broke, causing injury. If the negligence of defendant concurred to cause injury, then the breaking of the rein would not prevent recovery, unless plaintiff was negligent, respecting the use of the rein. *Putman v. N. Y. C. & H. R. R. Co.*, 47 Hun, 439.

But see *Moore v. Abbott*, 32 Me. 461; *Coombs v. Topshan*, 38 id. 204; *Farrar v. Greene*, 32 id. 574.

\* NOTE.—Regulated by statute in New York by N. Y. L. 1890, ch. 565, sec. 33 as amended by L. 1892, ch. 786, as amended by L. 1901, ch. 301.

A railroad company, which voluntarily maintained gates and a flagman, is chargeable with the same care as if the duty were compulsory. *Edgerly v. Long Island R. Co.*, 46 App. Div. 284.

Negligence not inferred from failure to maintain gates. *Cohn v. New York &c. R. Co.*, 5 App. Div. 196.

In absence of statute or ordinance, crossing gates are not required. *Martin v. New York &c. R. Co.*, 20 Misc. 363.

But their presence or absence may have an important bearing on the question of the exercise of due care at a dangerous crossing. *St. Louis &c. R. Co. v. Stewart*, 68 Ark. 606.

See, also, *New York &c. R. Co. v. Moore*, 105 Fed. Rep. 725; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Cleveland &c. R. Co. v. Reiss*, 13 Oh. C. C. 405; *English v. Southern P. R. Co.*, 13 Utah, 407.

Violation of ordinance in failing to operate gates is negligence *per se*. *Indianapolis Union R. Co. v. Neubacher*, 16 Ind. App. 21.

Railroad held negligent in ceasing to operate its gates, though their erection had been voluntary. *Chicago &c. R. Co. v. Redmond*, 70 Ill. App. 119.

A gong signal, voluntarily installed, must be kept in repair. *Cleveland &c. R. Co. v. Coffman*, (Ind. App.) 64 N. E. Rep. 233.

Where the gates were not customarily operated during certain hours of the day, it was error to leave it to the jury to say whether such failure was negligence. *Chicago &c. R. Co. v. Durand*, (Kan.) 69 Pac. Rep. 356.

Ordinance requiring gates and flagmen where the crossing was not dangerous was unreasonable. *State v. Bloomfield*, 59 N. J. L. 109.

It was for the jury to say whether defendant was negligent in raising the gates and permitting a boy of six and a half to go upon the track in front of an approaching train, the view being obstructed by a passing train. *Tabello v. Delaware &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 561.

Gateman was charged with the duty of protecting a child of seven from injury. *Jones v. Harris*, 186 Pa. St. 469.

#### (b). CONTRIBUTORY NEGLIGENCE.

A train had passed; the gate had been raised and the gateman had gone into his house; this was a substantial invitation to pass, and just as significant as if the gateman had beckoned the traveler to come on. Contributory negligence was for the jury. *Glushing v. Sharp*, 96 N. Y. 676.

A traveler was killed at a crossing by the superintendent's car, which hid the view of the engineer and fireman. No signal was given until the car was right upon the intestate. *The gates at the crossing were open and*

*the gateman absent.* The traveler was not required to look and listen, as a matter of law, but contributory negligence was for the jury. *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 134, aff'g judg't for pl'ff.

**From opinion.**—"The defendant 'for the better protection of life,' and to 'promote the safer and better management of its road,' either of its own volition or under the command of law (Laws of 1884, chap. 439, sec. 31), had erected gates across Walnut street, on either side of its tracks, and had stationed a person there 'to open or close such gates when an engine or train passed.'

The duty of the company was imperative, and it is obvious that an open gate was a direct and explicit assurance to the traveler that neither train nor engine was rendering the way dangerous—that none was passing. A closed gate was an obstruction preventing access to the road; an open gate was equally positive in the implication to be derived from it, that the way was safe. Nothing less could be implied, and no other conclusion could be drawn from that circumstance. The silence of the bell and whistle was an indication that no train or locomotive was within eighty rods of the crossing; the open gate was affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass. The way, then, was open to the intestate, and as the highway was straight, that fact was apparent to him, not only when he reached the track, but for a long distance off. He had a right to rely to a certain extent upon that representation. *Stapley v. Railway*, 1 Ex. L. R. 21; *Glushing v. Sharp*, 96 N. Y. 676. It is difficult, therefore, to see how his death can be attributed to any other cause than the negligent acts of the defendant. But if there is room for a different inference, there is not enough of it to make the question one of law."

Defendant had erected safety gates on each side of its tracks at crossing. It was raining hard and plaintiff had an umbrella up. As she approached the crossing she looked and saw that the gates were up and stationary. She passed the first gate, crossed the tracks, and as she was passing under the second gate, it was lowered by the gateman more rapidly than usual, and struck and injured her.

The evidence authorized the jury in finding that defendant omitted to observe that degree of care required of it, and that, owing to the omission, plaintiff was injured; that the omission on her part to look, when passing under the second gate, to see whether it was coming down was not, as matter of law, negligence; but that it was a question of fact for the jury. *Feeney v. L. I. R. Co.*, 116 N. Y. 375, aff'g judg't for pl'ff.

**From opinion.**—"The degree of care required of a person approaching a dangerous place should be proportioned to the degree of danger, known or apparent, to be encountered. (*Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 456.) In crossing the tracks of a railroad operated by steam, more care is required than in crossing a railroad operated by horses, because the cars upon the former move more rapidly and cannot be so readily stopped as those upon the latter. (*Barker v. Savage*, 45 N. Y. 193.) There is still less danger in passing under safety gates, as they need not be lowered rapidly and should at all times be under the control of the gateman. If he does his duty, there is little or no danger. The plaintiff had the right to assume that the gateman would not be

negligent on the occasion in question (*Newson v. N. Y. Central R. Co.*, 29 N. Y. 383), although she was not, on this account, relieved from the necessity of exercising that degree of care that would have been used by a person of ordinary prudence under the same circumstances."

"O." was going south on the west sidewalk of a city street running north and south, and across which three tracks of the defendant's railroad ran. At "O.'s" approach the safety gates began to rise, and he went on. He could see nothing south or west as he approached the middle track on account of cars standing thereon, one of which reached half across the sidewalk. On passing from behind this car between the middle of the south track he was struck by the cross-beam of a tender approaching so that it left but three feet between it and the car. "O." was a stranger in the locality and was walking fast with head down, and, the sidewalk being rough, he did not look towards the approaching locomotive whose bell was not rung. The gateman had begun to lower the south gate, and shouted to "O.," who paid no attention.

Whether he heard the shout or not, the open gate was virtually an invitation to him to proceed and a team crossing slowly was in plain sight and would naturally add to his confidence. The question of contributory negligence was for the jury. Although deceased was bound to use his eyes, he was not bound to use them in any particular manner or at any particular instant of time. *Oldenburg v. N. Y. C. & H. R. R. Co.*, 124 N. Y. 414. aff'g judg't for pl'ff.

**From opinion.**—"As said by this court in a recent case: 'The raising of the gate was substantial assurance to him of safety, just as significant, as if the gateman had beckoned to him or invited him to come on, and that any prudent man would not be influenced by it is against all human experience.' *Glushing v. Sharp*, 96 N. Y. 676. Or, as laid down in a still later case: 'The open gate was an affirmative and explicit declaration and representation that neither train nor locomotive was approaching with intent to pass.' *Palmer v. N. Y. C. & H. R. R. Co.*, 112 N. Y. 234, 241.

While the deceased had the right to rely, to a certain extent, upon the assurance thus given by the defendant, that it was safe for him to go on, it was still his duty to be on the lookout for danger, and to exercise the same care that a man of ordinary prudence would have exercised under the same circumstances. The degree of care depended upon his knowledge of the situation, or upon those facts that he would have discovered by the use of ordinary vigilance. It does not appear that he had ever seen this crossing before, or that he knew anything about it, except what he observed on the occasion when he met his death. In this respect, as well as by the implied invitation to proceed arising from the use of safety gates, this case is easily distinguished from those relied upon by the defendant. *Woodard v. N. Y., L. E. & W. R. Co.*, 106 N. Y. 369; *Young v. N. Y., L. E. & W. R. Co.*, 107 id. 500."

A traveler approaching a railroad crossing, guarded by gates, need not exercise the same vigilance in looking and listening as would be re-



quired, if the gates were absent. *Rodrian v. N. Y. &c. R. Co.*, 125 N. Y. 526; *Oldenburg v. N. Y. Central R. Co.*, 124 id. 414; *Palmer v. N. Y. C. R. Co.*, 112 id. 234.

The plaintiff, approaching the defendant's tracks, found the gates closed; the train passed, the gates were opened, and the plaintiff started on, but after he had passed the first gate, the gates were again closed, so that escape was impossible, and he was struck by the train, view of which was obstructed by the train that had just passed, and by the darkness of the night.

The plaintiff and his witnesses testified, that they neither heard nor saw the latter train until a moment before the collision.

Contributory negligence was for jury. *Kane v. N. Y., N. H. & H. R. R. Co.*, 132 N. Y. 160.

It was shown that at a point where the defendant's railroad tracks crossed a street in a village, the plaintiff's intestate waited for about twenty minutes, at the end of which time the defendant's servant raised the gates high enough for her to pass through and looked at her. She started to cross the tracks, whereupon the gates were opened wide by the defendant's agent, and a man driving a horse and wagon started to cross the tracks. An engine, projecting fifteen feet into the street, automatically blew off steam, making a noise that frightened the horse, which became unmanageable and ran against the plaintiff's intestate, causing injuries resulting in her death.

The raising of the gates was an assurance of safety to the plaintiff's intestate, which she was entitled to rely upon. For jury. *Scaggs v. The President, Managers and Company of the Delaware & Hudson Canal Company*, 74 Hun, 198; s. c., rev'd, 145 N. Y. 201.

Plaintiff's intestate on a dark night was driving a heavy wagon over several tracks of defendant's road; the gates were open and an engine was moving slowly with no lights and without signals. The intestate was last seen standing up and looking up and down the tracks; a flagman called out from the further side "stay back."

Nonsuit error. Open gates were an assurance of safety. *Sindeman v. N. Y. C. & H. R. R. Co.*, 42 Hun, 306.

*Glushing v. Sharp*, 96 N. Y. 676.

A person driving a team approached a crossing guarded with gates shut down, whereupon he stopped until a train had passed and the gate-tender had raised the gates and signaled him to cross; upon doing so he was struck by another train and his wagon thrown against plaintiff, who was on the street. The question was for the jury, and if the driver's act in going upon the track on a trot, or whipping up his team in the face of the danger could be a defense against plaintiff, the question of

contributory negligence was also for jury. *Bond v. N. Y. C. & C. R. Co.*, 69 Hun, 476.

The duty of a traveler to look and listen may be modified by the fact that the gates maintained at the crossing are open; still, it is his duty to be on the lookout for danger, and to use the same care that a man of ordinary prudence would use under the same circumstances. *Schultz v. N. Y. C. & H. R. R. Co.*, 69 Hun, 515.

Deceased was negligent in driving on after a freight train had passed when an express was coming in plain sight for several hundred yards away. He had ample opportunity of knowing that there was no flagman, and gates were not in operation at night. *Lamb v. New York & C. R. Co.*, 18 App. Div. 579.

A traveler, seeing an engine at the crossing and knowing an escape of steam is liable to occur, assumes the risk of approaching with his horse, and, the danger being obvious, it is immaterial that the gates were up. *Wilson v. New York & C. R. Co.*, 41 App. Div. 36.

Traveler may rely on the appearance of safety indicated by the position of crossing gates. *Woehrle v. Minnesota & C. R. Co.*, 82 Minn. 165.

See, also, *Pierce v. Jones*, 22 Ind. App. 163; *Overtoom v. Chicago & C. R. Co.*, 181 Ill. 323; *Louisville & C. R. Co.*, (Ky.) 64 S. W. Rep. 725; *Chicago & C. R. Co. v. Redmond*, 70 Ill. App. 119; *Conaty v. New York & C. R. Co.*, 164 Mass. 572; *Hicks v. New York & C. R. Co.*, id. 424; *Roberts v. Delaware & C. Canal Co.*, 177 Pa. St. 183.

Driver was not negligent, *per se*, in proceeding with a heavy load at a trot up a steep grade where the gates were up and a flag flying indicating that trains would stop before reaching the crossing. *Clark v. Boston & C. R. Co.*, 164 Mass. 434.

Nor in not waiting for a train to pass far enough for him to see the track behind it, where the gates are open. *Indianapolis & C. R. Co. v. Neubacher*, 16 Ind. App. 21.

But the traveler must, nevertheless, use his senses; he is not justified in proceeding heedless of sight or sound, or relieved of all duty of looking and listening. *Romeo v. Boston & C. R. Co.*, 87 Me. 540.

See, also, *Ellis v. Boston & C. R. Co.*, 169 Mass. 600; *Pennsylvania & C. R. Co. v. Pfuelb*, 60 N. J. L. 278; s. c. aff'd, 61 id. 287; *Rangeley v. Southern R. Co.*, 95 Va. 715; *White v. Chicago & C. R. Co.*, 102 Wis. 489; *Schneider v. Northern P. R. Co.*, 81 Minn. 333.

Where an automatic gong announced the approach of a train, and a driver, seeing a train some distance off, attempted to cross without looking in the other direction, where he might have seen the train that struck him close at hand, his negligence prevented his recovery. *Brincker v. Michigan C. R. Co.*, 121 Mich. 283.

And it has been held that a traveler is not relieved of the duty to look and listen by the fact that such a gong has been provided at a crossing. Where he failed in such duty, he was not allowed to recover though the gong was out of order. *Conkling v. Erie R. Co.*, 63 N. J. L. 338.

Where a traveler is fully aware of the approach of a train, he cannot complain of failure to lower gates or provide a flagman. *Walker v. Kinmare*, 76 Fed. Rep. 101.

See, also, *Theobald v. Chicago &c. R. Co.*, 75 Ill. App. 208; *Bjork v. Illinois C. R. Co.*, 85 Ill. App. 269; *Chicago &c. R. Co. v. Sutherland*, 88 Ill. App. 295.

Nor where he crosses in spite of the warning of closed gates. *Lake Shore &c. R. Co. v. Ehlert*, 63 Oh. St. 320.

See, also, *McAnnally v. Pennsylvania R. Co.*, 194 Pa. St. 464; s. c., 47 L. R. A. 788.

Traveler's negligence was for the jury, where, after warning had been given to stop, traveler whipped up his horse, and the gateman shouted "go on," and lifted up the gates. *Doyle v. Boston &c. R. Co.*, 145 Mass. 386.

*Randall v. Connecticut &c. R. Co.*, 132 Mass. 269; *Craig v. New York &c. R. Co.*, 118 id. 431; *Gaynor v. Old Colony &c. R. Co.*, 100 id. 208.

And she failed to alight to hold her horse while the train was passing after being shut within the crossing area by the lowering of the gates. *Davis v. Central R. &c.* (N. J. L.) 52 Atl. Rep. 561.

Operation of gates at a crossing, held not to relieve a street car company of the statutory duty of stopping and sending a man ahead. *Cincinnati Street R. Co. v. Murray*, 53 Oh. St. 570; s. c., 30 L. R. A. 508.

## VII. Flagman.

### (a). NEGLIGENCE.

A company is not required to keep a flagman at a public crossing, but if it elect to do so, by establishing a custom, it may make a law unto itself.

Withdrawal of customary flagman may impute negligence, but the traveler must use his eyes and ears. *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

But absence of customary flagman may be considered on subject of contributory negligence. *Ernst v. Hudson River R. Co.*, 35 N. Y. 9.

But, see, *Ernst v. Hudson River R. Co.*, 39 N. Y. 61.

The railway company is not bound to keep a flagman at every crossing. Where, on the trial of an action by a foot passenger against a railroad company for injuries, received from a passing train, while attempting to cross the track in a city street, the judge charged the jury, that

it was a question for them to determine, whether the crossing in question was in so populous a portion of the city, that it was due to the public safety and common prudence, that the company should keep a flagman stationed at that point, and if they determined that it was, then an omission to do so was negligence, it was error. *Beisiegel v. N. Y. C. & H. R. R. Co.*, 40 N. Y. 9, rev'g judg't for pl'ff.

*Houghkirk v. Prest. &c. D. & H. Canal Co.*, 92 N. Y. 219; rev'g s. c., 28 Hun, 407.

If the customary flagman neglects to give warning and the traveler does not hear the signal, and injury arises solely therefrom, the defendant may be liable. *Kissinger v. N. Y. & H. R. R. Co.*, 56 N. Y. 538, aff'g judg't for pl'ff.

Omission to post flagman or place gates at a crossing is *not negligence*. *Weber v. N. Y. & H. R. R. Co.*, 58 N. Y. 451.

The absence of usual flagman at the crossing is admissible on question of defendant's negligence in running its train with prudence. *McGrath v. N. Y. C. & H. R. Co.*, 63 N. Y. 522, rev'g judg't for def't. *Friess v. N. Y. C. &c. R. Co.*, 67 Hun, 205

It is not for the jury to determine what signals should have been given in a particular case, and a general submission of that question to them without qualification or limitation is error. *Dyer v. Erie R. Co.*, 71 N. Y. 238, rev'g judg't for pl'ff.

The absence of the flagman customarily at the crossing, or his failure to give warning, imputes negligence. *Dolan v. D. & H. Canal Co.*, 71 N. Y. 285.

When plaintiff was beckoned two or three times by the flagman to cross the track, he had a right to assume that it was safe to do so, so far as the acts of the defendant and its agents were concerned; and if more steam was emitted from the engine while he was passing than before, that was an unfair surprise to the plaintiff, and if it contributed to his injury, it was the fault of the defendant's agents, for which the defendant was responsible. *Borst v. Lake Shore & Mich. S. R. Co.*, 4 Hun, 349.

The omission of the company to station a flagman at the crossing may be proved and considered by the jury in determining whether, under all the circumstances of the case, including the absence of the flagman, the company exercised reasonable care and prudence in running the train at the time and place in question, yet, it is error for the court to charge that if the jury finds that it was the duty of the company, under the circumstances of the case, to keep a flagman at the crossing, as a matter of precaution to warn those approaching it, its omission to perform that duty is negligence, which may make it liable for the injuries sustained.

The same rule applies to an omission of the company to erect and keep a gate at the crossing, and as to the charge of the court in respect thereto. *Doyle v. L. I. R. Co.*, 33 Hun, 37, rev'g judg't for pl'ff.

A team, driven by the plaintiff, approached the crossing from the east and the gates being down, stopped a little way from the east gate while a train on the Central track passed by, going from the city, north. As this train passed, the gate-tender began to raise the east gate, and as the bars went up the team started along under the gate to cross the tracks. As the team came upon the Central tracks the people in the wagon, for the first time, saw approaching them from the north, a train on the Lackawanna track, which adjoined the Central track. The gate-tender did not raise the west gate at all. He beckoned the people in the wagon to drive on across the tracks. Plaintiff, who became frightened and excited, whipped up his team and drove across the tracks, and when on the Lackawanna track the train struck the wagon.

As the gate-tender was situated where he had a favorable view of the tracks, the people in the wagon had a right to suppose, when the gate-tender raised the east gate, that he intended to raise the west gate immediately thereafter; that no trains were coming, and that the team might safely pass over the track at the crossing.

That, whether they did rely upon this act of the gate-tender, and, therefore, made less vigilant use of their eyes than they would otherwise have done to discover whether a train was coming, and whether they were justified in so doing, and whether they failed under the circumstances, in view of the raising of the east gate by the gate-tender, to exercise such a degree of care and caution as an ordinarily prudent man would have used, were questions of facts for the jury.

Judgment in favor of the defendants, entered upon an order directing a nonsuit and a dismissal of the plaintiff's complaint, reversed, *Glushing v. Sharp*, receiver (96 N. Y. 676); *Lindemann v. N. Y. C. & H. R. R. R. Co.* (42 Hun, 306) followed. *Callaghan v. D., L. & W. R. Co., et al.*, 52 Hun, 276, 277.

Error to charge that the jury might find negligence from the absence of a light, or gate, or flagman, or some warning. *Case v. N. Y. Cent. & C. R. Co.*, 75 Hun, 527.

The defendant's train was backed towards the public crossing without a brakeman at the rear, and without notice by bell or whistle; the flagman or gate-tender was absent from his post. and the position of the gates, if not an invitation to pedestrians to cross, was, at least, ambiguous. The defendant was negligent. *Wiley v. L. I. R. Co.*, 76 Hun, 29.

Negligence of a flagman. to signal that the track was clear after a

freight train had passed, while an express was in fact coming, was for the jury. *Waldele v. New York &c. R. Co.*, 4 App. Div. 549.

Defendant not liable to one crossing recklessly against warnings of a flagman during a high wind and while snow was blowing. *Wilber v. New York &c. R. Co.*, 17 App. Div. 623.

The jury may consider evidence that no flagman was kept at the crossing in the populous part of a city. *Moore v. N. Y. C. &c. R. Co.*, 2 Misc. 23.

Railroad is not bound as matter of law to maintain gates or flagman at a crossing, in the absence of requirement by competent authority. *Martin v. New York &c. R. Co.*, 20 Misc. 363.

Whether failure to keep a flagman or maintain gates is negligence is for the jury. *Lesan v. Maine &c. R. Co.*, 77 Me. 85.

*Philadelphia &c. R. Co. v. Layer*, 112 Pa. St. 414; *Lehigh Valley R. Co. v. Brandtmaier*, 113 id. 610; *Penn. R. Co. v. Marshall*, 119 Ill. 399; *Delaware &c. R. Co.*, 6 Cas. (Pa.) 454; *Hart v. Chicago &c. R. Co.*, 56 Iowa 186; *Bradley v. Boston &c. R. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. Co.*, 10 id. 562; *Haupt v. New York &c. R. Co.*, 20 Misc. 291; rev'g s. c., 18 id. 594; *Newport News &c. R. Co. v. Stewart*, 99 Ky. 496; *Cleveland &c. R. Co. v. Richardson*, 10 Oh. C. D. 326.

Held unnecessary where the view was unobstructed. *Lake Shore &c. R. Co. v. Reynolds*, 23 Oh. C. C. 199.

Or the crossing little used. *Hutcherson v. Louisville &c. R. Co.* (Ky.) 52 S. W. Rep. 955.

*Northern C. R. Co. v. Medairy*, 96 Md. 168.

Although not required by statute, the absence of a gate or a flagman may impute negligence. *Eaton v. Fitchburg R. Co.*, 129 Mass. 364.

*Commonwealth v. Boston &c. R. Co.*, 101 Mass. 201; *Cleveland &c. R. Co. v. Reiss*, 13 Oh. C. C. 405; *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155; *New York &c. R. Co. v. Swartout*, 3 Oh. Dec. 636; *Missouri &c. R. Co. v. Magee*, 92 Tex. 616.

Ordinance requiring gates and flagmen, where the crossing was not dangerous, was held unreasonable. *State v. Bloomfield*, 59 N. J. L. 109.

Failure of the authorities to require a flagman as permitted by statute, held not to relieve company from charge of negligence, where ordinary care and prudence under the circumstances requires the precaution. *Chesapeake &c. R. Co. v. Gunter*, (Ky.) 56 S. W. Rep. 527.

Improper signal of flagman to "come on," creates liability in the company for injuries sustained by reason thereof. *Penn. R. Co. v. Sloan*, 125 Ill. 72.

See, also, *Edwards v. Chicago &c. R. Co.*, (Mo. App.) 67 S. W. Rep. 950; *Chicago &c. R. Co. v. Spring*, 13 Ill. App. 174; *Chicago &c. R. Co. v. Sykes*, 96 Ill. 162; *Texas &c. R. Co. v. Gilleland*, (Tex. Civ. App.) 36 S. W. Rep. 1134.

Defendant's negligence was for the jury, where no flagman was at crossing and escape of steam from company's engine frightened horse on the highway. *Hart v. Chicago &c. R. Co.*, 56 Iowa, 166.

*Hill v. Portland &c. B. Co.*, 55 Me. 438; *Norton v. Eastern R. Co.*, 113 Mass. 366; *Toledo &c. R. Co. v. Harman*, 47 Ill. 298; *Penn. R. Co. v. Barnett*, 59 Pa. St. 259; *Haas v. Grand Rapids &c. R. Co.*, 47 Mich. 401.

Negligence in backing a train over a crossing without flagman, signals, or warning, is a question for the jury. *Union Pac. R. Co. v. Henry*, 36 Kas. 565.

*K. P. R. Co. v. Richardson*, 25 Kas. 409; *K. P. R. Co. v. Pointer*, 14 id. 49; *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Flagman's duty, held not to extend to warning one whose horses were frightened at a switch engine near the crossing, where it was not going to run over it. *Walters v. Chicago &c. R. Co.*, 104 Wis. 251.

Although traveler, when warned by flagman, did not stop, engineer, after discovering his danger, should not refuse to use the means in his power to prevent the injury. *H. & T. R. Co. v. Carson*, 66 Tex. 345.

*Little Rock &c. R. Co. v. Cavenesse*, 48 Ark. 106; *St. Louis &c. R. Co. v. Freeman*, 36 id. 41; *Harvey v. Rose*, 26 id. 3; *Little Rock &c. R. Co. v. Parkhurst*, 36 id. 377; *Bauer v. St. Louis &c. R. Co.*, 46 id. 388; *St. Louis &c. R. Co. v. Wilkerson*, 46 id. 513; *O'Keefe v. Chicago &c. R. Co.*, 32 Iowa, 467; *Morris v. Chicago &c. R. Co.*, 45 id. 29. See, however, *Nashville &c. R. Co. v. Smith*, 6 Heisk. (Tenn.) 174; *Brown v. Lynn*, 31 Pa. St. 510; *Northern &c. R. Co. v. Price*, 29 Md. 420; *Baltimore &c. R. Co. v. Kean*, 3 Cent. R. (Md.) 716; *Locke v. First Division &c. R. Co.*, 15 Minn. 350; *Nelson v. Atlantic &c. R. Co.*, 68 Mo. 593; *Frazer v. South &c. R. Co.*, 81 Ala. 185; *Government Street R. Co. v. Hanlon*, 53 id. 70; *Tanner v. L. & N. R. Co.*, 60 id. 621; *Cook v. Cen. R. Co.*, 67 id. 533; *Mobile &c. R. Co. v. Wilson*, 76 Fed. Rep. 127.

#### (b). CONTRIBUTORY NEGLIGENCE.

Withdrawal of flagman from accustomed place at the crossing does not justify a traveler in omitting the use of senses; hence the evidence of such custom and of absence of flagman, as bearing on plaintiff's negligence, is error. *McGrath v. N. Y. C. & H. R. R. Co.*, 59 N. Y. 468; *rev'g s. c.*, 1 Hun, 437, and *judgt* for pl'ff.

*Waddelle v. New York &c. R. Co.*, 4 App. Div. 549.

Where plaintiff was placed in immediate peril by reason of having acted upon flagman's signal to proceed when a train was approaching he could not be held to the use of the best and most accurate judgment in the moment of excitement. *Hurley v. New York &c. R. Co.*, 90 Hun, 1.

*Waddelle v. New York &c. R. Co.*, 4 App. Div. 549.

Pedestrian crossed track in snow storm, without looking a second time, after looking and listening at a distance of twelve feet. The flag-

man gave no warning. Contributory negligence was for the jury. *Wilber v. New York &c. R. Co.*, 8 App. Div. 138.

Plaintiff was negligent *per se* in failing to make any effort to stop his horse upon seeing the gates descend when about 10 feet from them. *Brink v. Erie R. Co.*, 47 App. Div. 483.

Traveler may rely on flagman's signal to cross. *Alabama &c. R. Co. v. Anderson*, 109 Ala. 299.

See, also, *St. Louis &c. R. Co. v. Gill*, (Tex. Civ. App.) 55 S. W. Rep. 386; *Pierce v. Jones*, 22 Ind. App. 163; *Ayres v. Pittsburg &c. R. Co.*, 201 Pa. St. 124.

Or upon absence of warning by a flagman charged with that duty. *Chicago &c. R. Co. v. Blauhl*, 175 Ill. 183; aff'g s. c., 70 Ill. App. 518.

See, also, *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123; *Dolph v. New York &c. R. Co.* (Conn.) 51 Atl. Rep. 525.

But he must also exercise ordinary care in the use of his senses. *Wabash R. Co. v. Smillie*, 97 Ill. App. 7.

See, also, *Chicago &c. R. Co. v. Ohlsson*, 70 Ill. App. 487; *Hancock v. Lake Erie &c. R. Co.*, 21 Ind. App. 10.

It must appear that traveler understood warning, otherwise no negligence. *Guggenheim v. Lake Shore &c. R. Co.*, 66 Mich. 150.

See, also, *Bresnahan v. Michigan &c. R. Co.*, 49 Mich. 410; *Michigan &c. R. Co. v. Campau*, 35 id. 468; *R. Co. v. Miller*, 25 id. 290; *Dimick v. Chicago &c. R. Co.*, 80 Ill. 338.

The question of negligence is for the jury when a person in the absence of customary flagman failed to take farther precautions. *Chicago &c. R. Co. v. Hutchinson*, 120 Ill. 587.

*Cleveland &c. R. Co. v. Schneider*, 14 West. R. 558; see, also, *Baker v. Pendergast*, 32 Oh. St. 494.

It was held not negligence, *per se*, where traveler stopped and listened, and trees obstructed his view and flagman gave no signal. *Berry v. Penn. R. Co.*, 48 N. J. L. 141.

*Strong v. Sacramento &c. R. Co.*, 61 Cal. 326.

Where one followed a preceding team and was struck by a train completely hidden from view, he was not guilty of negligence. *Funston v. Chicago &c. R. Co.*, 61 Iowa, 452.

*Dimick v. Chicago &c. R. Co.*, 80 Ill. 338.

At a crossing, where sight and sound were unobstructed, a flagman, after a train had passed, turned to operate a semaphore. Plaintiff, in a covered wagon, without looking, attempted to cross behind another wagon and persisted, though the flagman returned and tried to prevent him. The company was held free from negligence and the plaintiff guilty of contributory negligence. *Work v. Chicago &c. R. Co.*, 105 Fed. Rep. 874.



## GATES AND FLAGMAN—ERECTION OF.

Chapter 439, Laws of 1884, providing that the Supreme Court or county court may order that gates shall be erected across a street and that a person be stationed to open and close the same, &c., is constitutional and the railroad company is liable under sec. 154 of the Penal Code for disobedience of such order. *People v. L. I. R. Co.*, 134 N. Y. 506.

Chapter 439, Laws of 1884, authorizing the Supreme Court to order a flagman to be stationed at a railway crossing upon a street, &c., at the same level, is constitutional. *People v. L. I. R. Co.*, 58 Hun, 412; s. c. *aff'd*, 134 N. Y. 506.

## VIII. Customary and Private Ways.

Where the public for a considerable period of time have notoriously and continuously been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, a license to so cross has been held to result, and to impose a duty upon the railroad corporation as to all persons so crossing to exercise reasonable care in the running of its trains, to protect them from injury, and so when particular persons have a right of passage; but there is much authority for the rule that mere passive acquiescence will not constitute a license.

See the subject treated exhaustively under "Private Premises, Injuries Thereon," *post*.

A workman from a factory waited for some cars, unattended, save by a brakeman, to pass and then stepped behind them with the intention of crossing the track beyond, but, to avoid a train on that track, he stepped back on the track just passed and was struck by the first-named cars, which had, in the meantime, come to a stop and then moved backwards. The defendant was not liable. The defendant permitted people to cross these tracks, but owed them no active diligence, nor was it restricted in the use of the tracks by the license. Departure from ordinary use would not make it liable, unless danger would be anticipated from the act. *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *rev'd* s. c., 4 Hun, 760.

Citing *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

Where a railroad company has placed obstructions to the view upon its lands near a farm crossing, known to be used to some extent by the public, and where the place is such that one lawfully using the crossing cannot see, or with ordinary care otherwise discover the approach of a train, the company is required to exercise such care as will be likely to warn of its approach, or so to manage its trains as that it will not be likely to injure one so using the crossing. *Cordell v. N. Y. C. & H. R.*

*R. R. Co.*, 70 N. Y. 119, 124, rev'g judg't for pl'ff; s. c., 64 id. 535, rev'g s. c., 6 Hun, 461.

**From opinion.**—"It may be that the fact of obstructions, and other existing circumstances, rendered it the duty of the defendant in approaching this crossing (a farm crossing), which was known to be used to some extent by the public, to exercise more care and vigilance than was exercised in the management of the train, and in giving warning of its approach. It is not necessary to determine the question, as there must be a new trial, and the evidence may be changed; but I cannot assent to the proposition, that as matter of law the company were absolutely relieved from obligation to exercise proper care in addition to that required by statute in the management of its trains in full view of the surrounding facts. The court should have confined the jury to the question of negligence in the management of the train, and not placed it upon the obstructions except, as a circumstance requiring greater caution in running the train. The case of *Sutton v. N. Y. C. & H. R. R. Co.*, (66 N. Y. 243), is not decisive in this case. That was the case of a mere licensee, who was permitted to cross the track for water, and it was held that the company was not required to exercise the highest degree of vigilance to prevent his being injured. In that case some empty cars were started by the wind, and ran down a grade by their own weight, and injured the plaintiff. It appears that if the brake had been properly set on the cars, they would not have been started by the wind, and we held the company not liable for this casualty. Here the plaintiff was something more than a mere licensee. The place was in some respects a public crossing, and the plaintiff had a right to go upon the track, and, I think, that the company owed him a duty, if the place was such that he could not see the train, or otherwise with ordinary care know of its approach, to have exercised such care as would have been likely to warn of its approach, or at least, that it would so manage the train as that it would not be likely to injure the plaintiff, or others similarly situated."

The train which caused the death was backing up, amidst noise, without a bell being rung or other signal given, in charge of a brakeman, who was on a platform between two cars, where he could not see persons on the track or have notice to apply the brakes in case of danger. Persons were at all times crossing the tracks, several hundreds crossing daily at a point where the owners of adjoining lands had a right of way, and where the public for thirty years had been in the habit of crossing.

Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license, and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in the running of its trains, so as to protect them from injury.

Although not absolutely bound to ring a bell or blow a whistle upon the locomotive of a train, approaching such a crossing, the company is bound to give some notice and warning, and as to what is sufficient is a question of fact for a jury.

Where a train is backing toward a crossing, the fact that the bell was

rung does not, as matter of law, establish reasonable care; it is for the jury to determine as to whether any other precaution should have been taken upon the train, under the circumstances. *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, aff'g judg't for pl'ff.

*Distinguishing Laremore v. C. P. I. Co.*, 101 N. Y. 391; *Sutton v. N. Y. Cent. R. Co.*, 66 id. 243; *Nicholson v. E. R. Co.*, 41 id. 525.

Chapter 187, Laws 1876, authorized the defendant to operate cars at any speed provided by common council, provided it should fence the road and provide openings. The plaintiff's intestate was killed at one of the openings. His hearing was impaired and he went straight across the track in the smoke from another train. No signals were required at the spaces, and the intestate was negligent and no recovery was allowed. *Heaney v. L. I. R. Co.*, 112 N. Y. 122.

Where the public have for a long time notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license and imposes a duty upon the company, as to all persons so crossing, to exercise reasonable care in the running of its trains so as to protect them from injury.

Although in such a case the company is absolutely bound to ring a bell or blow a whistle as the train approaches the crossing, it is bound to give some notice and warning; and the fact that the bell was rung does not establish, as matter of law, that the company used reasonable care. As to whether any other precautions should have been taken, and as to what is sufficient in such a case, are questions for the jury. *Swift v. S. I. R. T. Co.*, 123 N. Y. 645, aff'g judg't for pl'ff.

The plaintiff, while crossing defendant's track, in the evening, at a point where a street was to be, but had not yet been laid out, but where people were in the habit of crossing and recrossing, was struck by one of defendant's engines and injured. Held, that he was guilty of contributory negligence in going upon defendant's track, and that he could not recover.

The court charged that, even if the public had no right to use the land of the defendant, at the place where the plaintiff was injured, yet, if people were in the habit of crossing and recrossing there, that the company was bound to use care and caution in running at that point. Held, that this was error; that no right could be acquired by the public in such a manner, without evidence of notice to the company and subsequent acquiescence by it.

Even if there was any evidence from which a license might be inferred, such license created no legal right and imposed no duty upon

the defendant, except the general duty, which every man owes to others, to do them no intentional wrong or injury. *Matze v. N. Y. C. & H. R. R. Co.*, 1 Hun, 417, granting new trial after verdict for pl'ff.

*Phila. &c. R. Co. v. Hummell*, 44 Pa. 375, 379, 380; see *Bush v. Brainard*, 1 Cow. 78.

Defendant accustomed to give signals at a private crossing is liable for injuries caused by failure to do so. *Nash v. N. Y. C. & H. R. R. Co.*, 51 Hun, 594.

Where a crossing over the track of a railroad company has been used so long with the assent of such company that such acquiescence amounts to a license, a duty is imposed upon the company in respect to all persons using the crossing to exercise reasonable care in operating its trains so as to protect them from injury. *Vandewater v. N. Y. & N. Eng. R. Co.*, 74 Hun, 32.

Whether the defendant's omission to properly maintain the barway at the farm crossing could be considered in this case upon the question of the defendant's negligence is not free from doubt. In *Keyser v. C. & G. T. R. R. Co.* (56 Mich. 559) it was held that a railroad company's neglect to fence its track was for the jury to consider as bearing upon its liability for an injury done to a child who got upon the track in consequence thereof. (See, also, *Marcott v. Marq., Hought. & Ont. R. R. Co.*, 47 Mich. 9; *Morrissey v. Providence & Wor. R. R. Co.*, 15 R. I. 271.) A contrary doctrine seems to have been held in *Walkenhauer v. C., B. & Q. R. Co.* (17 Fed. Rep. 136) and *Fitzgerald v. St. Paul, M. & M. Ry. Co.* (29 Minn. 336). *Meagher v. Cooperstown & Charlotte Valley R. Co.*, 75 Hun, 455.

Where a fence separates the tracks running in different directions, the fact that a plank walk for the transfer of baggage connects the two sides of the station with gates in the fence, and that one of the gates is closed and the other left open, does not imply an invitation to cross. *Kent v. New York &c. R. Co.*, 51 App. Div. 508.

A railroad company holding out a private crossing as one suitable for travelers to use is liable for injuries caused by its own negligence. *Murphy v. Boston &c. R. Co.*, 133 Mass. 121.

*Sweeney v. Old Colony &c. R. Co.*, 92 Mass. 378; See, also, following cases: *Campbell v. Boyd*, 88 N. C. 129; *Mulholland v. Brownigg*, 2 Hawks, (N. C.) 349; *Combs v. New Bed. &c. R. Co.*, 102 Mass. 584; *Tobin v. P. S. &c. R. Co.*, 59 Mo. 188; *Illinois C. R. Co. v. Clark*, 83 Ill. App. 620; *Illinois C. R. Co. v. Klein*, 95 id. 220; *Louisville &c. R. Co. v. Bodine*, (Ky.) 59 S. W. Rep. 740; *Connell v. Chesapeake &c. R. Co.*, (Ky.) 58 S. W. Rep. 374; *Green v. Chicago &c. R. Co.*, 110 Mich. 648; *Russell v. Atchison &c. R. Co.*, 70 Mo. App. 88; *Bradley v. Ohio River &c. R. Co.*, 126 N. C. 735; *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Missouri &c. R. Co. of Tex. v. Bellew*, 22 Tex. Civ. App. 265; *Risinger v. South-*

ern R. Co., 59 S. C. 129; *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1058.

But a mere passive permission will not subject it to liability. *Wright v. Boston &c. R. Co.*, 142 Mass. 296.

*Hickey v. Boston &c. R. Co.*, 14 Allen, 429; *Johnson v. Boston &c. R. Co.*, 125 Mass. 75; *Gaynor v. Old Colony &c. R. Co.*, 100 id. 208; *Morrissey v. Eastern R. Co.*, 126 id. 377; *Wright v. Boston &c. R. Co.*, 129 id. 440; *Lewis v. Baltimore &c. R. Co.*, 13 Am. L. Reg. N. S. (Md.) 284; *Baltimore &c. R. Co. v. State*, 62 Md. 479; *Illinois Central R. Co. v. Godfrey*, 71 Ill. 500; *Philadelphia &c. R. Co. v. Hummel*, 44 Pa. St. 375; *Gillis v. Penn. R. Co.*, 59 id. 129; *Jeffersonville &c. R. Co. v. Goldsmith*, 47 Ind. 43; see, also, *Moenner v. Carroll*, 46 Md. 212.

No implied license to the public to use as a crossing such a dangerous place as a switch yard. *Grady v. Georgia R. &c. Co.*, 112 Ga. 668.

An unpaved and ungraded street was used by the public as a crossing; and when blocked by defendant's cars on a siding it was customary for people to crawl under them. A boy of eight, while playing under the cars was run over, when they were set in motion when struck by others, switched onto the siding without notice. Direction for defendant held error. *Hofler v. Southern R. Co.*, (Ky.) 53 S. W. Rep. 665.

The same care as at a public crossing is required where track passes along a street lined with stores. *Houston &c. R. Co. v. Laskowski*, (Tex. Civ. App.) 47 S. W. Rep. 59.

Where crossing had been obstructed by company's cars, additional care must be used by the company in passing it. *Thomas v. Delaware &c. R. Co.*, 19 Blatch. U. S. 533.

It was held not negligence to omit signals at a private crossing where there were gates, but where trains never stopped. *Philadelphia &c. R. Co. v. Fronk*, 67 Md. 339.

*Northern Central R. Co. v. State*, 54 Md. 115; *Louisville &c. R. Co. v. Survant*, (Ky.) 44 S. W. Rep. 88; *Lyons v. Illinois C. R. Co.*, (Ky.) 59 S. W. Rep. 507; *Southern R. Co. v. Barbour*, (Ky.) 51 S. W. Rep. 159; *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159; s. c. aff'd, 185 Ill. 400.

A statutory requirement that a railroad signal at crossing of "any other road," construed to apply to public highways and not to private roads. *Reynolds v. Great Northern R. Co.*, 69 Fed. Rep. 808; s. c., 29 L. R. A. 695.

But a way used for years by the public to reach the depot was held to be a "traveled place" within a statute regulating railway signals. *Risinger v. Southern R. Co.*, 59 S. C. 429.

Though farm crossings are not embraced in the statutory provisions as to signals at a "traveled road or street," common law principles may require signals. *Czech v. Great Northern R. Co.*, 68 Minn. 38; s. c., 38 L. R. A. 302.

A crossing near depot habitually used by persons passing to and from the depot must be protected by the railroad. *R. Co. v. Hirsch*, 69 Miss. 126.

Negligence to use a bridge over a private crossing known to be in defective condition. *Evans v. Charleston &c. R. Co.*, 108 Ga. 270.

Negligence *per se* to ride a bicycle over a private crossing without looking or listening. *Sewell v. New York &c. R. Co.*, 171 Mass. 302.

## IX. Construction and Repair of Crossings.

**A railroad company must use reasonable care and skill in the construction and maintenance of crossings over a public street.**

### (a). NEGLIGENCE.

Plaintiff was thrown from his wagon by the breaking of a wheel as it struck a rail on defendant's track at a highway crossing. Plaintiff gave evidence tending to show that the planks at the crossing had become decayed and worn down, so that the rail projected and thus caused the accident. The court laid down the rule as to defendant's duty as above. *Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594; aff'g s. c., 13 Hun. 1, and judg't for pl'ff.

*Cott v. L. R. R. Co.*, 36 N. Y. 204; *People v. N. Y. C. & H. R. R. Co.*, 74 id. 302.

A horse got its shoe caught between a plank and a rail, at a street crossing. There was more space than was necessary for the flange, and the plank was above the rail. For the jury. *Payne v. Troy & Boston R. Co.*, 83 N. Y. 572; rev'g s. c., 9 Hun, 526, and judg't for def't.

The defendant was putting in a crossing; a deaf baker attempted to cross, one of the defendant's servants leading the horse. The horse ran and the wagon hit a post and spilled out the baker and his biscuits. For the jury. *Rembe v. N. Y., O. & W. R. R. Co.*, 102 N. Y. 721.

The plank, between which and the rail the plaintiff caught his foot, was two and one-half inches from the rail, while at this and other crossings, other planks were beveled and came close to the rail. For the jury. *Spooner v. D., L. & W. R. R. Co.*, 115 N. Y. 22.

The plaintiff, while crossing defendant's road, fell and was injured by cars. The street at that place was icy. No duty rested on the defendant to keep the space free from ice, and the evidence to show the defendant negligent in this regard was improper. *Silberstein v. R., W. S. & P. F. R. Co.*, 117 N. Y. 293.

The plaintiff struck his foot against one of the rails of a street railway track, and was injured by falling. The top of the rail was over two

inches above the surface of the street, but had been even therewith, when laid, about ten years prior. Defendant's negligence was for the jury. *Schild v. C. P. N. & E. R. Co.*, 133 N. Y. 446.

*Rex v. Kerrison*, 3 M. & S. 526; *Oliver v. No. Eastern &c. R. Co.*, L. R. (9 Q. B.) 409.

Horse injured at highway crossing; defendant liable for neglect to keep its roadway in repair, and presumption of negligence arose from existence of defect and injury thereby. Defendant was negligent as a matter of law. *Worcester v. 42d &c. R. Co.*, 50 N. Y. 203; *France v. Erie R. Co.*, 2 Hun, 513.

A railway ran on a street, and the planking to facilitate easy crossing of teams left such unnecessary space, that the plaintiff's horse wrenched its hoof off therein. Defendant liable. *Cuddeback v. Jewett*, 20 Hun, 187.

It was for the jury to say whether defendant was negligent in removing planking at the crossing in order to prevent the accumulation of ice and the derailment of trains. *Lowell v. Central Vermont R. Co.*, 15 App. Div. 218.

Company not required to use extraordinary care to keep crossings level. *Taylor v. Long Branch R. Co.*, 16 App. Div. 1.

Railroad was not liable for the fright of a mule at a hole and some rotten planks where it was not calculated to frighten ordinary horses. *Northern Alabama R. Co. v. Sides*, 122 Ala. 594.

A private crossing, left open for use of the public, must be kept in repair. *Central R. &c. Co. v. Robertson*, 95 Ga. 430.

See, also, *Southern P. Co. v. Hooper*, 110 Ga. 779; *Taylor &c. R. Co. v. Warner*, 88 Tex. 642.

A railroad company, held liable for leaving unlighted and unguarded, a hole dug in a smooth space between two streets, provided for passengers but customarily used by the public. *Burton v. Western &c. R. Co.*, 98 Ga. 783.

Negligence to pile cinders along a highway at a crossing where they are concealed by weeds until one is close upon them. *Illinois C. R. Co. v. Griffin*, 184 Ill. 9; aff'g s. c., 84 Ill. App. 152.

Railroad employes were negligent in leaving a spike in an upturned plank at a crossing while they were repairing it, so that the horse, which they had invited to pass, might step on it. *Terre Haute &c. R. Co. v. Grandfield*, 58 Ill. App. 136.

Not negligence *per se* to leave space between plank and rail, of such a size that a small child could get its foot in it. *Atchison &c. R. Co. v. Roemer*, 59 Ill. App. 93.

As to what constitutes an "approach" within a statute requiring the

railroad companies to keep approaches to crossings in repair, see *Illinois C. R. Co. v. Truesdell*, 68 Ill. App. 324.

Where the private crossing required by statute to be kept in repair, is a farm crossing, it must be safe, not only for drivers, but for pedestrians. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159; s. c. aff'd. 185 Ill. 400.

See, also, *Baltimore &c. R. Co. v. Keck*, 89 Ill. App. 72.

The statutory duty of a railroad company to properly construct highway crossing, held not to depend on the prior existence of one. *Evansville &c. R. Co. v. State*, 149 Ind. 276.

And by maintaining a crossing constructed by a former owner it is bound to keep it in repair. *Seybold v. Terre Haute &c. R. Co.*, 18 Ind. App. 367.

Statutory duty to restore highway to former condition held to include erection of barriers during construction operations. *Seybold v. Terre Haute &c. R. Co.*, 18 Ind. App. 367.

Railroad company, held liable for failure to provide crossways wide enough for harvesting machines in general use. *Atchison &c. R. Co. v. Henry*, 60 Kan. 322.

That it was wider than the minimum authorized, held no defense. *Atchison &c. R. Co. v. Henry*, 57 Kan. 154.

Insufficient filling between rails delayed traction engine. Company held liable for damage from collision with express train. *Louisville &c. R. Co. v. Bloyd*, (Ky.) 55 S. W. Rep. 694.

An overhead bridge with small cracks in flooring, admitting steam from a locomotive, which frightened a horse, held not defective. *Kilsey v. New York &c. R. Co.*, (Mass.) 63 N. E. Rep. 80.

Obstruction of highway by cars as a result of which injuries ensue, renders company liable. *Vicksburg &c. R. Co. v. Alexander*, 62 Miss. 496.

*Peoria &c. R. Co. v. Lyons*, 9 Ill. App. 350; *Osgood v. Lynn*, 130 Mass. 492; *State v. Morris &c. R. Co.*, 25 N. J. L. 437.

A statutory requirement to keep the approaches to "highway" crossings in repair, held to apply to city streets. *Hamlin v. Southern R. Co.*, 76 Miss. 410.

A railroad is only chargeable with the failure to use reasonable care to discover and repair a crossing; it is not an insurer of their safety. *Nixon v. Hannibal &c. R. Co.*, 141 Mo. 425.

A statutory duty to provide "suitable crossings," construed to include the lighting of an overhead bridge. *Concord v. Boston &c. R. Co.*, (N. H.) 38 Atl. Rep. 378.

Defendant was liable, where plaintiff was prevented from crossing in



time by the fright of his mule at an excavation in its road bed near the crossing. *Parks v. Southern R. Co.*, 124 N. C. 136.

Defendant was not liable because a cut on its right of way was left unfenced, where to reach it, plaintiff had to drive 20 feet out of the highway and a foot above its surface. *Daneck v. Pennsylvania R. Co.*, 59 N. J. L. 415.

Statutory liability for defects in a "crossing," construed not to apply to sidewalk. *Lynch v. Cleveland &c. R. Co.*, 20 Oh. C. C. 248.

Injury to horse by reason of space between rail and planking is attributable to defendant's negligence. *Baughman v. Shenango &c. R. Co.*, 92 Pa. St. 335.

*Brown v. Penn. R. Co.*, 15 Phila. R. 321; *Oakland R. Co. v. Fielding*, 48 Pa. St. 320; *Woburn v. Boston &c. R. Co.*, 109 Mass 283. See *Ferguson v. Virginia &c. R. Co.*, 13 Nev. 184.

Plaintiff had safely crossed in front of an approaching train, when his horse took fright at steam escaping from a heating apparatus and backed into the train. His negligence in crossing in front of the train did not prevent his recovery. *Mendenhall v. Philadelphia &c. R. Co.*, (Pa.) 51 Atl. Rep. 1028.

Failure to comply with statutory requirement to restore street at crossing to safe condition, imposes liability for resulting damage regardless of negligence. *Galveston &c. R. Co. v. White*, (Tex. Civ. App.) 32 S. W. Rep. 186; *Dublin v. Taylor &c. R. Co.*, 50 id. 120; rev'g s. c., 49 id. 667.

A statute requiring construction of farm crossings within inclosed land, construed not to apply to rights previously acquired. *San Antonio &c. R. Co. v. Bell*, (Tex. Civ. App.) 32 S. W. Rep. 374.

A crossing, dangerous by reason of its location and the lay of the surrounding land, is a circumstance for consideration of the jury in determining whether the proper care has been taken in the particular case to avoid accident, but is not itself, ordinarily, a ground of recovery. *Texas &c. R. Co. v. Warren*, (Tex. Civ. App.) 32 S. W. Rep. 578; *San Antonio &c. R. Co. v. Stollers*, 49 id. 679.

Statutory penalty for failure to repair does not exclude suit for damages. *St. Louis &c. R. Co. v. Byas*, 12 Tex. Civ. App. 657.

A plank so far from the rail as to cause a severe jolt to a crossing vehicle, held not a compliance with a statute requiring restoration of street to safe condition. *Missouri &c. R. Co. v. Connelly*, 14 Tex. Civ. App. 529.

Railroad company was held liable for permitting an upturned sliver in a plank to remain so as to catch plaintiff's shoe and prevent his cross-

ing in time to avoid a train. *Houston &c. R. Co. v. Weaver*, (Tex. Civ. App.) 41 S. W. Rep. 846.

Negligence of a railroad company, in providing a crossing over a ditch in a city street, with a railless bridge on an incline only one-fifth the width of the sidewalk connecting with it, was for the jury. *Houston &c. R. Co. v. Dunn*, 17 Tex. Civ. App. 687.

Negligence in failing to fill between tracks at a crossing was not ground of recovery, where the accident happened beyond the limits of the street. *San Antonio &c. R. Co. v. Belt*, (Tex. Civ. App.) 46 S. W. Rep. 374.

Liability for failure properly to restore a highway cannot be avoided by delegating the duty to an independent contractor. *Texas &c. R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

A mud hole in the street, caused by a leak from defendant's tank, was not the proximate cause of the accident, where deceased's horse became frightened at an engine and was running away. *Ft. Worth &c. R. Co. v. Ncely*, (Tex. Civ. App.) 60 S. W. Rep. 282.

Statutory duty to restore highways crossed, construed to include the erection of barriers for the protection of travelers during the course of making the restoration. *Texas &c. R. Co. v. Johnson*, 20 Tex. Civ. App. 572.

Defendant was negligent in leaving a pile of stones at a crossing while making alterations, without lighting or guarding them, in violation of an ordinance. *Houston &c. R. Co. v. Pollard*, (Tex. Civ. App.) 66 S. W. Rep. 851.

By opening a way along its right of way for use, during the repairs of the highway bridge, a railway company undertakes to see that it is reasonably safe. *Marshall v. Valley R. Co.*, 97 Va. 653.

Negligence in leaving upper rail upon a curve projecting an inch above planking, for the jury. *McDermott v. Chicago &c. R. Co.*, 91 Wis. 38.

Statutory duty of restoration of highway at crossing does not require repair of original defects. *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157.

The duty of a railroad company to restore a highway crossed to a condition of usefulness is a common law duty. *State v. Lake Erie &c. R. Co.*, 83 Fed. Rep. 284.

Fright of plaintiff's horse and not defendant's negligent maintenance of a crossing, was the proximate cause of the overturning of a carriage by an unevenness in the approach to a crossing, safe for carriages driven at ordinary speed. *Myers v. Chicago &c. R. Co.*, 101 Fed. Rep. 915.

#### (b). CONTRIBUTORY NEGLIGENCE.

Where the defendant maintained a frog on its track on the sidewalk

of a city street, and the frog was an open one, and so constructed, that a traveler's foot might be caught therein, and no means were taken to prevent the same by blocking it, or otherwise, as was extensively done in other places, a verdict in favor of a boy of twelve years not familiar with the crossing nor the construction of the frog, nor aware of any danger, was sustained. A person has a right to travel on a sidewalk, although he knows it to be unsafe, and any question of carelessness on his part is for the jury. *Friess v. N. Y. C. & H. R. R. Co.*, 67 Hun, 205.

Not negligence *per se* to use a crossing known to be dangerous. *Harper v. Missouri &c. R. Co.*, 70 Mo. App. 604.

See, also, *Nixon v. Hannibal &c. R. Co.*, 141 Mo. 425; *Johnson v. Great Northern R. Co.*, 7 N. D. 284; *Mahnstrom v. Northern P. R. Co.*, 20 Wash. 195.

In absence of knowledge to contrary, traveler may assume that the crossing is in proper condition. *Southern R. Co. v. Posey*, 124 Ala. 486.

*Chicago &c. R. Co. v. Bartley*, 59 Kan. 776.

Plaintiff was not negligent *per se* in attempting to cross in front of a train, where his mule took fright at an excavation by the tracks, which he could not see until he got upon the crossing. *Parks v. Southern R. Co.*, 124 N. C. 136.

See, also, *Tankard v. Roanoke &c. R. Co.*, 117 N. C. 558.

Company not liable when in the attempt to pass the obstruction a traveler takes a dangerous way and is injured. *Jackson v. R. Co.*, 13 Lea, (Tenn.) 491.

See, also, *Tisdale v. Norton*, 8 Metc. 388; *Hyde v. Jamaica*, 27 Vt. 443; *Reynolds v. Northern R. Co.*, 22 Wash. 165; *Evans v. Charleston &c. R. Co.*, 108 Ga. 270.

When such conduct is for the jury. *Corey v. Northern &c. R. Co.*, 32 Minn. 457.

*Kelly v. Southern &c. R. Co.*, 28 Minn. 98; *Meyers v. Chicago &c. R. Co.*, 59 Mo. 223; *Roberts v. Chicago &c. R. Co.*, 35 Wis. 679.

Pedestrian with ample time to cross in front of train, caught his foot in defective crossing and was run down. Was not guilty of contributory negligence. *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; s. c. aff'd. 180 Ill. 453.

## **DAMAGES.**

- I. FAILURE TO DULY CARRY GOODS.**
- II. REPAIRS, LOSS OF USE, &c.**
- III. FAILURE TO DULY CARRY PASSENGERS.**
  - (a) Expulsion from train.
  - (b) Detention.
- IV. EARNINGS AND PROFITS.**
  - (a) Husband and wife.
- V. HUSBAND AND WIFE.**
  - (a) Action by husband.
  - (b) Action by wife.
- VI. ELEMENTS OF DAMAGE.**
  - (a) Physical and mental effects, loss of time, &c.
  - (b) Mental suffering.
  - (c) Mental suffering, disfigurement.
  - (d) Mental suffering, in case of death.
  - (e) Mental suffering, failure to deliver telegram.
  - (f) Nursing, medical treatment, &c.
  - (g) Prospective damages.
  - (h) Exposure.
  - (i) Fright.
- VII. DAMAGES TO PARENT FOR INJURY TO CHILD.**
- VIII. INJURIES CAUSING DEATH.**
  - (a) Funeral expenses.
- IX. DAMAGES TO PARENT FOR DEATH OF CHILD.**
  - (a) Father.
  - (b) Mother.
- X. DEATH OF PARENT, HUSBAND, OR WIFE.**
- XI. PRIVATE PREMISES.**
  - (a) Trees.
  - (b) Crops and buildings.
  - (c) Other property.
- XII. PROXIMATE CAUSE.**
  - (a) Predisposition to disease.
  - (b) Medical treatment.
- XIII. EXEMPLARY DAMAGES.**
- XIV. NOMINAL DAMAGES.**

**XV. EXCESSIVE DAMAGES.**

- (a) Verdicts not excessive.
- (b) Verdicts inadequate.
- (c) Verdicts excessive.

**XVI. MITIGATION OF DAMAGES.**

- (a) Insurance.
- (b) Money expended for injured person.

**XVII. INTEREST.**

Liability of directors, at suit of stockholders, for negligence, is confined to damage to the corporation, and does not include contingent liability of stockholders for debts of the corporation. *Bloom v. National &c. Loan Co.*, 152 N. Y. 114; aff'g s. c., 81 Hun, 120.

Purchaser of an equity of redemption received from a title company, employed to take charge of the transaction, a deed with a description of the wrong property. The deed was reformed, but the purchaser lost the property by the foreclosure of an unknown additional mortgage. Recovery against the title company was allowed for the amount paid for the property. *Ehmer v. Title Guarantee &c. Co.*, 156 N. Y. 10; aff'g s. c., 89 Hun, 120.

Damages for a sheriff's failure to levy is the value of the property at forced sale. *Gilbert v. Gallup*, 76 Ill. App. 526.

No recovery allowed for injury which plaintiff by reasonable effort could have prevented. *Hartford Deposit Co. v. Calkins*, 85 Ill. App. 627.

Damages for failure to issue process to review judgment, is the amount paid on the judgment, in the absence of proof that the payment could have been avoided if process was properly issued. *Baltimore &c. R. Co. v. Weedon*, 78 Fed. Rep. 584.

**I. Failure to Duly Carry Goods.**

For failure to deliver goods entrusted to a common carriage for transportation, the carrier is liable in damages for the value of the goods at the place of destination at due time of delivery, less the price to be paid for such transportation, in case the same has not been paid. *Sturgess v. Bissell*, 46 N. Y. 462.

*The Nith*, 36 Fed. Rep. 86; *Mo. P. R. Co. v. Edwards*, 28 Tex. 307.

If merchandise be not carried within a reasonable time, the damages from a falling market is the difference in value at the time and place of due delivery and that of actual delivery. *Ward v. N. Y. C. R. Co.*, 47

N. Y. 29, rev'g judg't for def't; disapproving *Wibert v. N. Y. &c. R. Co.*, 19 Barb. 36; 29 id. 633.

Same principle: *Griffin v. Colver*, 16 N. Y. 489; *Sands v. Lilienthal*, 46 id. 541; *Sherman v. Hudson R. Co.*, 64 id. 254; *Kent v. Hudson R. Co.*, 22 Barb. 278; *Medbury v. New York &c. Road*, 26 id. 564; *St. Louis &c. R. Co. v. De Shong*, 63 Ark. 443; *Little Rock &c. R. Co. v. Miller Coal Co.*, 66 id. 645; s. c., 51 S. W. Rep. 1045; *East Tennessee &c. R. Co. v. Johnson*, 85 Ga. 497; *Louisville &c. R. Co. v. Heilprin*, 95 Ill. App. 402; *Tebbs v. Cleveland &c. R. Co.*, 20 Ind. App. 192; *Missouri &c. R. Co. v. Truskett*, (Ind. Terr.) 53 S. W. Rep. 444; *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785; *Palmer v. Penobscot Lumbering Asso.*, 90 Me. 193; *Cutting v. Grand Trunk R. Co.*, 13 Allen, 381; *Sisson v. Cleveland &c. R. Co.*, 14 Mich. 489; *Hance v. Wabash R. Co.*, 62 Mo. App. 60; *Johnson &c. Comm. Co. v. Wabash &c. R. Co.*, 64 id. 590; *Wilson v. Missouri &c. R. Co.*, 66 id. 388; *Klass Comm. Co. v. Wabash R. Co.*, 80 id. 164; *East Tennessee &c. R. Co. v. Hale*, 85 Tenn. 69; *Galveston &c. R. Co. v. Ball*, 80 Tex. 602; *Gulf &c. R. Co. v. Stanley*, 89 Tex. 42; *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74; *Texas &c. R. Co. v. Berchfield*, 12 id. 145; *Inman v. St. Louis &c. R. Co.*, 14 id. 39; *San Antonio &c. R. Co. v. Wright*, 20 id. 136; *Missouri &c. R. Co. v. Witherspoon*, 18 id. 615; *Texas &c. R. Co. v. Truesdell*, 21 id. 125; *Gulf &c. R. Co. v. Staton*, (Tex. Civ. App.) 49 S. W. Rep. 277; *Reeves v. Texas &c. R. Co.*, 32 id. 920; *Texas &c. R. Co. v. Avery*, 33 id. 704; *Missouri &c. R. Co. v. Cobb*, 36 id. 500; *San Antonio &c. R. Co. v. Thompson*, 66 id. 792; *Central Trust Co. v. Savannah &c. R. Co.*, 69 Fed. Rep. 683; *O'Hanlon v. North R. Co.*, 6 Best & Smith, 484; *Bracket v. McNair*, 14 T. R. 170; *Collard v. S. E. Railway Co.*, 7 Hurl. & N. 79; *Wilson v. Lancashire &c. R. Co.*, 99 Eng. C. L. 632; *Same v. N. Castle & Ber. R. Co.*, 18 E. L. & E. 557.

Owner cannot abandon damaged goods. Can recover only for difference in market value, between injured and damaged condition. *King v. Sherwood*, 22 App. Div. 548.

Where dogs are returned on failure to find consignee and reshipped by owner without attention from him, he was not allowed to recover for death of one due to long confinement. *Harrison v. Wier*, 75 N. Y. Supp. 909.

Plaintiff recovered value of bicycle bought and shipped for use on a vacation outing, but not delivered or found until after the vacation was over. *Mitchell v. Weir*, 19 Misc. 530; s. c. aff'd, 19 App. Div. 183.

Value of a portion of a shipment delivered, is evidence as to the value of the portion lost. *Marquis v. Wood*, 29 Misc. 590.

Expense of writing and telephoning for goods, included in damages. *Murrell v. Pacific Ex. Co.*, 54 Ark. 22.

Refusal to ship from a given place does not charge carrier with the loss due to inability to sell there. *Little Rock &c. R. Co. v. Conatser*, 61 Ark. 560.

Where damages are due to delay, the cost of extra feed is an additional item. *Missouri &c. R. Co. v. Truskett*, (Ind. Terr.) 53 S. W. Rep. 444.

So also, cost of putting stock in condition for next market. *Stock-Yards Co. v. Hawkins*, 8 Kan. App. 155.

In an action for breach of contract to carry, by wrongful expulsion, damages were confined to value of ticket and loss of time. *Union P. R. Co. v. Shook*, 3 Kan. App. 710.

See, also, *Louisville &c. R. Co. v. Robinson*, (Ky.) 36 S. W. Rep. 6.

Measure of damages for delivery to consignee in violation of orders of consignor, is the value of the goods. *Louisville &c. R. Co. v. Hartwell*, 99 Ky. 436.

Expense of telegrams, searching of teams in hauling, is included in damages for delay. *Swift River Co. v. Fitchburg R. Co.*, 169 Mass. 326.

Decline in market price during delay, not included. *Vaughn v. Wabash R. Co.*, 62 Mo. App. 461.

Nor highest price due to "corner" on board of trade. *Johnson &c. Comm. Co. v. Wabash R. Co.*, 64 Mo. App. 590.

Loss, due to shrinkage in weight or to physical injury, included. *Gann v. Chicago &c. R. Co.*, 72 Mo. App. 34.

See, also, *Shelby v. Missouri &c. R. Co.*, 77 Mo. App. 205, (also extra feed and labor).

Agreement, that damage be determined by value at place of shipment, enforced. *Horner v. Missouri &c. R. Co.*, 70 Mo. App. 285.

Shipper recovered for trouble and expense of carrying goods to another carrier, upon defendant's refusal to accept them. *Lanning v. Sussex R. Co.*, 1 N. J. L. J. 21.

Carrier with notice thereof, held liable for damages incurred under a penalty contract, due to delay in delivery. *Illinois C. R. Co. v. Southern &c. Cabinet Co.*, 104 Tenn. 568.

Where there is no transportation at all, the damage is the difference between the market value at the place of destination and the place of shipment, with interest from commencement of suit, less freight, in the absence of notice of a special contract. *International &c. R. Co. v. Startz*, (Tex. Civ. App.) 33 S. W. Rep. 575.

Notice was given to carrier that a pop corn wagon was for use on a certain day. There was a delay of 13 days in delivery. Defendant was liable for a loss of profits on that day, and fair rental value for the other 12. *Gulf &c. R. Co. v. Compton*, (Tex. Civ. App.) 38 S. W. Rep. 220.

Extra feed and labor during delay included. *Galveston &c. R. Co. v. Thompson*, (Tex. Civ. App.) 44 S. W. Rep. 8.

Where the cattle injured have no market value, the measure of damages is the difference between their actual value before and after injury. *Texas &c. R. Co. v. Fambrough*, (Tex. Civ. App.) 55 S. W. Rep. 188.

See, also, *Houston &c. R. Co. v. Ney*, (Tex. Civ. App.) 58 S. W. Rep. 43.

Carrier not liable for injury after proper tender to consignee and refusal by him. *St. Louis &c. R. Co. v. Gates*, 15 Tex. Civ. App. 135.

Measure of damages for injury causing the loss of an unborn colt, held to be the depreciation in the value of the mare. *Texas &c. R. Co. v. Randle*, 18 Tex. Civ. App. 348.

In absence of notice of a special contract, damages resulting from a breach thereof caused by delay, cannot be recovered. *International &c. R. Co. v. Hatchell*, 22 Tex. Civ. App. 498.

See, also, *Pacific Ex. Co. v. Redman*, (Tex. Civ. App.) 60 S. W. Rep. 677; *Missouri &c. R. Co. v. Webb*, 20 Tex. Civ. App. 431; (Special contract price); *St. Louis &c. R. Co. v. Cates*, 15 id. 135.

But notice to trainmaster, under no duty to notify station agent, is not notice to the company. *Missouri &c. R. Co. v. Belcher*, 89 Tex. 428.

And notice subsequent to shipment is insufficient to charge carrier. *Bradley v. Chicago &c. R. Co.*, 94 Wis. 44.

Plaintiff's machine, which was moved from place to place was a new invention and had no established rental value. The measure of damages for delay was the value of its use based on the character of the machine, its capacity to do work, and the amount of work to be done by it, less the expense attached to running it. *Texas &c. R. Co. v. Hassel*, (Tex. Civ. App.) 58 S. W. Rep. 54.

Value of damaged goods may be determined by sale at public auction within a reasonable time. *The Queen*, 78 Fed. Rep. 155.

And intermediate fluctuations of market value should be disregarded. *The Earnwood*, 83 Fed. Rep. 315.

Notice that a shipment of horses was for a certain purpose at a certain time, made carrier liable for what they might have earned during delay, though no contract for hire existed. *Port Blakely Mill Co. v. Sharkey*, 102 Fed. Rep. 259.

## II. Repairs, Loss of Use &c.

The loss of use and repairs of vessel are proper items of damage growing out of injury by defendant's negligence. *Wilson v. Knapp*, 70 N. Y. 596, aff'g judg't for pl'ff.

*Wright v. Mulvaney*, 78 Wis. 89.

So, where boat was sunk. *Mark v. Hudson R. Co.*, 103 N. Y. 28.

For the purpose of a recovery for a total loss, it may be shown that the cost of raising a wreck was greater than its value. *Blanchard v. N. J. S. Co.*, 59 N. Y. 292; aff'g s. c., 3 N. Y. S. C. (T. & C.) 771, and judg't for pl'ff.

Where water flowed from defendant's drain and privies into the plain-



tiff's cellar, the expense of repairs and of preventing further injury was proper; also, loss of rental and injuries caused by stench. *Jutte v. Hughes*, 67 N. Y. 267; rev'g s. c., 8 J. S. 126, and judg't for pl'ff.

Citing *Francis v. Schoellkopf*, 53 N. Y. 152; *Ruff v. Rinaldo*, 55 id. 664; *De Went v. Wiltse*, 9 Wend. 325; *McKern v. See*, 4 Robt. 450.

In action for goods stolen from a storehouse, the expense of recovery and repair thereof is recoverable. What plaintiff did to recover the property was for defendant's benefit, for which he was entitled to credit, but he could not claim such credit without allowing the expense incurred. Evidence of price paid for property in connection with its use and condition was proper in the absence of ability to value the property by experts. *Jones v. Morgan*, 90 N. Y. 4; aff'g s. c., 24 Hun, 372, and judg't for pl'ff.

Distinguishing *Beach v. Raritan &c. R. Co.*, 37 N. Y. 457.

See *Arzaga v. Villalba*, 85 Cal. 191.

Error to allow a plaintiff to testify what he paid his physician, and for the repairs to a bicycle; the value of such items should have been shown. *Schimpf v. Sliter*, 64 Hun, 463; *Gumb v. Twenty-third Street R. Co.*, 114 N. Y. 411.

Where goods were wrongfully seized under execution, evidence of loss of profits caused by interruption of business, admissible as an element of damage. *Langan v. Potter*, 28 N. Y. Supp. 752.

Necessity of repairs and reasonableness of price paid, must appear. *Edge v. Third Ave. R. Co.*, 67 N. Y. Supp. 1002.

For a hayrack destroyed, the cost of the material and value of time taken to rebuild it is recoverable. *Union Pac. &c. R. Co. v. Williams*, 3 Colo. App. 526.

Damages for injury to carriage, includes the reasonable price for hiring another during time of repair. *Wellman v. Miner*, 19 Misc. 644.

See, also, *Schalscha v. Third Avenue R. Co.*, 19 Misc. 141.

Damages for injury to a horse, carriage and harness, include compensation for the loss of their use and the expense of doctoring. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

Damages for injury to barges, included demurrage. *Pierce v. Walton*, 20 Ind. App. 66.

See, also, *Loud &c. Lumber Co. v. Peter*, 20 Oh. C. C. 73.

Damages for the loss of a deed, includes the cost of a suit to resupply it, but excludes depreciation of the property in the interval; in the absence of proof of an opportunity to sell. *People's Savings Co. v. Pickrell*, (Ky.) 56 S. W. Rep. 500; rev'g 55 S. W. Rep. 194.

Damages in an action for the unlawful detention of a threshing ma-

chine do not include anticipated profits from contracts for threshing. *Williams v. Wood*, 55 Minn. 323.

Where a car injured plaintiff's wagon, the measure of damages was difference in value of the wagon immediately before and after the injury, and a reasonable sum for loss of use of wagon for a time reasonably necessary to repair the same. *Hoffman v. Street R. Co.*, 51 Mo. App. 273.

*Street v. Laumier*, 34 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Monroe v. Latten*, 25 Kans. 354. Where the action is for the immediate destruction of the property, measure of damages is value of the property and interest; *Churchman v. Kansas City*, 44 Mo. App. 665; *McKnight v. Ratcliff*, 44 Pa. St. 156.

Measure of damages for negligent insufficient levy of a tax, held to be the expense of its increase. *School District v. Burress*, (Neb.) 89 N. W. Rep. 609.

Cost of reasonable repairs made necessary by the injury, allowed, though they made the result more valuable than before injury. *Loud & Co. v. Peter*, 20 Oh. Cir. Ct. 73.

Anticipated profits of real estate business, during reconstruction, were recovered. *Choctaw & Co. v. Alexander*, 7 Okla. 579, 591.

Reasonableness of amount paid for repairs need not be proved, when within knowledge of the jury. *Chaperon v. Portland & Co. Electric Co.*, (Ore.) 67 Pac. Rep. 928.

Damages for partial destruction of house, held to be cost of reconstruction and compensation for loss of use. *Helbling v. Allegheny & Co.*, 201 Pa. St. 171.

Value of use and hire of animals rightly to be considered in estimating damages, where the award of the value of animals with interest thereon would be insufficient. *Craddock v. Goodwin*, 54 Tex. 588.

See *Schley v. Lyon*, 6 Ga. 535; *Hair v. Little*, 28 Ala. 248; *Davenport v. Ledger*, 80 Ill. 578; *Ewing v. Blount*, 20 Ala. 694; *Banks v. Hatton*, 1 Not. & M. (S. C.) 221; *Haviland v. Parker*, 11 Mich. 103; *McDonald v. North*, 47 Barb. 531.

Damages for repairs, is the reasonable not actual cost. Demurrage and wages of idle crew not included, unless pecuniary loss therefrom resulted from accident. *The Robert Hadden*, 68 Fed. Rep. 1017; see, also. *The Glencairn*, 78 Fed. Rep. 379.

Commissions on money disbursed for repairs are excluded, notwithstanding a custom to allow them. *The Glencairn*, 78 Fed. Rep. 379.

Tug, responsible for stranding a schooner, offered assistance in getting her off, which was refused. Not liable for subsequent damage. *The Bronx*, 86 Fed. Rep. 808.

In case of partial loss, the measure of damages is reasonable cost of

repair and pecuniary damage from lack of use; but in case of total loss there is the value of the thing lost, which is presumed to include value of its earning power. *The Hamilton*, 95 Fed. Rep. 844.

The cost of an artificial limb is special damage and must be so alleged. *Southern P. Co. v. Hall*, 100 Fed. Rep. 760.

Damages for the loss of use of water, is the value thereof in the market for irrigation purposes. *North Point &c. Irr. Co. v. Utah &c. Canal Co.*, 23 Utah, 199.

"Inconvenience," resulting from injury is not recoverable. *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589.

### III. Failure to Duly Carry Passengers.

In an action for a breach of contract to carry the plaintiff from New York to San Francisco via Lake Nicaragua, the evidence of exposure on the isthmus was proper, as bearing on the question of sickness, time lost there, expenses while there, expenses out and return; time and expenses lost by sickness are elements of damage. *Williams v. Vanderbilt*, 28 N. Y. 217, aff'g judg't for pl'ff.

No recovery allowed for ejection for non-payment of fare, of one who had been a passenger on another car that had become disabled. His remedy was suit for breach of contract. *Taylor v. Nassau &c. R. Co.*, 32 App. Div. 486.

Plaintiff delivered to defendant at New York a sum of money for a passage ticket from Johnstown, Pa., to Chicago, to be delivered that day to "R.," a museum freak at Johnstown, and stated at the time that it was essential that it be delivered that day to enable "R." to proceed to Chicago, where he was required to appear four days later for the purpose of exhibition pursuant to an engagement made by plaintiff. The ticket was not delivered and "R." failed to appear at Chicago, whereby plaintiff lost the profits of the contract for his exhibition. Held, that plaintiff's statement was sufficient to put defendant on inquiry, and that defendant not having made such inquiry must be deemed to have assumed responsibility for such damage as plaintiff would sustain by reason of such breach of engagement for "R.'s" exhibition, so far as was occasioned by his own breach of contract. A recovery of consequential damages resulting from a breach of contract from special circumstances is allowed, provided they may be said to have been within the reasonable contemplation of the contracting parties. *Limon v. Penn. Ry. Co.*, 54 N. Y. St. R. 245.

See, also, *Hadley v. Bafendale*, 9 Exch. 353; *Booth v. Spuyten Duyvel Rolling Mill Co.*, 60 N. Y. 487; 1 Sutherland on Damages, 50. See "Common Carrier of Passengers," page 576.

Measure of damages for loss of baggage, is value of use to passenger, not market value. *Simpson v. New York &c. R. Co.*, 16 Misc. 613.

An occupant of a berth in a sleeping car was not allowed to recover for loss of a roll of money to be deposited in bank on arrival. *Williams v. Webb*, 27 Misc. 508; mod'g s. c., 22 id. 513.

Recovery for humiliation and indignity allowed in action for ejection. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Damages for being carried by, may include compensation for vexation and anxiety as well as physical injury in returning. *Louisville &c. R. Co. v. Quick*, 125 Ala. 553.

Passenger was ejected from a train, but her baggage was carried on. She recovered for mental and physical distress due to delay in regaining it; but not for price of clothes purchased meanwhile. *Proctor v. Southern &c. R. Co.*, 130 Cal. 20.

A theatrical manager purchased tickets for himself and troupe to be carried to a certain point, where tickets for his show to the value of \$225 had been received. Owing to a collision plaintiff failed to reach his destination and the gate money was refunded. The damages resulting from the unusual character of the business of the traveler, unknown to the carrier contracting with him, were too remote. *Georgia R. Co. v. Hayden*, 71 Ga. 518.

Damages for ejection, may include compensation for pain and suffering, loss of time and feeling of shame and humiliation. *Louisville &c. R. Co. v. Goben*, 15 Ind. App. 123.

Deputy marshal may recover what he could have made on his trip, such as fees and the like, had he not been injured. *Chicago &c. R. Co. v. Hoover*, (Ind. Terr.) 64 S. W. Rep. 579.

Two hundred and eighteen dollars for compelling a delicate woman to get off a train and walk 400 yards on a rough way on a hot day, back to the station, is not excessive. *Louisville &c. R. Co. v. Guy*, (Ky.) 37 S. W. Rep. 1043.

That plaintiff is peculiarly sensitive to indignities, is no ground for enhancing damages for ejection. *Spink v. Louisville &c. R. Co.*, (Ky.) 52 S. W. Rep. 1067.

Damages for failure to hold a train as contracted, was the loss of time, expense and personal inconvenience. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

Exemplary damages were recovered for failure to back to a brick curbing on a muddy road on a rainy night, after passing it 20 to 40 feet, and take on passenger who had signaled. *Jackson &c. R. Co. v. Lowry*, 79 Miss. 431.

Railroad company is liable for nominal damages, regardless of actual

injury, for a breach of statutory duty, to stop a train before ejecting a passenger. *Holt v. Hannibal &c. R. Co.*, 87 Mo. App. 203.

Railroad company unable to take passenger back on his return ticket because its equipment was negligently out of repair, held liable on its contract, but not in tort, and exemplary or punitive damages were not allowed. *Hansley v. Jamesville &c. R. Co.*, 117 N. C. 565.

For failure to transport plaintiff's museum in time for an exhibition, the measure of damages is the probable net profits plaintiff would have made. *Yoakum v. Dunn*, 1 Tex. Civ. App. 524.

Passenger who voluntarily left a stated train and walked back to secure a conveyance, was not allowed to recover for inconvenience of the walk. *Houston &c. R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

In the absence of notice that plaintiff could not afford to buy other clothing and household goods, he could not recover for exposure incident to the carrier's failure to deliver them. *St. Louis &c. R. Co. v. May*, (Tex. Civ. App.) 44 S. W. Rep. 408.

Damages allowed for injury due to holding another's child, while compelled to stand in a crowded train. *Texas &c. R. Co. v. Rea*, (Tex. Civ. App.) 65 S. W. Rep. 1115.

Damages for loss of baggage, does not include loss of use and mental suffering. *Houston &c. R. Co. v. Seale*, (Tex. Civ. App.) 67 S. W. Rep. 437.

Defendant made a contract to carry an opera company from Peoria to Louisville, *guaranteeing* that the troupe would reach its destination by Monday morning. They arrived Tuesday, and were too much fatigued to play that evening. Recovery was allowed for loss of the engagement Monday evening and loss for Tuesday evening, but damages for loss of rest of engagements and breaking up of troupe was not allowed. The loss from the failure to arrive in season to give the performance, which the parties knew the troupe was going to Louisville to give, would come fairly within the contemplation of the parties; the loss from failure to pay the performance, whereby the troupe was broken up, would not. *Foster v. Cleveland C. C. & St. L. Ry. Co.*, 56 Fed. Rep. 434.

Failure to duly carry, held not proximate cause of loss of wages or profits that might have been earned, where no contract existed. *North American T. &c. Co. v. Morrison*, 178 U. S. 262; rev'g s. c., 85 Fed. Rep. 802.

So of the anticipated profits of a theatrical troupe, in the absence of a definite agreement to carry to a given point by a given time. *Southern R. Co. v. Myers*, 87 Fed. Rep. 149.

Where a carrier failed to complete journey, but put passenger off at an intermediate point, he recovered return passage money, incidental ex-

penses and compensation for loss of time. *Smith v. North American &c. Co.*, 20 Wash. 580; s. c., 44 L. R. A. 557.

In a similar case, the passenger completed the journey by other means of conveyance and recovered the expense incurred therein and compensation for loss of the time that he would probably have been employed at his destination, at wages there prevailing, less living expenses. *Ransberry v. North American &c. Co.*, 22 Wash. 476.

(a). EXPULSION FROM TRAIN.

Measure of damages is, compensation for loss of time, extra fare and injuries to feelings. *Jacobs v. Third Avenue R. Co.*, 75 N. Y. Supp. 679; rev'g s. c., 34 Misc. 512.

Passenger, who, after ejection, refused to reboard train at conductor's invitation unless it was backed to him, was not allowed to recover for postponement of his wedding. *Louisville &c. R. Co. v. Hine*, 121 Ala. 234.

Inconvenience of person unlawfully ejected from a train is subject of recovery. *Central &c. R. Co. v. Strickland*, 90 Ga. 562.

A person improperly ejected from a train may recover the amount of cost of ticket, which he had, damages on account of delay, and additional expenses for indignity and for personal injuries, if the expulsion was malicious or wanton. *Paleo v. Connell*, 127 Ill. 419.

Where a girl of six years was expelled from a train in violation of the statute, 240 feet from a station, functional derangement of the mind by fright by being thus left on the track was subject of recovery. *Illinois Central R. Co. v. Latimer*, 128 Ill. 163.

No recovery for passenger ejected near by a station, at which he embarked, for damages caused by walking a long distance to his destination, while he was ill. *Chicago &c. R. Co. v. Burrow*, 32 Ill. App. 161.

So, humiliation and indignity. *Paleo v. Bray*, 125 Ind. 229.

In case of wrongful expulsion, suffering from insult and abuse, outraged feelings, mental suffering, are elements of damage. *Shepherd v. Chicago &c. R. Co.*, 77 Iowa, 54.

See, *post*, p. 853.

Recovery of passenger, denied a ticket by ticket agent under belief that train he was taking did not stop at his destination, and required by the conductor to pay additional fare, was limited to the excess fare. *Courts v. Louisville &c. R. Co.*, 99 Ky. 574.

Humiliation, held an element of damage for wrongful ejection, in action of contract. *Lexington &c. R. Co. v. Lyons*, (Ky.) 46 S. W. Rep. 209.

Passenger refused to tell conductor whether signature on his mileage

book was his, and was arrested. A verdict for \$550 was reduced to \$10. *Palmer v. Maine C. R. Co.*, 92 Me. 399.

For refusal to permit passenger to lawfully board train, the amount paid for another ticket, loss of time, hotel expenses and compensation for other inconveniences suffered were recoverable. *Northern Cent. R. Co. v. O'Connor*, 76 Md. 287.

Loss of job of work, occasioned by ejection of a passenger, causing delay, cannot be considered. *Carsten v. Northern P. R. Co.*, 44 Minn. 454.

Remarks or comments of other passengers, after passenger was ejected, not subjects of damages. *Hoffman v. Northern P. R. Co.*, 45 Minn. 53.

Representation by ticket agent that a ticket was good on any train, does not entitle purchaser to exemplary damages for refusal to carry on a train on which, in fact, it was not good. *Yazoo & C. R. Co. v. Rodgers*, (Miss.) 31 South Rep. 581.

Ejection of passenger, not stopping at his destination, held not the proximate cause of injuries from exposure from a journey, unnecessarily taken at night, to reach destination, and no recovery was allowed therefor. *Chicago & C. R. Co. v. Spirk*, 51 Neb. 167.

The form of action does not change the rule of damage for an ejection before reaching destination, where plaintiff boarded the wrong train through a mistake of defendant's servant. *Pittsburg & C. R. Co. v. Reynolds*, 55 Oh. St. 370.

Where young lady was unlawfully obliged to either vacate the car or pay fare, the actual fare paid and the humiliation and mental suffering on account of the attention attracted to her, and being put under obligations to a stranger for the money, are subjects of recovery. *Willson v. Northern P. R. Co.*, 5 Wash. 621.

Damages for ejection, were not limited to amount necessary to repay fare, where reasonable investigation would have shown the conductor that it had been paid once. *Sprenger v. Tacoma T. Co.*, 15 Wash. 660.

#### (b). DETENTION.

Damages for illness caused by unheated depot where passenger was obliged to wait in order to take train, was subject of compensation. *Texas & C. R. Co. v. Mayes*, 15 S. W. Rep. 13.

Where a passenger given the alternative of leaving the train or paying fare chooses the former, he may recover for unused portion of ticket; inconvenience, loss of time and necessary expense incident thereto. *Houston & C. R. Co. v. Crone*, (Tex. Civ. App.) 37 S. W. Rep. 1074.

Where a passenger is ejected and arrested, imprisonment and detention are elements for consideration in determining the damages. *Gulf & C. R. Co. v. Conder*, (Tex. Civ. App.) 58 S. W. Rep. 58.

Where a steamer deviated from its course as stated upon the ticket, a passenger was allowed to recover for loss of time. *DeColange v. The Chateau Margaux*, 37 Fed. Rep. 157.

#### IV. Earnings and Profits.

Loss to the plaintiff, in his practice, if a professional man, may be shown. *Metcalf v. Baker*, 57 N. Y. 662, affirming judgment for plaintiff.

When the profits of a business are uncertain, proof of past profits is improper. *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; reversing judgment for plaintiff.

From opinion.—“I also think the judge erred in overruling the defendant's objection to the following question: ‘About what had been your profits, year by year, in that business?’ The plaintiff had testified that he was engaged in the tea importing and jobbing business, buying and selling teas, and had been for a great number of years. That he had a partner who attended to the sales, while he made the purchases. That in purchasing teas a high degree of skill was necessary, which the plaintiff possessed. That the business was extensive. That in consequence of the injury the plaintiff could not purchase teas, and there was a great falling off in the business of the firm. In *Lincoln v. Saratoga and S. Railroad Co.*, 23 Wend. 425, it was held, in an analogous case, that the plaintiff might prove that he was engaged in the dry-goods business, and its extent, but there was no attempt to prove the past profits of the business, with a view to show what the future would be. Where, in such a case, the plaintiff has received a fixed compensation for his services, or his earnings can be shown with reasonable certainty, the proof is competent. (*McIntyre v. N. Y. C. R. R. Co.*, 37 N. Y. 287; *Grant v. The City of Brooklyn*, 41 Barb. 381.) In *Nebraska City v. Campbell*, 2 Black. (U. S.) 590, it was held that proof that the plaintiff was a physician, and the extent of his practice, was competent. *Wade v. Leroy* (20 How. U. S. 34) held the same. In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain to furnish any safe guide in fixing the amount of damages. In *Walker v. The Erie R. R. Co.*, (63 Barb. 260) it was held that proof of the amount of income derived by the plaintiff for the year preceding the injury, from the practice of his profession as a lawyer, was competent. This goes beyond the rule adopted in any of the other cases, and it certainly ought not to be further extended. Whether proof of the income derived by a lawyer from the past practice of his profession is competent for the purpose of authorizing the jury to draw an inference as to the extent of the loss sustained by inability to personally attend to business, may, I think, well be doubted. There is no such uniformity in the amount of different years, as a general rule, as to make such inference reliable.”

See *Ehrgott v. Mayor*, 96 N. Y. 264, distinguishing this case, and largely limiting it. *Post*, p. 835.

Where loss of time is claimed as an item of damage from personal injury occasioned by negligence, if plaintiff fails to prove the value of



the time lost, or facts on which an estimate of such value can be founded, only nominal damages for that item can be given.

In such an action it was proved that plaintiff was engaged in business at the time of the injury, but had not been able to attend to it since; it was not shown what his business was, or the value of his time, nor any facts as to his occupation, from which the value could be estimated. *Leeds v. Met. Gaslight Co.*, 90 N. Y. 26.

**From opinion.**—"In very numerous actions for negligence, both those where death had resulted and which were prosecuted under the statute, and those for injuries not resulting in death, evidence showing the occupation or business of the injured party and tending to establish his earning power has been held competent and material. (*Grant v. City of Brooklyn*, 41 Barb. 384; *Masterton v. Village of Mount Vernon*, 58 N. Y. 391; *Beisiegel v. N. Y. Central R. R. Co.*, 40 id. 10.) And that it is so because the element of damages which consists of lost time is purely a pecuniary loss or injury, and for such only fair and just compensation must be given and the jury have no arbitrary discretion, but must be governed by the weight of evidence. (*McIntyre v. N. Y. Central R. R. Co.*, 37 N. Y. 289.) The rule of recovery is compensation. Where the loss is pecuniary and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only. (*Sedgwick on Damages*, chap. 2, p. 47; *Brantingham v. Fay*, 1 Johns. Cas. 264; *N. Y. Dry Dock Co. v. McIntosh*, 5 Hill, 290.) In the present case the jury knew simply that time was lost by reason of incapacity to labor."

See *People ex rel. Deverell v. Musical &c. Union*, 118 N. Y. 109.

A book canvasser was properly allowed to show his earnings for six or seven years before the accident. *Ehrgott v. Mayor &c.*, 96 N. Y. 264, aff'g judg't for pl'ff.

Distinguishing *Masterton v. Village of Mount Vernon*, 58 N. Y. 391.

**From opinion.**—"It would be quite difficult, if not impossible, to place before the jury the extent of the pecuniary loss, unless a plaintiff in such a case, could show how much he had been earning, and was capable of earning, in his usual vocation. In the case of a lawyer, if informed merely of the number of days he worked in a year, or of the number of clients he had, or of the number of cases he tried and argued; and in the case of a physician or dentist, if informed merely of the number of his patients, a jury would get a very inadequate idea of his earnings. It is certainly much better in such cases to place before the jury, the amount earned by the person in his profession during a series of years before the injury. That amount may vary in the past, and looking to the future, must be uncertain, and yet the proof will furnish to the jury the best possible basis to estimate the pecuniary loss. So here the plaintiff's income was not from capital invested, but solely from his personal skill and services; and his earnings for the six or seven years showed what his services were worth to himself, and what he was capable of earning, and thus gave the jury a basis from which to estimate his pecuniary loss. It would have aided the jury but very little to place before them the nature of his business, and the number of volumes of the cyclopedia sold. The question was how much did he earn, and how much was he capable of earning; and proof which would furnish answers to these questions would enable the jury to determine how much he had lost from

his inability to continue his vocation. There is abundant authority to justify the reception of this evidence. *Grant v. City of Brooklyn*, 41 Barb. 381; *Walker v. Erie R. Co.*, 63 id. 260; *Nash v. Sharpe*, 19 Hun, 366; *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287; *Kessel v. Butler*, 53 id. 612; *Wade v. LeRoy*, 20 How. (U. S.) 343; *Nebraska City v. Campbell*, 2 Black, 590; *Phillips v. Southwestern Ry. Co.*, L. R. 4, Q. B. Div. 406."

Where no evidence is given of the plaintiff's circumstances and condition in life, his earning power, skill and capacity, no damages for future loss is proper. *Staal v. Grand St. &c. R. Co.*, 107 N. Y. 625; rev'g s. c., 36 Hun, 208, and judg't for pl'ff.

Following *Leeds v. Metropolitan &c. Co.*, 90 N. Y. 26.

Where plaintiff was unable to attend to her duties as a school teacher for six weeks and thereby lost her salary, and on account of injury to her finger could not strike the keys of the piano, as it was necessary to do in giving music lessons, she was entitled to recover only nominal damages for such loss of wages on account of failure to give evidence thereof. *Baker v. M. R. Co.*, 118 N. Y. 533.

*Seitz v. Dry Dock &c. R. Co.* (N. Y. C. P.) 32 N. Y. St. R. 56.

To show losses from several days' absence from business, the plaintiff testified that his goods were in a safe; he had the combination and the clerks could not get in. Several customers called and he lost much profit, that he usually made from them. Evidence improper. *Phyfe v. Manhattan R. Co.*, 30 Hun, 377, rev'g judg't for pl'ff.

When earnings depend upon skill and capital combined, it is error to allow proof of them. *Johnson v. Manhattan R. Co.*, 52 Hun, 111, rev'g judg't for pl'ff.

Distinguishing *Ehrgott v. Mayor*, 96 N. Y. 265.

In an action for the death plaintiff may show what amount the deceased was earning at the time of his injury, and although his employers may have been accustomed to pay him more than they were under legal obligation to do, it is still pertinent to the question of the pecuniary loss which has been sustained. *Kimmer v. Weber*, 81 Hun, 599; s. c. rev'd on another point, 151 N. Y. 417.

The jury cannot capitalize the earnings of the injured person, that is, give him a sum the interest of which would be equal to what his earnings had been in previous years. *Gregory v. N. Y., L. E. & W. R. Co.*, 55 N. Y. 308.

Citing *Houston & Tex. R. Co. v. Burke*, 9 Am. & Eng. R. Cas. 369.

Damages for loss of fingers, includes loss of earning power occasioned thereby, but not loss of ability to do things at which no money is earned. *Freeland v. Brooklyn &c. R. Co.*, 54 App. Div. 90.

One supporting his family by peddling, may recover for loss of wages. *Feinstein v. Jacobs*, 15 Misc. 474.

No recovery allowed, where complaint alleged "incapacity from attending to business," but set out no impairment of income. *Brachfeld v. Third Ave. R. Co.*, 30 Misc. 425; rev'g s. c., 29 id. 586.

Prior earnings or profits may be shown as a basis upon which to admeasure damages, in cases of personal injury, where the profits are the result of the injured person's personal services. *Markowitz v. Metropolitan Street R. Co.*, 31 Misc. 175.

Decedent's experience in railroading, is an element in determining his earning capacity. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Recovery for permanent injuries, is not measured by rate of wages cut off. *Clare v. Sacramento Electric &c. Co.*, 122 Cal. 504.

A passenger was allowed to recover for inability to attend to his business, though there was no proof of earnings. *Storrs v. Los Angeles T. Co.*, 134 Cal. 91.

Wages paid for doing the work, plaintiff was customarily employed at, is evidence of loss by impaired earning power. *Finken v. Elm City Brass Co.*, 73 Conn. 423.

Elements of damages for personal injuries are, compensation for loss of time and wages, pain and suffering, medical supplies and assistance, future suffering and impairment of earning power. *Knopf v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 392.

See, also, *Strattner v. Wilmington &c. R. Co.*, 3 Penn. (Del.) 245; *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330; *Adams v. Wilmington &c. R. Co.*, id. 264; *San Antonio &c. R. Co. v. Keller*, 11 Tex. Civ. App. 569; *Galveston &c. R. Co. v. Hampton*, 24 id. 458.

What would have been earned in plaintiff's trade, as well as for pain and suffering and expenses of medical aid. *Washington &c. R. Co. v. Patterson*, 9 App. D. C. 423.

Present value of prospective earnings, is not the entire amount for the given number of years less seven per cent of the whole. *Macon &c. R. Co. v. Moore*, 99 Ga. 229.

Recovery may be had for loss of earning capacity due to permanent injuries, though there is no proof as to prior earnings. *Augusta v. Owens*, 111 Ga. 464.

Reversible error, to leave the jury without rule for computing damages. *Southern R. Co. v. O'Bryan*, 112 Ga. 127.

Error to charge as to prospects of "increased earnings," neither alleged or proved. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

Where the injury is permanent, the mortality and annuity table may be admitted, as to the question of the value of the loss of wife's services. *Collins Park &c. R. Co. v. Ware*, 112 Ga. 663.

Business assistance during disability, is an element of damage. *North Chicago Street R. Co. v. Zeiger*, 182 Ill. 9; aff'g s. c., 78 Ill. App. 463.

Earnings in an employment abandoned five years before the injury, held not evidence on loss of earning capacity. *West Chicago Street R. Co. v. Maday*, 188 Ill. 308; aff'g s. c., 88 Ill. App. 49.

In an action for injuries, evidence of plaintiff's average earnings may be given, although at the time of the injury he was engaged in other work. *Galesburg v. Hall*, 45 Ill. App. 290.

Though at first not aware of serious injury, plaintiff was compelled to stop work on account of it. He recovered substantial damages. *Ripley v. Leverenz*, 83 Ill. App. 603; s. c. rev'd, 183 Ill. 519.

Proof of occupation and inability to work at it, is admissible under general allegations. *Swift & Co. v. O'Neill*, 88 Ill. App. 162; s.c. aff'd, 187 Ill. 337.

See, also, *Illinois Steel Co. v. Ostrowski*, 194 Ill. 376; aff'g s. c., 93 Ill. App. 57.

In suit by minor, jury cannot consider impairment of earning capacity during minority. *Western Union Teleg. Co. v. Woods*, 88 Ill. App. 375.

Earnings before injury is evidence on impairment of earning capacity. *Kankakee v. Steinbach*, 89 Ill. App. 513.

See, also, *Elgin v. Anderson*, 89 Ill. App. 52.

Carefulness and competency of deceased, held elements of consideration for the jury in estimating damages. *Pittsburg &c. R. Co. v. Parish*, 28 Ind. App. 189.

A farmer incapacitated by injuries received may recover in damages for loss of time, suffering and medical attendance, but, *unless special damage is claimed*, not for injury to his business. *Homan v. Franklin County*, 90 Iowa, 185.

Opinions as to what plaintiff might have earned, at vocations at which he was never employed, held inadmissible. *Atchison &c. R. Co. v. Chance*, 57 Kan. 40.

Plaintiff may recover for loss of earning power, value of his time and labor to himself in conduct of his own business, but not speculative profits or profits on invested capital. *Chicago &c. R. Co. v. Posten*, 59 Kan. 449.

See, also, *Chicago &c. R. Co. v. Scheinkoenig*, 62 Kan. 57.

Evidence of plaintiff's financial condition is inadmissible. *Ft. Scott &c. R. Co. v. Lightburn*, 9 Kan. App. 642.

Charge allowing for "earning capacity" of deceased, when he was only five years of age, was misleading and erroneous. *Smith v. Middleton*, (Ky.) 66 S. W. Rep. 388.

Defendant's circumstances may be an element of consideration, where injury was caused by his servant alone, and he was not personally at fault. *Lovacano v. Jurgens*, 50 La. Ann. 441.

Loss of profits in conducting a business dependent upon the labor of

others is not an element of recovery, but the value of the services of the injured person in connection with such business. *Silsby v. Michigan Car Co.*, 95 Me. 204.

Definite and certain profits of an established business, but not speculative, are recoverable. *National &c. Board Co. v. Lewiston &c. Light Co.*, 95 Me. 318.

Damage to health and business proper for injury from sewage. *Allen v. Boston*, 159 Mass. 324.

Individual earning power is the measure of damage for loss of time; not market value of average wages of a man of plaintiff's average capacity. *Draithwaite v. Hall*, 168 Mass. 38.

Allowance of present value of an annuity for given time, at given per cent, as damages for loss of earning capacity, sustained. *Copson v. New York &c. R. Co.*, 171 Mass. 233.

The difference between actual earnings and probable earnings had the injury not happened may be awarded. *Geveke v. Grand Rapids &c. R. Co.*, 56 Mich. 589.

Plaintiff's physical condition, and the rate of his wages, before injuries were received, may be shown. *Gardiner v. Detroit St. R. Co.*, 99 Mich. 182; *Fordyce v. Withers*, 1 Tex. Civ. App. 540.

Recovery may be had for loss of earning power as manual laborer, though a non-lucrative employment, as a brain worker, may possibly be secured. *Ostrander v. Lansing*, 115 Mich. 224.

While the loss of profits is not an exact measure of damages for loss of earning power, it is some evidence. *Hart v. New Haven*, (Mich.) 89 N. W. Rep. 677.

In the absence of evidence of plaintiff's earning capacity or loss of earnings, such loss cannot be recovered. *O'Brien v. Loomis*, 43 Mo. App. 29.

Where plaintiff had no fixed salary but was working on commissions—his yearly average of earnings, held to be the measure for the value of a loss of time of salesman on commissions. *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500.

Where the nature of the employment is such that proof can be made of the value of lost time, it must be made. *Haworth v. Kansas &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 111.

Where no special damages are alleged, plaintiff cannot enhance his damages by showing his knowledge of a trade and employment at it. Loss of earnings is not a necessary consequence of an injury. *Krueger v. Chicago &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 220.

But the complaint need not allege the value thereof. *Mabrey v. Cape &c. Road Co.*, (Mo. App.) 69 S. W. Rep. 394.

Evidence of extra earnings, by selling rations to sub workmen, was admitted on the question of earning capacity. *Wilkie v. Raleigh & C. R. Co.*, 127 N. C. 203.

Proof of occupation and earnings therein, permitted under general allegations of damage. *Alliance v. Campbell*, 6 Oh. C. D. 762.

It is only the present worth of future earnings that can be recovered. The various elements that enter into an assessment of damages for loss of earning power are discussed at length in the opinion. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Annuity tables held inadmissible and Carlisle tables admissible, when accompanied by evidence of health and habits. *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98; *McKenna v. Celunus Nat. Gas Co.*, 198 id. 31.

Profits on invested capital is not, but profits due to personal management of business is, an element of damage for loss of earning power. *Wallace v. Pennsylvania R. Co.*, 195 Pa. St. 127.

No damages are recoverable for loss of earning power, without evidence on the subject. *McKenna v. Citizens' Nat. Gas Co.*, 198 Pa. St. 31.

In the absence of evidence that plaintiff's services were worth more than his present salary, it was held error to charge that the amount thereof was not conclusive on that question. *McKenna v. Citizen's & C. Gas Co.*, 201 Pa. St. 146.

Where a brakeman was paid by the mile his average daily mileage and number of days lost was admitted, on question of value of time lost. *Olson v. Burlington & C. R. Co.*, 12 S. D. 326.

Boy recovered for loss of three fingers, though he received more wages after than before the accident. *Central Man. Co. v. Cotton*, (Tenn.) 65 S. W. Rep. 403.

No recovery for loss of time unless there be evidence of its value or damages resulting from it. *International & C. R. Co. v. Simcock*, 81 Tex. 503; *Britton v. Grand Rapids R. Co.*, 90 Mich. 159.

Proper measure of damages as to decrease of plaintiff's earning capacity, is the difference between the wages he earned before his injury and those he was capable of earning thereafter. *Gulf & C. R. R. Co. v. Abbott*, (Tex.) 24 S. W. 299.

Where plaintiff is experienced in several occupations, loss of earning power in the particular one he was engaged in at the time of injury, is not the measure of damages. *Missouri & C. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345.

Mail clerk incapacitated for that service, was not limited in his recovery to the time when he expected to leave that occupation and enter another. *Houston & C. R. Co. v. McCullough*, 22 Tex. Civ. App. 208.

Recovery for value of time lost and compensation for loss of earning capacity, is not double damages. *Galveston &c. R. Co. v. Lynch*, 22 Tex. Civ. App. 336.

See, also, *Gulf &c. R. Co. v. Warner*, 22 Tex. Civ. App. 167; *Missouri &c. R. Co. of Texas v. White*, id. 424; *San Antonio &c. R. Co. v. Belt*, 24 id. 281.

Though admissible, proof of life expectancy is not essential to recovery for a personal injury. *International &c. R. Co. v. Elkins*, (Tex. Civ. App.) 54 S. W. Rep. 931.

Evidence that plaintiff is old, poor, and has to labor to support himself and dependent daughter, is inadmissible. *Belton v. Lockett*, (Tex. Civ. App.) 57 S. W. Rep. 687.

Plaintiff allowed to state what his time would reasonably have been worth, had he been in usual health. *Gulf &c. R. Co. v. Bell*, 24 Tex. Civ. App. 579.

Limitation of recovery for impaired capacity to the present worth of future earnings, on a 6% basis was improper. *Galveston &c. R. Co. v. Kief*, (Tex. Civ. App.) 58 S. W. Rep. 625.

Exact proof of loss of earning capacity, is not required. *De La Vergne &c. Mach. Co. v. Stahl*, 24 Tex. Civ. App. 471.

Where plaintiff was unfitted to perform any but manual labor, evidence of wages of household servants was admissible. *San Antonio &c. R. Co. v. Skidmore*, (Tex. Civ. App.) 65 S. W. Rep. 215.

That one was earning \$1.25 a day at one trade at the time of injury, does not prevent his proving that he was capable of earning more at another. *Chicago &c. R. Co. v. Long*, (Tex. Civ. App.) 65 S. W. Rep. 882.

Keeper of a jail at \$35 per month, was not allowed to show his occupation as farm superintendent at \$700 yearly five years before. *Houston &c. R. Co. v. Gee*, (Tex. Civ. App.) 66 S. W. Rep. 78.

Allowance for mental and physical suffering and loss of earning power, held not double damages. *Galveston &c. R. Co. v. Jones*, (Tex. Civ. App.) 68 S. W. Rep. 190.

Where earning capacity is permanently limited, but not destroyed, mortality tables are applicable. *Missouri &c. R. Co. v. Scarborough*, (Tex. Civ. App.) 68 S. W. Rep. 196.

A convict, injured during imprisonment, cannot recover for his inability to labor during the term of his imprisonment. *Dalheim v. Lemon*, 46 Fed. Rep. 225.

Damages for nursing wife and doing her work are, value of competent servant to perform same duties, and not wages such as husband would have earned at his trade. *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152; *Salida v. McKinna*, 16 Colo. 523.

See *Barnes v. Keene*, 132 N. Y. 13.

The measure of damages for loss of earning capacity, is the cost of a life annuity equal to the amount of decrease in earning power. *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. Rep. 634.

Allowance of salary in present occupation that could be earned during the probable duration of future disability, held error. *Denver v. Sherret*, 88 Fed. Rep. 226.

In a statutory action for death, the measure of damages is what the life would have been worth to decedent; not to a beneficiary. Hence earning capacity during minority is excluded. *Linss v. Chesapeake &c. R. Co.*, 91 Fed. Rep. 964.

Plaintiff may show the character of his ordinary pursuits, and the effect of the injury in preventing his following them. *Southern P. Co. v. Hall*, 100 Fed. Rep. 760.

Jury authorized to take notice of general wage schedule of railroad foreman. *Missouri &c. R. Co. v. Elliot*, 102 Fed. Rep. 96.

Cost of keeping and schooling, inadmissible in action for services of minor. *Birkel v. Chandler*, 23 Wash. 241.

Plaintiff was allowed to show earnings in occupation abandoned three years before, on question of loss of earning capacity. *Peterson v. Seattle Co.*, 26 Wash. 615.

#### (a). HUSBAND AND WIFE.

In an action by a married woman to recover damages for personal injuries caused by the wrongful act of another, unless she is carrying on a trade or business, or performing labor or services on her sole and separate account, she is not entitled to recover consequential damages resulting from her inability to labor. Her services and earnings belong to her husband, and for loss of such service he may have an action. This right is not affected by the act of 1862 (chap. 172, Laws of 1862), amending the act concerning the rights and liabilities of husband and wife. (Chapter 90, Laws of 1860.) *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47.

Before the injury a married woman took charge of her family, and she also worked out by the day, earning \$1.25 per day. To the proof of this fact upon the trial the defendant objected on the ground that her time and services belonged to her husband. The court overruled the objection, and also refused to charge, that she could not recover for her time and services while disabled. No error; had the defendant requested a charge that *she could not recover for the loss of services to her husband in the discharge of her domestic duties*, the request could not properly have been refused, but the request proceeding upon the idea that *all* her time and services belonged to her husband was properly denied. *Brooks*



v. *Schwerin*, 54 N. Y. 343, aff'g judg't for pl'ff, distinguishing *Filer v. N. Y. Cent. R. Co.*, 49 N. Y. 47.

Where a married man takes boarders into his house or converts it into a hospital for the sick, and his wife takes charge of his establishment or renders services in the house to boarders or sick persons, in the absence of proof of any special agreement, all her services and earnings belong to her husband, and he can maintain an action to recover therefor. *Reynolds v. Robinson*, 64 N. Y. 589, rev'g judg't for pl'ff.

Distinguishing *Brooks v. Schwerin*, 54 N. Y. 343.

Unless the complaint shows that the plaintiff, a married woman, is entitled to the fruits of her labor or is in business on her own account, evidence thereof is error in action by her. *Uransky v. Dry Dock, E. B. & R. Co.*, 118 N. Y. 304; rev'g s. c., 44 Hun, 119, and judg't for pl'ff.

Distinguishing *Hartell v. Holland*, 19 W'kly Dig. 312; *Ehrgott v. Mayor &c.*, 96 N. Y. 275; and following, *Gumb v. Twenty-third Street R. Co.*, 114 id. 411.

A husband is entitled to the services of his wife in respect to *household duties*, and the right of action for an injury to her, which prevents her rendering such services, belongs to the husband; so, also, of wages earned outside the household duties from him by the wife, and where she had been accustomed to work for her husband *outside of her household duties* and to receive payment therefor from her husband, under agreement for compensation by which such pay became her own property, such earnings can not be considered by the jury in an action brought by her to recover for injuries preventing her further rendition of such services. *Blaechinska v. Howard Mission &c.*, 130 N. Y. 497; rev'g s. c., 56 Hun, 322.

Unless the complaint allege, that the married woman carried on a separate business, to her own profit, and special damages thereto by reason of personal injury, the presumption is, that damages arising from her diminished capacity belonged to her husband, and it is error to allow her to recover therefor. *Woolsey v. Trustees of the Village of Ellenville*, 61 Hun, 136, rev'g judg't for pl'ff.

See, also, *Mellwitz v. Manhattan R. Co.*, 62 Hun, 622; *Haden v. Clark*, 10 N. Y. Supp. 291.

Where the loss of a wife's services is claimed, the husband cannot recover substantial damages in absence of evidence as to value of services performed by the wife when in health, and of the character or extent of the work performed by her in keeping plaintiff's house. *Munk v. Watertown*, 67 Hun, 261.

*Klein v. Jewett*, 26 N. J. Eq. 481; *Ohio and Mississippi R. Co. v. Crosby*, 107 Ind. 32.

The court charged in an action by a husband to recover for injuries to his wife that if the jury found a verdict for the plaintiff they were confined to compensating him for the loss of his wife's services, together with the amount he paid a man hired to do the work which she had previously performed; error. *London v. Cunningham*, 1 Misc. 408.

Where husband and wife work for another and their joint earnings are used for the support of the family, the husband is entitled to recover for the wife's services, in the absence of a special contract that payment should be made to her individually. *Graf v. Feist*, 9 Misc. 479.

Inasmuch as a wife's earnings belong to her husband, her individual and personal damages in an action by herself can be "measured only by the enlightened conscience of an impartial jury." *Brunswick Light Co. v. Gale*, 91 Ga. 813.

In action by husband and wife for injuries to wife, judgment runs to both, being community property. *Griffen v. Lewiston*, (Id.) 55 Pac. Rep. 545.

Wife without separate employment, cannot recover for loss of time. *Denton v. Ordway*, 108 Iowa, 487.

Where a statute provides that wages due a married woman for her separate labor, shall constitute her separate estate, loss of earnings is proper evidence in an action for injuries. *Smith v. Chicago &c. R. Co.*, 119 Mo. 246.

Married woman cannot recover for expense of medical aid, in the absence of a special contract by her. *Toledo v. Duffy*, 13 Oh. C. C. 482.

See, also, *Atlantic &c. R. Co. v. Ironmonger*, 95 Va. 625.

Measures of damages to a widow, is the amount of her husband's earnings he would probably have contributed to her support. *Missouri &c. R. Co. v. Hines*, (Tex. Civ. App.) 40 S. W. Rep. 152.

## V. Husband and Wife.

In an action by husband and wife for injuries to wife, the measure of damages is compensation for her pain and suffering caused thereby, present, past and future; expenses of nursing and loss of services to husband are excluded. *Friedman v. McGowan*, 1 Penn. (Del.) 436.

See, also, *Louth v. Thompson*, 1 Penn. (Del.) 149.

### (a). ACTION BY HUSBAND.

The husband may recover damages for the loss of his wife's society. *Jones v. Utica & B. R. R. Co.*, 40 Hun, 349.

From opinion.—"At an early date, the remedy for such injuries was an action of trespass with force and arms, but later, an action on the case was held

appropriate, and it was said in such a case, though quite unnecessary for the decision, that if a husband loses the society and assistance of his wife by an accidental tortious act of the defendant, an action will lie. (*Winsmore v. Greenbank*, Willes, 577; *Baker v. Bolton*, 1 Camp. 493.) The action was for the recovery of damages for injuring the plaintiff's wife while traveling in defendant's stage coach, from the effects of which she died in about a month, and it was held that the husband could recover for the loss of his wife's society from the date of her injury to the date of her death.

*Lynch v. Davis* (12 How. Pr. 323), was an action by a husband to recover damages for unskillful practice of a physician, resulting in the death of plaintiff's wife, and the same rule was held on demurrer at special term. *Phillippi v. Wolff*, 14 Abb. (N. S.) 196, was an action by a husband to recover damages for an abortion produced by defendant upon plaintiff's wife, and resulting in her death, and the same rule was held in *Hopkins v. The Atlantic & St. Lawrence Railroad* (36 N. H. 9), the plaintiff's wife was injured on defendant's road, and it was held that an assessment of damages for the loss of the wife's services and society was proper.

In *Green v. Hudson River R. Co.*, (32 Barb. 25) the wife was instantly killed, and in *Blake v. Midland Ry. Co.*, (18 Q. B. 93), the husband died the day after the injury, and both actions were brought under statute.

*Cregin v. Brooklyn Crosstown Railroad*, (18 Hun, 368; s. c., 19 id. 341; s. c., 75 N. Y. 192; s. c., 83 id. 595) was an action by a husband to recover damages for injury to his wife while being carried by defendant. Before trial the husband died. The action was continued by the administrator, and it was held, (83 N. Y. 595) that the right to recover for loss of society did not survive, but it seems to be assumed that the husband might have recovered for this loss.

If a wife is injured by a carrier, the husband may recover for loss of service, expenses and for loss of society. (2 Wood's Ry. Law, 1245, sec. 317; 2 Rorer Ry. Law, 1094, 1095; 2 Thomp. Neg. 1240, and if the wife be intentionally injured, the husband may recover for loss of society. Sch. Dom. Rel., sec. 77.)"

In an action by a husband to recover for a personal injury to his wife, the evidence tended to show that in consequence of the injury the wife had a miscarriage. The court erroneously permitted the jury to consider and include in their verdict "any damages arising from the injury and resulting in depriving the plaintiff of prospective offspring. *Butler v. The Manhattan Ry. Co.*, 143 N. Y. 417; reversing 4 Misc. 401.

Husband may recover for loss of wife's society through negligent act of defendant. *Ainley v. M. R. Co.*, 47 Hun, 236.

In action by husband for loss of services of wife, the ages of the parties and their conditions for enjoyment of life before and after the injury, are proper subjects for the consideration of the jury. *Zingrebe v. Union R. Co.*, 56 App. Div. 555.

Husband may recover for loss to him of services of wife, in care of children; but not for their loss of services of a mother. *Redfield v. Oakland &c. Street R. Co.*, 112 Cal. 220.

Estimate of damage for loss of service of wife may be made by the

jury, from their general experience. Wife's prior recovery does not bar husband's action. *Denver &c. T. Co. v. Riley*, 14 Colo. App. 132.

Elements of husband's damage for injury to his wife, are loss of services and society; as well as the expense of medical aid. *Washington &c. R. Co. v. Hickey*, 12 App. D. C. 269.

The measure of damages which a husband may recover for loss of his wife's services varies with the circumstances of each case; there need not be any express evidence of the value of those services. *Metropolitan &c. R. Co. v. Johnson*, 91 Ga. 466.

See *Lett v. St. Lawrence &c. R. Co.*, 1 Ont. 545; *Sloan v. N. Y. &c. R. Co.*, 4 Thomp. & C., (N. Y.) 135.

In an action by husband on account of injury to his wife, value of her domestic services and also as the manager of her husband's business, without contract or expectation of payment therefor by him, may be recovered. *Citizens' Street R. Co. v. Twinane*, 121 Ind. 375.

On the question of what a wife's services were really worth, what the husband had really realized therefrom in the past is immaterial. *Indianapolis &c. R. Co. v. Robinson*, 157 Ind. 414.

The Iowa statute permits a husband to join claims in his own right, to a suit by husband and wife, for injuries to his wife. *McDonald v. Chicago &c. R. Co.*, 26 Iowa, 124.

A suit brought for wrongs done to the wife must be brought by the husband in his own name, who is head and master of the community into which the damages, when recovered, fall. *Fournet v. Morgan &c. R. Co.*, 43 La. Ann. 1202.

A husband can sue in his own name for loss of services of wife, and for any expense or loss resulting from defendant's negligence. *Blair v. Chicago &c. R. Co.*, 89 Mo. 334.

*Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *McKinney v. Stage Co.*, 4 Iowa, 420; *Hopkins v. R. Co.*, 36 N. H. 9; *McDonald v. R. Co.*, 20 Iowa, 124; *Smith v. City*, 55 Mo. 456; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329.

And this is true, notwithstanding the wife has an action for the injuries received. *Blair v. Chicago &c. R. Co.*, 89 Mo. 334.

*Woodward v. Washburn*, 3 Denio (N. Y.) 369.

Wife's capacity for usefulness, aid and comfort are subjects of recovery. *Furnish v. Missouri P. R. Co.*, 102 Mo. 669.

Recovery for loss of time in nursing wife, must be limited to the reasonable value thereof. *Freeman v. Metropolitan Street R. Co.*, (Mo. App.) 68 S. W. Rep. 1057.

Loss of services is confined to services as wife, and does not include services, to the proceeds of which she is entitled, though she was in the

habit of contributing them to the support of the family. *Riley v. Lidtke*, 49 Neb. 139.

Husband, not allowed to recover for loss of services and medical expenses for wife, due to sickness, caused by death of a child, through negligence of a physician. *Myers v. Holborn*, 58 N. J. L. 193; s. c., 30 L. R. A. 345.

Recovery for loss of service, not barred by statutory provision that neither husband or wife has any interest in the property of the other. *Baltimore &c. R. Co. v. Glenn*, 66 Oh. St. 395.

Recovery may be had for the loss of earning power of wife. *Readdy v. Shamokin*, 137 Pa. St. 98.

Mental suffering of a wife is a proper element of damages in an action by the husband for injuries to the wife. *Campbell v. Harris*, 4 Tex. Civ. App. 636.

See *Brown v. Sullivan*, 71 Tex. 470; *R. Co. v. White*, 80 id. 202; see, however, *Lett v. St. Lawrence &c. R. Co.*, 1 Ont. 545; *Penn. R. Co. v. Goodman*, 62 Pa. St. 329.

Mental pain, anxiety and distress of wife, carried to wrong destination, may be recovered by her husband. *Texas &c. R. Co. v. Armstrong*, 93 Tex. 31.

Loss of wife's services and of husband's time in attending her, are elements of damage. *Ft. Worth &c. R. Co. v. Kennedy*, 12 Tex. Civ. App. 654.

And where he sues for injury to himself, her extra services in attending him. *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16.

A husband who has nursed his wife can recover the value of the services of a person competent to do that work, not the amount of wages which he might have earned at his trade. *Hazard Powder Co. v. Volger*, 58 Fed. Rep. 152.

*Barnes v. Keene*, 132 N. Y. 13.

#### (b). ACTION BY WIFE.

Where married woman was working for her husband for wages she cannot recover for loss of same. *Blaechinska v. Howard Mission*, 130 N. Y. 497.

Although a wife has been separated from her husband for twelve years, working out for her support, yet if, in absence of evidence of her husband's death, or that she had not heard from him, or that he had not assisted her, or of any agreement that she should have her earnings, she may not recover for her loss of time devoted to domestic services. *Thuringer v. N. Y. C. &c. R. R. Co.*, 71 Hun, 526.

Under the provisions of section 2 of chapter 90 of the Laws of 1860,

and of section 1 of chapter 381 of the Laws of 1884, if a married woman, with the knowledge of her husband, renders services to a third person, pursuant to a contract for compensation, she may maintain an action to recover the price agreed upon or the value of the services rendered.

The common-law presumption that the services of a wife belong to her husband exists notwithstanding the provisions of chapter 90 of the Laws of 1860, and chapter 381 of the Laws of 1884, but may be rebutted. *Stokes v. Pease*, 79 Hun, 304.

A married woman may not recover for loss of services or for medical expenses; but only for pain and physical impairment to herself. *Austin v. Bartlett*, 67 App. Div. 312.

A married woman, suing alone, cannot recover for her expenses without evidence that she actually paid or was liable therefor, unless separated from her husband. *Lewis v. Atlanta*, 77 Ga. 756.

See *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504.

Impairment of married woman's capacity to labor, together with pain and suffering, is recoverable by her and not by her husband. *Metropolitan Street R. Co. v. Johnson*, 90 Ga. 500.

A married woman, by statute, responsible for expense of medical assistance and entitled to earn money which is her own, is entitled to recover for loss of time and medical expenses. *West Chicago Street R. Co. v. Carr*, 67 Ill. App. 530

See, also, *Hill v. Sedalia*, 64 Mo. App. 494; *Chacey v. Fargo*, 5 N. D. 173.

A wife, suing for personal injuries, cannot recover for medical attendance, or loss of time, unless presumptive right of the husband to recover for the same is rebutted. *Ohio &c. R. Co. v. Cosby*, 107 Ind. 32.

*Long v. Morrison*, 14 Ind. 595; *Fuller v. Naugatuck R. Co.*, 21 Conn. 557; *Baltimore &c. R. Co. v. Kemp*, 61 Md. 74; *Moody v. Osgood*, 50 Barb. (N. Y.) 628.

Where a wife incurs liability, or expends money for medical services in respect of injuries received by herself, she may recover for the same. *Shelby County v. Castetter*, 7 Ind. App. 309.

Where wife has become liable for medical treatment from her own separate means she may recover therefor. *Shelby County v. Castetter*, 7 Ind. App. 318.

A married woman cannot include in her recovery, an item for medical treatment. *Efroymsen v. Smith*, (Ind. App.) 63 N. E. Rep. 328.

A married woman cannot recover damages, in an action for personal injuries in her own name, for loss of time, unless she is carrying on a business of her own apart from her husband. *Thomas v. Brooklyn*, 58 Iowa, 438.

*Nichols v. Dubuque &c. R. Co.*, 68 Iowa, 732; *Tuttle v. Chicago &c. R. Co.*, 42

id. 518; *Hall v. Manson*, 90 id. 585; *Van Doran v. Marden*, 48 id. 188; *Fleming v. Shenandoah*, 67 id. 508. See following cases: *McWhirter v. Hatten*, 42 Iowa, 288; *Grant v. Green*, 41 id. 88; *Lyle v. Gray*, 47 id. 153; *Klein v. Jewett*, 26 N. J. Eq. 474.

A married woman cannot recover for loss of time due to an injury, if she is a mere housewife. *Fleming v. Shenandoah*, 67 Iowa, 508.

Membership in a church or society, is not an element of damage to wife for personal injuries. *Denton v. Ordway*, 108 Iowa, 487.

Married woman, living with her husband, cannot recover for loss of time, medical attendance or impaired capacity to labor. *Atchison & C. R. Co. v. McGinnis*, 46 Kan. 109.

*Harmony v. Old Colony R. Co.*, 165 Mass. 100; s. c., 30 L. R. A. 658; *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 351.

A married woman, living apart from her husband, who supported herself for several years, was permitted to recover for medical attendance. *Lammiman v. Detroit & C. Street R. Co.*, 112 Mich. 602.

Otherwise, if she be living with him. *State v. Detroit*, 113 Mich. 643.

A married woman denied recovery for detention of her land, prior to her husband's death. *Smith v. White*, 165 Mo. 590.

Damages for personal injury are personal to the wife, although husband be nominal party. *Brown v. Hannibal & C. R. Co.*, 23 Mo. App. 209.

In an action by a married woman for injuries to her person, her age and condition in life are not to be considered. *Ross v. Kansas City R. Co.*, 48 Mo. App. 440.

Under statute permitting wife to recover for loss of services of husband, she may recover for prospective earnings, where his injury is permanent. *Clark v. Hill*, 69 Mo. App. 541.

In an action by husband and wife for injuries to her *before* her marriage, her loss of capacity to earn should be considered, although such damages accrued to her individually. *Reading v. Pa. R. Co.*, 32 N. J. L. 264.

The premature birth of a child, without proof of injury or pain on account of same, is not a subject of recovery. *Hawkins v. Front Street Cable R. Co.*, 3 Wash. 592.

## VI. Elements of Damage.

There is no rule of damages for personal injuries; their assessment is for the jury. *McLean v. Lewiston*, (id.) 69 Pac. Rep. 478.

Expense of watching the cattle, though exceeding the cost of fence was allowed, as damages for failure by railroad company to comply with fencing statute. *Atchison & C. R. Co. v. Billings*, 7 Kan. App. 399.

The effect of previous conditions on capacity to recover, cannot be considered. *Sullivan v. Marin*, (Mass.) 56 N. E. Rep. 600.

That plaintiff is poor, is not a consideration. *Southern R. Co. v. McLellan*, (Miss.) 32 South. Rep. 283.

Nor that he had wife and family. *Sykes v. St. Louis &c. R. Co.*, 88 Mo. App. 193; *Kansas City &c. R. Co. v. Eagan*, 64 Kan. 421.

But his condition in life, is an element for consideration. *Ward v. Steffen*, 88 Mo. App. 571.

Elements of damages for personal injuries are, expense incurred, loss of earning power and inconveniences and suffering, mental and physical. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

See, also, *Galveston &c. R. Co. v. Waldo*, (Tex. Civ. App.) 32 S. W. Rep. 783; *San Antonio &c. R. Co. v. Weigers*, 22 Tex. Civ. App. 344.

In action for death, evidence of its effect on mother was excluded. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631.

That a man was married and had small children, is not an element of consideration. *Lesler v. Rolfe &c. Co.*, (W. Va.) 41 S. E. Rep. 216.

(a). PHYSICAL AND MENTAL EFFECTS, LOSS OF TIME, &c.

Damages were allowed for miscarriage, resulting from a shock caused by a blow. *Jones v. Brooklyn &c. R. Co.*, 23 App. Div. 141.

Evidence of injury to eye was excluded, where the complaint, specific in other particulars, did not refer to it. *Geoghegan v. Third Ave. R. Co.*, 51 App. Div. 369.

No recovery was allowed for dislocation of arm, where the only evidence thereof was non-use. *Haszlacher v. Third Ave. R. Co.*, 60 N. Y. S. 1001.

Pain and suffering, resulting from personal injury, is an element of damage. *Louisville &c. R. Co. v. Binion*, 107 Ala. 645.

Where the injury consists of loss of hearing, impairment of sight and nervous shock, the assessment of damages is in the discretion of the jury. There can be no direct evidence of value. *Clar v. Sacramento &c. R. Co.*, 122 Cal. 504.

See, also, *Dunn v. Northeast &c. R. Co.*, 81 Mo. App. 42; *Smitson v. Southern P. R. Co.*, 37 Or. 74.

The jury may consider his loss of time, pain and suffering, necessary expenses in being cured, and fact that he was permanently injured. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614.

*Morris v. Chicago &c. R. Co.*, 45 Iowa, 29; *Whalen v. St. Louis &c. R. Co.*, 60 Mo. 323; *Seaboard Man. Co. v. Woodson*, 98 Ala. 378.

Pain and suffering, mental and physical, is an element of considera-



tion. *Chicago City R. Co. v. Anderson*, 182 Ill. 298; aff'g s. c., 80 Ill. App. 71.

See, also, *Brown v. Green*, 1 Penn. (Del.) 535; *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181; *West Chicago &c. R. Co. v. Lups*, 74 id. 420; *Olmstead v. Distilling &c. Co.*, 35 Oh. L. J. 133; *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1; *Musick v. Latrobe*, 184 id. 375.

Damages for the loss of a leg, may be assessed by the jury, from general knowledge of the results of such injury. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159.

Admission of evidence of illness of wife, produced by the accident to husband for which he sues, was error. *West Chicago Street R. Co. v. Dougherty*, 89 Ill. App. 362.

Damages for pain are given in actions predicated upon negligence only for the bodily or physical pain of which the mind is conscious. *Chicago v. Gilford*, 99 Ill. App. 88.

Lack of personal enjoyment is not an element of recovery. *Columbus v. Strassner*, 124 Ind. 482.

Instruction to consider plaintiff's loss of time, pain and suffering, "and all other facts and circumstances bearing on his injuries," held proper. *Pittsburg &c. R. Co. v. Carlson*, 24 Ind. App. 559.

The business of fishing does not involve speculative profits, but the personal efforts of one engaged in it, the profits of which are considered earnings and loss of time, can be shown as loss of earnings. *Lund v. Tyler*, 115 Iowa, 236.

A passenger may recover damages for pain and suffering as the result of his injury. *Pence v. Wabash R. Co.*, (Iowa) 90 N. W. Rep. 59.

Expert testimony not required to show permanency, when it is apparent from the nature of the injury. *Missouri &c. R. Co. v. Fowler*, 61 Kan. 320.

The court can give the jury no standard of value to measure damages for pain. *Salina Mills &c. Co. v. Hoyne*, (Kan. App.) 63 Pac. Rep. 660; s. c., 10 Kan. App. 581.

In an action for personal injuries, loss of time, moneys necessarily expended, and suffering are proper elements of damage. *Central Passenger R. Co. v. Kuhn*, 86 Ky. 578.

Barrenness, resulting from the accident, is not an element of damage. *South Covington &c. R. Co. v. Bolt*, (Ky.) 59 S. W. Rep. 26.

Nervous shock, producing defective vision, is an element of damage. *Baltimore &c. R. Co. v. Baer*, 90 Md. 97.

Age, condition in life, extent of injuries, bodily pain, mental anguish, are proper elements of damage. *Ridenhour v. Kansas City Cable R. Co.*, 102 Mo. 270.

*Wilson v. Pa. R. Co.*, 132 Pa. St. 27.

Proof, that injury by loss of toes, was enhanced by the fact that that leg was shorter than the other, was admitted. *Nebonne v. Concord R. R.*, 68 N. H. 296.

Evidence to show what a child without income or education would be worth as cook or field hand, was admitted in action by child. *Jeffries v. Seaboard &c. R. Co.*, 129 N. C. 236.

Aggravation of previous unhealthful condition, is an element of damage. *Gulf &c. R. Co. v. Reagan*, (Tex. Civ. App.) 34 S. W. Rep. 796.

One of unsound mind, may recover for lost time and labor and mental suffering. *Gulf &c. R. Co. v. Holtzheuser*, (Tex. Civ. App.) 45 S. W. Rep. 188.

Recovery for loss of time during total incapacity, and for impairment of capacity thereafter, is not double recovery. *Houston &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 48 S. W. Rep. 773.

Injury to eyesight, resulting from rupture, held an element of damage. *Missouri &c. R. Co. v. Hannig*, 20 Tex. Civ. App. 649.

Allegation of pain permits proof of both mental and physical pain. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

Physical and mental pain "must be considered" as an element of damages; held a proper charge. *Galveston &c. R. Co. v. Jenkins*, (Tex. Civ. App.) 69 S. W. Rep. 233.

A child may recover for loss of earning capacity, in addition to physical suffering. *Delaware &c. R. Co. v. Devore*, 114 Fed. Rep. 155.

Mental and physical suffering, loss of time, effect of injury upon life and capacity to earn a livelihood, are proper elements of damage. *Carpenter v. Mexico National R. Co.*, 17 Wash. L. R. 630.

*Howard Oil Co. v. Davis*, 76 Tex. 630.

Probable length of plaintiff's life may be considered. *Waterman v. Chicago &c. R. Co.*, 82 Wis. 613.

See *Atlanta &c. R. Co. v. Newton*, 85 Ga. 517.

Inconvenience is not included in compensatory damages. *Jenson v. Chicago &c. R. Co.*, 86 Wis. 589.

Annuity tables admitted on question of damages for permanent injury, when accompanied with other evidence for the purpose of showing expectancy, but not of using its figures to calculate damage. *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196.

See, also, *McKeigue v. Janesville*, 68 Wis. 50; *Union P. R. Co. v. Yates*, 40 L. R. A. 553, note.

#### (b). MENTAL SUFFERING.

*Bodily or mental pain*, medical expenses, and the direct pecuniary loss from the privation of the use of the plaintiff's limbs are elements of

damage. *Ransom v. N. Y. & E. R. Co.*, 15 N. Y. 415; aff'g judg't for pl'ff.

**From opinion.**—"The established precedents in actions on personal injuries, invariably state that the party 'suffered and underwent great pain.' (2 Chit. Pl. 648, 710, 711, 851.) The systematic writers, so far as they have noticed the question, state that personal suffering is an element from which to estimate the damages. (2 Greenl. sec. 267.) In *Theobald v. The Railway Passenger Assurance Company*, (26 Eng. L. & Eq. R. 432), it was held that expense and pain and loss, were the proper, and the only proper subjects to be considered in assessing the damages. In *Blake v. The Midland Railway Company*, (10 Eng. L. & Eq. R. 437; s. c., 18 Adolph. & Ellis N. S. 93) the judge instructed the jury that the plaintiff had experienced a great deal of anxiety, and it was for the jury to consider whether they would confine themselves to the pecuniary loss. \* \* \* On appeal it was said that 'when an action is brought by an individual for a personal wrong, the jury, in assessing the damages, can, with little difficulty award him a *solatium* for his mental sufferings, along with an indemnity for his pecuniary loss.' In *Seger v. The Town of Barkhamsted*, (22 Conn. 290, 298), the action was for an injury which the plaintiff had sustained in crossing a defective bridge. \* \* \* Storrs, J., in delivering the opinion of the court on appeal said that the plaintiff was entitled to be compensated for his actual personal injury. 'Such injury,' he said, 'is not confined to his wounds and bruises upon his body, but extend to his mental suffering.' He added, that 'to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be an affront to common sense.' In *Canning v. Inhabitants of Williamstown*, (1 Cush. 451), the action and the question were the same as in the last case, and the same judgment was given. It was held that the plaintiff's mental suffering from reasonable apprehension was a part of the injury for which he was entitled to damages. In *Lindsley v. Bushnell*, (15 Conn. 225) which was an action on the case for negligence in leaving an obstruction in the highway, \* \* \* the court, in laying down the rule of damages in such cases, stated that it included a compensation for bodily pain and mental anguish.

In this state, I believe I may say that, until recently, no doubt was ever supposed to exist but that the rule was as insisted upon by the plaintiff. The general prevalence of that opinion is, no doubt, the reason why no early adjudged cases upon the question can be found. It has always been assumed that personal suffering caused by the wrongful act of another was to be compensated in damages, in an action by the person injured, though the rule is different in actions for injuries to the relative rights of the plaintiff. *Cowden v. Wright*, (24 Wend. 429), was trespass by a father for assaulting and beating his son, *per quod servitium amisit*. The judge charged that the jury might take into consideration the feelings of the parents occasioned by the infliction of the injury upon their son. This was held to be wrong, and the judgment was reversed; but Chief Justice Nelson, in giving judgment, said: 'The child may also maintain an action in which the measure of redress depends upon the sound discretion of the jury, because his personal injury and suffering then constitute the gravamen of the suit.' More recently, however, since the courts have been much occupied in litigations between railroad companies, and passengers claiming to have been injured by negligence, the question has been frequently raised, and has, so far as I know, always been determined in accordance with the views which I entertain.

(*Morse v. The Auburn & Syr. R. R. Co.*, 10 Barb. 621; *Curtis v. The Rochester & Syr. R. R. Co.*, 20 id. 282.)"

*Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25; *Harding v. N. Y. & C. R. Co.*, 36 Hun, 72; (expulsion from car) *Quinn v. L. I. R. Co.*, 34 Hun, 332; *Matteson v. N. Y. & C. R. Co.*, 62 Barb. 364; s. c. aff'd, 35 N. Y. 487; *Seger v. Town of B.*, 22 Conn. 290.

Indignity of being ejected from a car, is an item. *Ray v. Cortland & C. R. Co.*, 19 App. D. 530.

Mental anguish from failure to reach a sick brother, on account of expulsion, held not an element of damage, in suit for the expulsion. *Hot Springs R. Co. v. Deloney*, 65 Ark. 177.

See, also, *Texarkana & C. R. Co. v. Anderson*, 67 Ark. 123; *Peay v. Western & Teleg. Co.*, 64 id. 538.

Paroxysms, caused by the humiliation of being ejected from a train, are bodily injuries and an element. *Sloane v. Southern California R. Co.*, 111 Cal. 668.

Damages allowed, for "wounded sensibility or affection, and for sense of wrong and insult." *Thomas v. Gates*, 126 Cal. 1.

Mental suffering alone does not constitute cause of action, but is an element of damage when the proximate result of an actionable wrong. *Brush Electric & C. Co. v. Simonsohn*, 107 Ga. 70; See, also, *Gibney v. Lewis*, 68 Conn. 392.

In an action to recover damages for mental and physical pain, assessment may be left to the enlightened conscience and intelligence of the jury. *Southern R. Co. v. Gresham*, 114 Ga. 183.

Injured feelings resulting from, but not part of the pain, naturally attending the injury, held not an element. *Chicago & C. R. Co. v. Taylor*, 170 Ill. 49; aff'g s. c., 68 Ill. App. 613.

See, also, *Cicero & C. R. Co. v. Brown*, 193 Ill. 274.

Wounded pride and humiliation, caused by wrongful ejection from a train, is an item. *Chicago & C. R. Co. v. Adams*, 60 Ill. App. 571.

See, also, *West Chicago Street R. Co. v. James*, 69 Ill. App. 609; *Chicago & C. R. Co. v. Spurney*, id. 549; *Decatur v. Hamilton*, 89 id. 561.

Mental pain, not directly or necessarily connected with physical pain is not an element. *North Chicago & C. R. Co. v. Duebner*, 85 Ill. App. 602.

*Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; s. c. aff'd, 182 Ill. 298; *Chicago & C. R. Co. v. Canevin*, 72 Ill. App. 81.

Mental suffering, unaccompanied by physical injury, held no ground for recovery of compensatory damages, though sometimes allowed as punitive damages. *Kalen v. Terre Haute R. Co.*, 18 Ind. App. 202.

See, also, *Deming v. Chicago & C. R. Co.*, 80 Ill. App. 152.

Mental pain or distress is proper element of damage. *Webber v. Creston*, 75 Iowa, 16.

*Kennon v. Gilmer*, 131 U. S. 22.

Mental suffering is an element of damage for delay, in the shipment of a corpse. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

See, also, *Hale v. Bonner*, 82 Tex. 33.

Shame and mortification at having to use crutches, is an element. *Beath v. Rapid R. Co.*, 119 Mich. 512.

Suffering of mind is proper element of damage. *Fell v. Rich Hill &c. Co.*, 23 Mo. App. 216.

Apprehension of insanity, caused by mental disability resulting from injury is an element of damage. *Walker v. Boston &c. R. Co.*, (N. H.) 51 Atl. Rep. 918.

Where mental troubles are the proximate result of personal injuries, recovery may be had. *Consolidated T. Co. v. Lamberton*, 60 N. J. L. 457.

Passenger allowed to recover for indignity as well as personal injuries. *Runyan v. Central R. &c. Co.*, 65 N. J. L. 228.

Physical suffering, resulting from apprehension only of injury, is not sufficient. *Ward v. West Jersey &c. R. Co.*, 65 N. J. L. 383.

Mental suffering, resulting from physical injury, is an element. *North German Lloyd Ss. Co. v. Wood*, 18 Pa. Super. Ct. 488.

See, also, *Bamford v. Pittsburg &c. T. Co.*, 194 Pa. St. 17; *Schenkel v. Pittsburg &c. T. Co.*, id. 182; *Pittsburg &c. R. Co. v. Montgomery*, 152 Ind. 1; *Missouri &c. R. Co. v. Warren*, 90 Tex. 566; *Antonio v. Porter*, 24 Tex. Civ. App. 444; *Norfolk &c. R. Co. v. Marpole*, 97 Va. 594.

Mental suffering of widow, is not an element in statutory action for death. *Knoxville &c. R. Co. v. Wyrick*, 99 Tenn. 500.

Mental anguish, caused by being carried to wrong destination, held an element. *Texas &c. R. Co. v. Armstrong*, 93 Tex. 31.

Mental suffering from apprehension of inability to pay rent, was held not an element. *Planters' Oil Co. v. Mansell*, (Tex. Civ. App.) 43 S. W. Rep. 913.

Passenger allowed to recover for mental suffering, caused by vulgar, profane and indecent language of fellow passengers. *Houston &c. R. Co. v. Perkins*, 21 Tex. Civ. App. 508.

Jury may consider mental suffering as an element of damage, based on evidence of physical injuries, and special proof of such suffering is not necessary. *Missouri &c. R. Co. v. Cox*, (Tex. Civ. App.) 55 S. W. Rep. 354.

See, also, *International &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 996.

Jury were permitted to infer mental suffering from proof of physical injuries. *Southern &c. Teleg. Co. v. Clements*, 98 Va. 1.

Held error to admit evidence of worry and disappointment, in action for failure to transport passenger. *Turner v. Great Northern R. Co.*, 15 Wash. 213.

(c). MENTAL SUFFERING, DISFIGUREMENT.

Disfigurement is an element of recovery. *Birmingham v. Lewis*, 92 Ala. 352; *Giffen v. Lewiston*, (Id.) 55 Pac. Rep. 545; *Newbury v. Getchell &c. Lumber Co.*, 100 Iowa, 441; *Rockwell v. Eldred*, 7 Pa. Super. Ct. 95.

Mental pain caused by the contemplation of a maimed body, and the humiliation of going through life in a crippled condition, held, too remote. *Chicago City R. Co. v. Anderson*, 80 Ill. App. 71; s. c. aff'd, 182 Ill. 298.

See, also, *Chicago &c. R. Co. v. Hines*, 45 Ill. App. 299.

Disfigurement or permanent annoyance caused by deformity, bodily and mental suffering, anxiety, are elements of damage. *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374.

Mental suffering and physical pain, held elements of damage to a small girl for permanent disfigurement. *Galveston &c. R. Co. v. Clark*, 21 Tex. Civ. App. 167.

Destruction of prospects of marriage of a five-year-old girl, is an element. *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783.

Mortification and exposure to the curiosity or ridicule of others, on account of mutilation of the body by injury, may be considered. *Heddles v. Chicago &c. R. Co.*, 77 Wis. 228.

(d). MENTAL SUFFERING—IN CASE OF DEATH.

In a statutory action for death, the mental suffering of deceased, or of his widow, is not an element of damages. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Sorrow is not a subject of recovery in action for death. *Chicago R. R. Co. v. Gillan*, 27 Ill. App. 386.

See, also, *Cerrillos Coal R. v. Deserant*, 9 N. M. 49; *Lake Shore &c. R. Co. v. Ehlert*, 19 Oh. C. C. 177.

In an action for injuries continued by an administrator after plaintiff's death, damages for mental and physical suffering of deceased were allowed. *Atchison &c. R. Co. v. Rowe*, 56 Kan. 411.

See, also, *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357.

In such case, the damages belong to the estate and not the widow and next of kin. *Missouri &c. R. Co. v. Bennett*, 5 Kan. App. 231; s. c. aff'd, 58 Kan. 499.

Where the action is for wrongful death, mental and physical suffering is not an element of damage. *Louisville &c. R. Co. v. Sander*, (Ky.) 44 S. W. Rep. 644.

But, where no motion is made to require plaintiff to elect, he was allowed to recover for such suffering as well as for the death. *Louisville &c. R. Co. v. Miniard*, (Ky.) 50 S. W. Rep. 962.

In action for death, grief or mental suffering are not subjects of recovery. *Baltimore &c. Road v. State, Grimes*, 71 Md. 573.

Mental suffering, injured feelings not recoverable for death. *Mynning v. Detroit &c. R. Co.*, 59 Mich. 257.

*Galveston v. Barbour*, 62 Tex. 172; *City of Chicago v. Scholten*, 75 Ill. 468; *Oldfield v. N. Y. &c. R. Co.*, 14 N. Y. 310; *Tilley v. Hudson R. Co.*, 29 id. 252; *Penn. R. Co. v. Butler*, 57 Penn. St. 335; *Hutchins v. St. Paul &c. R. Co.*, 44 Minn. 5; *Whitout v. Chicago &c. R. Co.*, 13 Wall. 270; but this does not seem to be the rule in Virginia, *Baltimore &c. R. Co. v. Noell*, 32 Gratt. 394. *Tiffany's Death by Wrongful Act* states that this principle is declared in nearly every case, when it is discussed, and cites many authorities.

In actions for death, wounded feelings, loss of companionship, pain and suffering are not recoverable. *Hutchins v. St. Paul &c. R. Co.*, 44 Minn. 5.

Evidence that deceased, killed in boiler explosion, was found 200 feet away dead, with blood escaping from mouth, nose and ears, held insufficient to sustain verdict for physical pain, under a statute permitting recovery therefor in actions for death resulting from injuries. *Hastings Lumber Co. v. Garland*, 115 Fed. Rep. 15.

In statutory action for death of son, evidence of nervous condition of mother, resulting therefrom, is inadmissible. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631; s. c., 46 L. R. A. 367.

#### (e). MENTAL SUFFERING—FAILURE TO DELIVER TELEGRAM.

Complaint in tort for mental suffering caused by delay in delivery of telegram, held demurrable on the ground that mental suffering is not an element of damage except when there is a right of recovery aside from such suffering. If breach of contract had been alleged and proved, the damages, though nominal would have been increased by the mental suffering. *Blount v. Western &c. Tel. Co.*, 126 Ala. 105.

Mental distress is not recoverable for failure to deliver a telegram apprising one of the sickness of a brother, whereby he was delayed in reaching him before his death. *Chapman v. Western Union Tel. Co.*, 88 Ga. 763.

## (f). NURSING, MEDICAL TREATMENT, &amp;c.

Only nominal damages were allowed for medical services, past and future, in absence of proof of amount, nature, probable duration and value thereof. *Page v. Delaware &c. Canal Co.*, 34 App. Div. 618.

And evidence of the number of visits, without evidence of value, is insufficient. *Carter v. Nunda*, 55 App. Div. 501.

Reasonable physician's fees may be recovered. *Alabama &c. R. Co. v. Siniard*, 123 Ala. 557.

Damages for injuries may include expenses of a nurse and a ward in the hospital. *Montgomery Street R. Co. v. Mason*, (Ala.) 32 South. Rep. 261.

Reasonable attorney's fee held an item of damages in an action for violation of a statute requiring freight trains to carry passengers. *St. Louis &c. R. Co. v. Neal*, 66 Ark. 543.

That plaintiff was forced to get assistance of his neighbors, is not sufficient to import damage; there being no inference that he paid, or became obligated to pay therefor. *Southern R. Co. v. Ward*, 110 Ga. 793.

Specification of medical expense without stating the amount, renders complaint demurrable. *Western &c. Teleg. Co. v. Griffith*, 111 Ga. 551.

Attorney's fees were allowed where a hotel proprietor's refusal to deliver a baggage check, was purely arbitrary, and put a guest to unnecessary expense. *Carhart v. Wainman*, 114 Ga. 632.

Value of wife's services in nursing husband is not recoverable by him. *Peoria &c. R. Co. v. Johns*, 43 Ill. App. 83.

Liability for medical expenses, proved reasonable, though not yet paid, was an element of damage. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304.

See, also, *Abilene v. Wright*, 4 Kan. App. 708; *Hutchinson v. Van Cleve*, 7 id. 676; *Lanniman v. Detroit &c. Street R. Co.*, 112 Mich. 602; *Omaha Street R. Co. v. Enninger*, 57 Neb. 240; *Wilson v. Southern P. R. Co.*, 13 Utah 352.

The value of services to ameliorate the suffering of an injured person may be proven, although such services were voluntary. *Penn. R. Co. v. Marion*, 104 Ind. 239.

*Klein v. Thompson*, 19 Oh. St. 569; *Ferryboat D. S. Gregory &c.*, 2 Benedict, (U. S.) 226. See *Indianapolis v. Gaston*, 58 Ind. 224; *Oh. &c. R. Co. v. Dickerson*, 59 id. 317; *Ohliger v. Toledo*, 20 Oh. C. C. 142

Services in nursing, gratuitously rendered by a member of the family, are recoverable. *Brosnan v. Sweetser*, 127 Ind. 1.

Amount charged, held not evidence of reasonable value. *Bedford v. Woody*, 23 Ind. App. 401.

See, also, *Bowsher v. Chicago &c. R. Co.*, 113 Iowa, 16.



No recovery is allowed for medical services where no evidence of their value is introduced. *Reed v. C. R. I. &c. R. Co.*, 57 Iowa, 23.

*Webster City &c. R. Co. v. Newson*, 70 Iowa, 355.

Minor, living with parents, cannot recover for medical attendance until he has personally paid the bill. *Newbury v. Getchell &c. Co.*, 100 Iowa, 441.

Not error to instruct, that plaintiff may recover for incidental expenses, if any were incurred, though there was no evidence that any had been. *Trumble v. Happy*, 114 Iowa, 624.

See, also, *Lamb v. Cedar Rapids*, 108 Iowa, 629.

Under a statute allowing attorney's fees to successful plaintiff, in an action for fire caused by locomotive, but one fee can be allowed, though the case is tried twice. *Clark v. Ellithorp*, 9 Kan. App. 503.

Doctor's bills paid are special damages and must be alleged. *Illinois C. R. Co. v. Hanberry*, (Ky.) 66 S. W. Rep. 417.

A reasonable amount may be allowed, though there is no distinct proof of the amount expended. *Scullane v. Kellogg*, 169 Mass. 544.

Expenses in going to a distant city for special treatment are recoverable. *Sherwood v. Chicago &c. R. Co.*, 82 Mich. 374.

No recovery by married woman for services of physician she has not paid or promised to pay for. *Rogers v. Orion*, 116 Mich. 324.

See, also, "Damages, Husband and Wife," *ante*, p. 844.

But where she has promised to pay for them, she may recover their reasonable value. *Vergin v. Saginaw*, 125 Mich. 499.

Injury due to failure to follow advice of physician, is not an element. *Zibbell v. Grand Rapids*, (Mich.) 89 N. W. Rep. 563.

A charge, that payment for services must have been made or agreed upon, objectionable as tending to mislead the jury to exclude the case of implied promise to pay in ordering and accepting the services. *Hart v. New Haven*, (Mich.) 89 N. W. Rep. 677.

No recovery for medical services, gratuitously performed, though their value be proved. *Morris v. Grand Ave. R. Co.*, 144 Mo. 500.

An express or implied contract must be shown; proof of the performance of service merely, is insufficient. *Robertson v. Wabash R. Co.*, 152 Mo. 382.

In case of injury to child, reasonable compensation for nursing may be recovered by parent. *Buck v. People's &c. R. Co.*, 40 Mo. App. 555.

*Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380. See *Bridger v. Ashville &c. R. Co.*, 27 S. C. 456.

If nothing was paid for medical services, etc., there can be no recovery. *Madden v. Missouri P. R. Co.*, 50 Mo. App. 666.

General allegations of expenses for medical attendance, admit proof of the amounts thereof. *Cooney v. Southern &c. R. Co.*, 80 Mo. App. 226.

Proof of liability, held inadmissible under an allegation of expense. *Muth v. St. Louis &c. R. Co.*, 87 Mo. App. 422.

Reasonable sums expended or incurred in medical aid, are an element of damages for personal injuries. *Fleming v. Kansas &c. R. Co.*, 89 Mo. App. 129.

See, also, *Emery v. Boston &c. R. Co.*, 67 N. H. 434; *Parker v. South Carolina R. Co.*, 48 S. C. 464.

Recovery allowed for care of horse, negligently poisoned. *Seavey v. Dennett*, 69 N. H. 479.

Plaintiff cannot recover for nursing and attendance of the members of his own household, unless they are hired servants. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Charge, allowing for future medical aid, sustained. *Baker v. Hagey*, 177 Pa. St. 128.

In the absence of evidence of what was paid for physician's services, or their reasonable value, the jury cannot estimate them as an element of damage. *Brown v. White*, (Pa. St.) 51 Atl. Rep. 962.

Necessary, reasonable and judicious expenditure in seeking a cure, recoverable. *Hart v. Charlotte R. Co.*, 33 S. C. 427.

Liability incurred for such services, is an item of damage. *Atchison &c. R. Co. v. Click*, (Tex. Civ. App.) 32 S. W. Rep. 226.

Proof of amounts charged, admitted, when their reasonableness was otherwise shown. *San Antonio v. Porter*, 24 Tex. Civ. App. 444.

Though recovery was limited to amount claimed, plaintiff was allowed to testify that he actually spent more. *Galveston &c. R. Co. v. Eckles*, (Tex. Civ. App.) 60 S. W. Rep. 830.

Medical expense, not being a legal liability of a minor, cannot be recovered in suit by him. *Bering Man. Co. v. Peterson*, (Tex. Civ. App.) 67 S. W. Rep. 133.

Recovery cannot be had for disbursements and obligations for medical treatment without showing that they were reasonable and necessary. *Missouri &c. R. Co. v. Reasor*, (Tex. Civ. App.) 68 S. W. Rep. 332; *Missouri &c. R. Co. v. Belew*, 22 id. 265.

See, also, *Texas &c. R. Co. v. Taylor*, (Tex. Civ. App.) 58 S. W. Rep. 844. rev'g s. c., id. 166; *International &c. R. Co. v. Sampson*, 64 id. 592.

But where the jury were specifically charged that they could not allow such sums, unless they were found to be reasonable, it was not error to allow them to be given in evidence. *Gulf &c. R. Co. v. Bell*, (Tex. Civ. App.) 58 S. W. Rep. 614.

rant an instruction containing the rule as to future suffering. *Radjavier v. Third Ave. R. Co.*, 58 App. Div. 11.

Prospective damages for the disabling effects of an injury may be recovered. *Bay Shore R. Co. v. Harris*, 67 Ala. 6.

*South &c. R. Co. v. McLendon*, 63 Ala. 266; *Barbour County v. Horn*, 48 id. 566; *Pym v. Great Northern R. Co.*, 2 Best & Smith (Q. B.) 759; *Fair v. London &c. R. Co.*, 21 Law Times Rep. 326.

Damages for a permanent injury are general and not special. *County of Bibb v. Ham*, 110 Ga. 340.

See, also, *Bradbury v. Benton*, 69 Me. 194.

Amount of compensation for pain and suffering, cannot be measured by standards of value, and its assessment is in the discretion of the jury. *North Chicago Street R. Co. v. Fitzgibbons*, 180 Ill. 466; aff'g s. c., 79 Ill. App. 632.

There was sufficient evidence of permanency to warrant an instruction, where it appeared that both bones of a leg were fractured so that plaintiff would "never have a perfect ankle joint." *Donk Brothers Coal &c. Co. v. Peton*, 192 Ill. 41.

Future suffering is an element of damage, when alleged and proved. *Cicero &c. R. Co. v. Brown*, 89 Ill. App. 318.

See, also, *Jones v. Deering*, 94 Me. 165; *Plummer v. Milan*, 79 Mo. App. 439; *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 351; *Omaha Street R. Co. v. Emminger*, 57 Neb. 240; *Smedley v. Hestonville &c. R. Co.*, 184 Pa. St. 620.

Shortening of life is not an element of damages, but evidence thereof is competent to show extent of injury. *Richmond Gas Co. v. Baker*, 146 Ind. 600; s. c., 36 L. R. A. 683.

See, also, *Wilberding v. Dubuque*, 111 Iowa, 484.

Under a conflict of testimony as to permanency of injury, it was held error to instruct the jury to allow damages for such pain and suffering "as may continue, as shown by the evidence." *Sanders v. O'Callaghan*, 111 Iowa, 574.

See, also, *Chicago &c. R. Co. v. Bailey*, 9 Kan. App. 207.

But an instruction, to allow damages for physical pain and mental anguish that plaintiff "will suffer in the future by reason of his injury, if any," was held proper. *Westercamp v. Brooks*, 115 Iowa, 159.

Evidence of value of services of school teachers in the locality, held admissible in action for death of girl. *Eginoire v. Union County*, 112 Iowa, 558.

Reasonable certainty, and not mere possibility of permanent injury, must be shown to warrant recovery. *Chicago &c. R. Co. v. Kennedy*, 2 Kan. App. 693.

See, also, *Edgerton v. O'Neill*, 4 Kan. App. 73; *L'Herault v. Minneapolis*, 69 Minn. 261.

Mortality tables are inadmissible, in the absence of proof of permanency of injury. *Leach v. Detroit &c. R. Co.*, 125 Mich. 373; *Haines v. Lake Shore &c. R. Co.*, (Mich.) 89 N. W. Rep. 349.

Tables were admitted, to be used by jury if they found permanent impairment, otherwise not. *Wilkins v. Flint*, (Mich.) 87 N. W. Rep. 195.

Prospective disablement may be inferred from the nature of the injury. *Cook v. Missouri Pac. R. Co.*, 19 Mo. 329.

*Tyson v. Booth*, 100 Mass. 258; *Russell v. Columbia*, 74 Mo. 480; *Chicago &c. R. Co. v. Warner*, 108 Ill. 538.

Jury were allowed to assess damages to father, for loss of earning capacity of son during minority, without direct proof of value. *Blackwell v. Hill*, 76 Mo. App. 46.

Expectancy of a minor should be reckoned from his age, and not his majority. *Swift & Co. v. Holowbek*, 55 Neb. 228.

It is not what is to be feared, but what is to be reasonably expected, as the probable result of accident, that the jury must consider. *O'Reilly v. Monongahela Street R. Co.*, 17 Pa. Super. Ct. 626.

Present damages for future consequences cannot be allowed unless the probability of their existing amounts to a reasonable certainty, and to more than mere speculation or hypothesis. *Mo. P. R. Co. v. Mitchell*, 75 Tex. 77.

See "Evidence," *post*, p 1223.

Allowance for loss of earning power if the injuries are permanent, as well as for present mental and physical pain and loss of time, is proper. *Galveston &c. R. Co. v. Hampton*, 24 Tex. Civ. App. 458.

Loss of capacity for pleasure is too vague. *Locke v. International &c. R. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 314.

Loss of earning capacity for two years, held sufficient basis for damages for future loss from that source. *International &c. R. Co. v. Lockr*, (Tex. Civ. App.) 67 S. W. Rep. 1082.

Probable future pain and suffering from permanent injury, is allowable. *Denver &c. R. Co. v. Roller*, 100 Fed. Rep. 738; s. c., 49 L. R. A. 77.

Damages for loss of earning capacity "during the period of his incapacity and probable incapacity," allowed. *Swensen v. Bender*, 114 Feb. Rep. 1.

Weight of an artificial leg is an element of damage. *Carrow v. Barr*, *R. Co.*, (Vt.) 52 Atl. Rep. 537.

Instruction permitting plaintiff to recover for pain he "may have to endure in the future," held error. *Raymond v. Keesberg*, 91 Wis. 191.

Admission of evidence of an expert that plaintiff was likely to be bothered with his injury for several years, and perhaps, always, at least under certain conditions, as over use, held error. *Collins v. Janesville*, 99 Wis. 464.

Error to give the rule as to future earnings in a charge, where there is no evidence on the subject. *La Fave v. Superior*, 104 Wis. 454.

(h). EXPOSURE.

The use, in a charge, of the word "inconvenience" of an injured party, criticised as somewhat vague and indefinite, as a basis for damages. *Root v. Des Moines &c. R. Co.*, 113 Iowa, 675.

Injury from exposure, proximately resulting from the expulsion of a passenger, may be recovered. *Serwe v. No. P. R. Co.*, 48 Minn. 78.

See, also, injury from unheated depot, *Texas R. Co. v. Mayes*, 15 S. W. Rep. 43.

But the exposure must be the proximate result. No recovery was allowed for exposure of an unnecessary trip across a prairie by one wrongfully ejected from a train. *Chicago &c. R. Co. v. Spirk*, 51 Neb. 167.

See, also, *Houston &c. R. Co. v. Rogers*, 16 Tex. Civ. App. 19.

Where a female walked four miles to a station from whence she came on account of unlawful expulsion, as there was no station house except a box car, of which she was ignorant, damages from exposure were recoverable. *Malone v. Pittsburg R. Co.*, 152 Pa. St. 390.

Damages for unnecessary violence in ejecting passenger from train cannot include inconvenience in making his way to the station in the night time, suffering or sickness from exposure. *Texas &c. R. Co. v. James*, 82 Tex. 306.

See *Ehrgott v. Mayor*, 96 N. Y. 264; *Childs v. N. Y., O. & N. R. Co.*, 77 Hun, 539; *post*.

Train failed to stop to take on passenger. No recovery for exposure from eight mile walk to destination, where lodging or private conveyance was available. *Gulf &c. R. Co. v. Cleveland*, (Tex. Civ. App.) 33 S. W. Rep. 687.

Recovery allowed for exposure of inmates, compelled to flee from burning building. *Serafina v. Galveston &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 142.

No recovery for exposure due to delay in delivering freight, where carrier had no notice that all plaintiff's goods were in the car, and he was without means to buy more. *St. Louis &c. R. Co. v. May*, (Tex. Civ. App.) 44 S. W. Rep. 408.

Plaintiff may recover for exposure to the weather, incident to a collision of railroad trains. *Missouri &c. R. Co. v. Settle*, 19 Tex. Civ. App. 357.

Charge allowing jury to "take into consideration the plaintiff's personal inconvenience and loss of time," held proper. *Boehm v. Duluth &c. R. Co.*, 91 Wis. 592.

(i). FRIGHT.

A woman was not allowed to recover for illness due to fright, caused by defendant's negligence. *Mitchell v. Rochester*, 151 N. Y. 107; s. c., 34 L. R. A. 781.

**From opinion.**—"Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence, which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon the question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. (*Lehman v. Brooklyn City R. Co.*, 47 Hun, 355; *Victorian Railways Commissioners v. Coultas*, L. R. [13 Appeal Cases] 222; *Ewing v. P. C. St. L. Ry. Co.*, 147 Pam. St. 40.) The learned counsel for the respondent in his brief, very properly stated that 'the consensus of opinion would seem to be that no recovery can be had for mere fright,' as will be readily seen by an examination of the following additional authorities. *Haile v. Texas & Pacific R. Co.* (23 Lawyers' Rep. 774; *Joch v. Dankwardt*, (85 Ill. 331); *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Western Union Tel. Co. v. Wood*, (57 Fed. Rep. 471); *Reuner v. Canfield*, (36 Minn. 90); *Allsop v. Allsop*, (5 Hurl. & Nev. [N. S.] 534); *Johnson v. Wells, Fargo & Co.*, (6 Nev. 224); *Wyman v. Leavitt*, (71 Me. 227). If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question of whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. The opinion also intimates that negligence, causing fright: which produces a miscarriage, is not the proximate cause of the miscarriage."

Effects of fright are an item of damage, when accompanied by some physical injury as a violent fall and shock from an electric car. *O'Flaherty v. Nassau &c. R. Co.*, 34 App. Div. 74.

Error to instruct jury to allow for impairment of nervous system, resulting from nervous shock, in addition to pain and suffering. *Washington &c. R. Co. v. Dashiell*, 7 App. D. C. 507.

No recovery allowed for injury from fright, caused by injury to mother of plaintiff. *Mahoney v. Dankwardt*, 108 Iowa, 321.

Illness caused by fright, due to lawful ejection of another passenger, is not actionable. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488; s. c., 43 L. R. A. 832.

See, also, *White v. Sanders*, 168 Mass. 296; *Smith v. Postal Teleg. &c. Co.*, 174 id. 576; *Berard v. Boston &c. R. Co.*, 177 id. 179.

Insulting and abusive language to plaintiff's husband gave her a nervous shock. There being no physical violence, no recovery was allowed. *Bucknam v. Great Northern R. Co.*, 76 Minn. 373.

No recovery for fright, not attended with physical injury. *Deming v. Chicago &c. R. Co.*, 80 Mo. App. 152.

See, also, *Cleveland &c. R. Co. v. Ebart*, 10 Oh. C. D. 291.

But where there is attendant physical injury, recovery may be had for impairment of health occasioned by consequent fright. *Consolidated T. Co. v. Lambertson*, 59 N. J. L. 297; s. c. aff'd, 60 id. 457.

See, also, *Buchanan v. West Jersey R. Co.*, 23 Vroom, (N. J. L.) 265; *Cleveland &c. R. Co. v. Ebert*, 10 Oh. C. D. 291; *Huffman v. Toledo &c. R. Co.*, 9 Oh. S. & C. P. Dec. 748.

Damages are not recoverable for mental suffering or fright where there is no physical injury, or injury to property, or other element of actual damage. *Gulf &c. R. Co. v. Trott*, 86 Tex. 412.

Fright and consequent impairment of health are subjects for damages, where plaintiff was carried by her station and compelled to alight under such circumstances as were calculated to cause fright. *Houston &c. R. Co. v. McKenzie*, (Tex. Civ. App.) 41 S. W. Rep. 831.

No recovery for being thrown into the water, or for fright caused by collision, where no subsequent harm resulted. *The Queen*, 40 Fed. Rep. 694.

Insanity resulting from shock and excitement, caused by railroad accident, no bodily injury being sustained, is not a subject of recovery. *Haile v. Texas &c. R. Co.*, 60 Fed. Rep. 557.

Where physical injury results from the fright, recovery may be had, though none attended the fright. *Gulf &c. R. Co. v. Hayter*, (Tex. Civ. App.) 55 S. W. Rep. 128.

In an action on contract for carrying a passenger past her station, recovery was allowed for fright without attendant physical injury. The court reconciles the apparently conflicting authorities on the subject (*Gulf &c. R. Co. v. Trott*, *supra*, denying recovery, and *Missouri &c. R. Co. v. Kaiser*, 82 Fed. Rep. 145, granting recovery, for fright unattended with physical injury) by the observation that the former was an action for tort and the latter was for breach of contract. *Texas &c. R. Co. v. Gott*, 20 Tex. Civ. App. 335.

Where bodily injury attended the fright, which results in disease, re-

covery was allowed. *Denver &c. R. Co. v. Roller*, 100 Fed. Rep. 738; s. c., 49 L. R. A. 77.

Injury from fright, to a person not physically struck, through the negligence of another, is not a subject of recovery. *Rock v. Denis*, 4 Montreal L. R. 356.

### VII. Damages to Parent for Injury to Child.

In an action for the loss of services of a minor, the jury may award the parent (1) for loss of service to the time of trial; (2) prospective loss during minority; (3) expenses incurred and immediately necessary, but not future *contingent* expenses. The child only, if anybody, can recover for such future contingent expenses. *Cuming v. B. C. R. Co.*, 109 N. Y. 95, rev'g judg't for pl'ff.

**From opinion.**—"Mother was allowed to recover for surgical expenses which have not been in fact incurred, and the incurring of which is not presently necessary, but which, in the opinion of experts examined on the trial, it will become necessary to incur in consequence of the injury at some time during the child's minority. The trial judge, with a view to the ascertainment of this item of damages, permitted a surgeon against the objection of the defendant, to testify that the expense of an operation, which, in his judgment, would become necessary at some remote period during the child's minority, would be \$300. In other words, the jury were permitted to include, as a part of the damages in the action, the value of *contingent and prospective surgical services*. This was error."

For injury to an infant four and one-half years old, the jury may, in its discretion, give damages *beyond the period of its minority*, and they may take into consideration all the probable, or even possible, benefits which might result to them from its life, modified, as in their estimation it should be by all the chances of failure or misfortune. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, aff'g 41 Hun, 404. judg't for pl'ff.

**From opinion.**—"The trial judge did not err in refusing to rule, upon the request of defendant's counsel, that the plaintiff was entitled to nominal damages only. The rule of damages in such cases is a difficult one to apply. The 'pecuniary injuries,' for which recovery only can be had, are always difficult of precise proof, uncertain and problematical, and what should be a proper compensation for them must always, upon such proof as can be made, be left to the judgment of the jury. The judgment is not an uncontrollable one, but is subject, if abused or not properly exercised, to be reviewed and modified in the court of original jurisdiction. Here there was proof of the circumstances of the plaintiff and his family, and the condition, character and sex of the child: and the authorities in this state would not justify a ruling that nominal damages only could be recovered. *Ihl v. Forty-second St., &c. R. R. Co.*, *supra*: *Houghkirk v. President &c. D. & H. Canal Co.*, 92 N. Y. 219."

In an action to recover for the loss of the services of a daughter, some



fourteen years of age, the court properly charged that the plaintiff, if entitled to recover, could recover for the loss of services, the result of the injury in the past, and also during the years of minority, and expenses necessarily incurred or which would be immediately necessary in consequence of the injury in the care of the child. *Dollard v. Roberts*, 130 N. Y. 269, aff'g judg't for pl'ff.

The father of an infant child, injured by the defendant's negligence, may recover the value of the services of the child while so incapacitated, and the reasonable expenses necessary to be incurred to restore the child to health.

The amount of the loss recoverable is not affected by the financial condition of the parent. *Barnes v. Keene*, 132 N. Y. 13, rev'g judg't for pl'ff.

In such an action it appeared that the father, who had experience as a nurse himself, in that capacity took the entire charge of the child; after proving the value of his services as such, he was permitted to prove, under objection and exception, that in order to care for his child he gave up a lucrative business engagement and also to prove the amount of the agreed compensation; the court refused to charge that the jury was not at liberty to allow more than what would have been paid to a competent trained or professional nurse. Held, error; that while plaintiff was entitled to recover the value of his services as a nurse, he was not entitled to recover in addition thereto, what he might have made had he not abandoned the business engagement.

A parent may recover for the prospective loss of the services of a child beyond the time of trial. Refusal to charge that nominal damages only could be recovered was proper. *Drew v. Sixth Ave. R. Co.*, 26 N. Y. 49, aff'g judg't for pl'ff.

A jury, acting on its own knowledge, may say that the services of a boy from eleven to twenty-one years of age would be worth \$1,500. *O'Mara v. H. R. R. Co.*, 38 N. Y. 445, aff'g 18 Hun, 192, and judg't for pl'ff.

The plaintiff's son, some six years old, was injured by the defendant's negligence and required nursing and medical attendance for several months. It was not shown that he had ever rendered his mother any service. Held, that the plaintiff's widowed mother could recover for doctor's bills, without proving that any actual loss of services has been sustained by her. *Kennedy v. N. Y. C. & H. R. R. Co.*, 35 Hun, 186, aff'g judg't for pl'ff.

An employer's liability act, giving right of action to party injured, does not enable a father to recovery for injury to child. *Woodward Iron Co. v. Cook*, 124 Ala. 349.

It is error to allow to a minor plaintiff damages for loss of time and earning power for the time during his majority. *Western &c. Tele. Co. v. Woods*, 88 Ill. App. 375.

Loss of services of child, is an element of damage to the parent. *Adams Hotel Co. v. Cobb*, (Ind. Terr.) 53 S. W. Rep. 478.

Fair compensation for loss of service, taking account of age, health, habits and cost of maintenance of deceased, is the true measure of damages. *Benton v. Chicago &c. R. Co.*, 55 Iowa, 496.

The fact that the mother was in comfortable circumstances and did not profit by her son's earnings should diminish the recovery, where action was brought for death of son. *Atchison &c. R. Co. v. Brown*, 26 Kas. 443.

Impairment of earning capacity of infant who has never earned anything may be considered. *Rosenkranz v. Lindell R. Co.*, 108 Mo. 9.

Liability for death by negligence, does not extend to recovery for the loss of a contract for support by deceased. *Brink v. Wabash R. Co.*, 160 Mo. 87.

A widowed mother may recover the amount of the loss of services, less the cost of the child's maintenance. *Matthews v. Missouri R. Co.*, 26 Mo. App. 75.

For injury to child father may recover for loss of services, care and expense resulting from the injury, for a time within its majority, medical attention, care, nursing and medicine. *Buck v. Peoples' Street &c. Co.*, 40 Mo. App. 555.

Reasonable compensation of father and mother for nursing child is recoverable. *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380.

Loss of services, past and future, up to a child's majority, as well as expense of medical attendance, are items of damage to the parent. *Meade v. Chicago &c. R. Co.*, 72 Mo. App. 61.

See, also, *Missouri &c. R. Co. v. Rogers*, (Tex. Civ. App.) 39 S. W. Rep. 383.

Speculative and uncertain earnings of a father, on account of his necessarily nursing his child, cannot be recovered. *Bridger v. Asheville &c. R. Co.*, 27 S. C. 456.

Consideration by the jury of a prior suit by the child, held misconduct requiring reversal of a verdict against the mother in a suit by her for the same injuries to the child. *Forsyth v. Central Man. Co.*, 103 Tenn. 497.

Diminution in child's capacity to earn money during the time intervening between the injury and his reaching his majority gives cause of action to the parents unless child had been emancipated by the parent. *Texas &c. R. Co. v. Morin*, 66 Tex. 225.

See *R. Co. v. Miller*, 51 Tex. 275; *Sawyer v. Sauer*, 10 Kas. 519; See *Jordan v. Bowen*, 46 N. Y. Supr. Ct. 355.

Minor living with his mother is not entitled to recover for loss of earning power for the period covered by the remainder of his minority. *Gulf &c. R. Co. v. Johnson*, 91 Tex. 569.

Minor is entitled, however, to recover for loss of earning power during such a period, when his mother has subsequently died without settlement with her therefor. *Missouri &c. R. Co. v. Tonahill*, 16 Tex. Civ. App. 625.

But damages for physical pain and suffering belong to the minor and not to his parent. *Texas &c. R. Co. v. Malone*, 15 Tex. Civ. App. 56.

### VIII. Injuries Causing Death.

Upon the trial of an action brought to recover damages for the death of the plaintiff's intestate, caused by the alleged negligence of the defendant, it is proper for the court to charge the jury, on the question of damages, that they may look ahead and consider what the deceased would have brought to the next of kin while he was living and what was their prospect of inheriting from him after his death. *Johnson v. The Long Island R. Co.*, 80 Hun, 306; *aff'd*, 144 N. Y. 719.

*Tiffany's Death by Wrongful Act*, sec. 171, states the rule as follows: "Where the evidence shows that it is probable that the decedent but for his death, would have accumulated property, which, if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss."

Citing several English authorities, and *Illinois Central R. Co. v. Barron*, 5 Wall. 90; *Lake Erie R. Co. v. Mugg*, (Ind.) 31 N. E. Rep. 564; *McAdory v. Louisville &c. R. Co.*, 10 South. R. 507; *Castello v. Landwehr*, 28 Wis. 522; *Catawissa R. Co. v. Armstrong*, 52 Pa. St. 282.

Under a statute, providing that the measure of damages is compensation for pecuniary loss to the beneficiaries, but that the proceeds must be divided as an unbequeathed personality, a childless widow was compelled to divide with father of deceased. *Snedeker v. Snedeker*, 164 N. Y. 58; *aff'g s. c.*, 47 App. Div. 471.

See, also, *Coghlan v. Third Ave. R. Co.*, 16 Misc. 677; *s. c. aff'd*, 7 App. Div. 724.

It is not necessary to show the condition and circumstances of the next of kin, nor in what proportions they are entitled. *Ingrafia v. Samuels*, 71 App. Div. 14.

In determining damages for the death of a husband, a business man,

61 years of age, but active and in good health, the jury may consider his earning capacity as evidenced by his actual earnings. But they are not absolutely bound by those figures; being at liberty to consider whether such capacity might have been increased or diminished. *Beecher v. Long Island R. Co.*, 53 App. Div. 324.

In an action for death, nominal damages, at least, are presumed, and a complaint not stating facts constituting damage, is not demurrable. *Pizzi v. Reid*, 72 App. Div. 162.

Disbursements for education of brother, and monthly investments in land, made from earnings, are to be considered in computing damage to next of kin. *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449.

In computing pecuniary loss to beneficiaries, the amount of earnings spent by decedent upon himself were deducted. *Alabama &c. R. Co. v. Jones*, 114 Ala. 519.

Damages to dependent next of kin are not confined to his probable contributions, where deceased was in the habit of saving part of his earnings. *Bessemer Land &c. Co. v. Campbell*, 121 Ala. 50.

The money value of intestate's life depends upon his expectancy of life, habits of industry, means, business, earnings, health, skill, and reasonable future expectations; and not what the heirs are likely to recover from his estate. *Tutwiler Coal &c. Co. v. Enslen*, 129 Ala. 336.

Where a statute, imposing liability on a railroad for negligent killing of passengers, is punitive in its nature, the measure of damages is the degree of culpability of the wrongful act, and not compensation to those pecuniarily injured. In an action under such a statute by an executrix, evidence of earning capacity of deceased is irrelevant. *Louisville &c. R. Co. v. Tegner*, 125 Ala. 594.

Pecuniary value of a life to the next of kin, is such as may result from a relation of dependency, or from the distribution of an estate, which it may reasonably be expected he would have accumulated had he lived. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Pecuniary value of loss of society of husband, was included. *Keast v. Santa Ysabel &c. Min. Co.*, 136 Cal. 256.

See, also, *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Age, ability, disposition to labor, and habits of living and expenditure, are elements entering into the consideration of what deceased would have earned during the remainder of his life, and left to his next of kin, had he lived. *Maxwell v. Wilmington &c. R. Co.*, 1 Marv. (Del.) 199.

See, also, *Croker v. Pusey &c. Co.*, 3 Penn. (Del.) 1; *Tully v. Philadelphia &c. R. Co.*, 50 Atl. Rep. 95.

"Full sum of the probable future earnings of deceased, taking into consideration his health, business capacity, habits, experience, and value

of his services in the care of the family," held erroneous. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

Damages to next of kin of a minor, are not confined to loss of services during minority. *Baltimore &c. R. Co. v. Then*, 159 Ill. 535; aff'g s. c., 59 Ill. App. 561.

See, also, *West Chicago Street R. Co. v. Dooley*, 76 Ill. App. 424.

Lineal kindred, held entitled to nominal damage without proof of support, but collaterals, required to prove damage. *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495; aff'g s. c., 74 Ill. App. 356.

See, also, *Locher v. Kluga*, 97 Ill. App. 518.

The actual pecuniary loss, is all that can be recovered. And the fact that the distribution of the proceeds as unbequeathed personality gives a majority to those not in fact injured, is no excuse for enlarging the amount so that the share of the one pecuniarily injured under such a distribution, will be compensation for the loss suffered. *Falkenau v. Rowland*, 70 Ill. App. 20.

A complainant omitting allegation of survivorship of next of kin and pecuniary loss, held demurrable. *St. Luke's Hospital v. Foster*, 86 Ill. App. 282.

The loss to next of kin must be limited to what the evidence shows they have actually sustained. *McNulta v. Jenkins*, 91 Ill. App. 309.

Assessment of damages should proceed upon the anticipation of pecuniary benefit which the surviving next of kin are shown to have had reasonable ground to indulge. *Diebold v. Sharp*, 19 Ind. App. 474.

See, also, *Wabash R. Co. v. Cregan*, 23 Ind. App. 1.

Evidence that deceased was in the line of promotion and would have received greater wages, not admissible. *Brown v. Chicago &c. R. Co.*, 64 Iowa, 652.

Compensation to the estate is the measure, and not such a sum, interest on which during his expectancy would produce his probable future earnings. *Spaulding v. Chicago &c. R. Co.*, 98 Iowa, 205.

Life expectancy tables, beginning at the age of 30, admitted in action for death of one of 27. *Pearl v. Omaha &c. R. Co.*, 115 Iowa, 535.

Damages for death depend not only upon the character, habits and business capacity of deceased, but upon the age, sex and circumstances of the next of kin. *Missouri &c. R. Co. v. Moffatt*, 60 Kan. 113.

Where recovery is to be "part of the estate of the deceased person," it is unnecessary to allege survival of widow or child. *East Tennessee Teleg. Co. v. Simms*, 99 Ky. 404.

The measure is value of decedent's power to earn money, not value of his power to labor. *Louisville &c. R. Co. v. Ward*, (Ky.) 44 S. W. Rep. 1112.

In the absence of gross and willful negligence, the measure of damage was held to be compensation to decedent's estate for the loss of earning power. *Louisville &c. R. Co. v. Clark*, (Ky.) 49 S. W. Rep. 323.

See, also, *Louisville &c. R. Co. v. Eakins*, 103 Ky. 465; *Louisville &c. E. Co. v. Taaffe*, 106 Ky. 535; *Louisville &c. R. Co. v. Tucker*, (Ky.) 65 S. W. Rep. 45; *Chesapeake &c. R. Co. v. Lang*, 100 Ky. 221; *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42.

Age, health, earning capacity and expectation of life, are elements of consideration. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

See, also, *Chesapeake &c. R. Co. v. Dupree*, (Ky.) 67 S. W. Rep. 15.

Measure of damages, held to be compensation for loss of reasonably probable pecuniary benefit to next of kin. *McKay v. New England Dredging Co.*, 92 Me. 454.

See, also, *May v. West Jersey &c. R. Co.*, 62 N. J. L. 67; *Graham v. Consolidated Traction Co.*, 64 id. 10; *Hughey v. Sullivan*, 36 Oh. L. J. 247.

Evidence of deceased's habits of industry, ability to make money, and success in business, may be considered. *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103.

Evidence of what deceased earned the year before his death was excluded. *Hamman v. Central Coal &c. Co.*, 156 Mo. 232.

The value of decedent's estate, held immaterial. *Chicago &c. R. Co. v. Hambel*, (Neb.) 89 N. W. Rep. 643.

Expense of board, nursing, medical aid, loss of time, physical pain, distress or anxiety of mind in view of approaching death, experienced by person injured, are subjects of recovery. *Corliss v. Worcester &c. R. Co.*, 63 N. H. 404.

Elements of consideration include condition, health, habits, cost of living and usual expenditures. *Coley v. Statesville*, 121 N. C. 301.

Also his age, habits of industry, means and business qualifications. The present value thereof is to be determined by deducting such expenditures from his gross income and estimating the value of the accumulation of the balance, based on his expectancy of life. *Benton v. North Carolina R. Co.*, 122 N. C. 1007; *Mendenhall v. North Carolina R. Co.*, 123 id. 275; *Russell v. Windsor Steamboat Co.*, 126 id. 961.

Family can only recover for pecuniary loss, and not for suffering caused by the bereavement. *Lake Shore &c. R. Co. v. Ehlert*, 19 Oh. C. C. 177.

It is error to instruct the jury that in estimating damages, "they may consider the opportunities of acquiring wealth or fortune, by change of circumstances in life." *Mansfield Coal &c. Co. v. McEnerg*, 91 Pa. St. 185.

See *Penn. R. Co. v. Butler*, 7 P. F. Smith (Pa.) 335.

Under a statute permitting a jury to allow what they think proportioned to the injury to the beneficiaries, resulting from death, damages are not confined to pecuniary loss. *Strother v. South Carolina &c. R. Co.*, 47 S. C. 375.

Such a sum as would, at the present time, be compensation for the pecuniary loss to plaintiffs caused by the death. *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

See, also, *Houston &c. R. Co. v. Johnson*, (Tex. Civ. App.) 66 S. W. Rep. 72.

Reasonable expectation of pecuniary benefit is a proper element of damages, in a suit by the heirs, for injuries causing death. *Collins v. Davidson*, 19 Fed. Rep. 83.

*Chicago v. Keefe*, 114 Ill. 222; *Franklin v. South East. R. Co.*, 3 Hurl. & Nor. 211; *Dalton v. South East. R. Co.*, 93 Eng. C. L. 296; *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103; *Potter v. Chicago &c. R. Co.*, 12 Wis. 372; *Ewen v. Chicago &c. R. Co.*, 38 id. 613; *Galveston &c. R. Co. v. Hughes*, 22 Tex. Civ. App. 134; *English v. Southern P. R. Co.*, 13 Utah, 407.

In case of collision due to mutual fault, half damages are recoverable for death of a member of the crew of one of the vessels. *The Job T. Wilson*, 84 Fed. Rep. 204.

In absence of proof of actual or probable pecuniary damage, collateral heirs of deceased were limited to nominal damage. *In Re California Nav. &c. Co.*, 110 Fed. Rep. 670.

Death alone, without pecuniary injury to next of kin, held not to give even nominal damages under a statute giving such damages as may have been suffered. *Lazelle v. Newfane*, 70 Vt. 440.

The manner of distribution of damages for death is exclusively for the jury. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631; s. c., 46 L. R. A. 367.

In an action for death it is not essential to introduce mortality tables. *Norfolk &c. R. Co. v. Phillips*, (Va.) 41 S. E. Rep. 726.

#### (a). FUNERAL EXPENSES.

In an action for death from negligence, the funeral expenses were properly recovered, when any of those for whose benefit the action is brought were legally bound to pay them. *Murphy v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 445, aff'g judg't for pl'ff.

*Penn. R. Co. v. Bantom*, 54 Pa. St. 495; *Lehigh &c. Co. v. Rupp*, 100 id. 95; *Owen v. Brockschmidt*, 54 Mo. 285; *Roeder v. Ormsby*, 22 How. Pr. 270.

Defendant cannot show that he paid for maintenance of decedent after the injury, and for burial expenses except to show satisfaction of cause of action which must be pleaded. *Murray v. Usher*, 117 N. Y. 542.

Expenses incurred by person injured, for medical treatment between

432.) Recognizing the generally prospective and indefinite character of those damages, and the impossibility of a basis for accurate estimate, it allows a jury to give what they shall deem a just compensation, and limits their judgment to a sum not exceeding \$5,000. (*Tilley v. Hudson Riv. R. Co.*, 29 N. Y. 252.) But within that range the jury is neither omnipotent, nor left wholly to conjecture. They are required to judge, and not merely to guess, and, therefore, such basis for their judgment as the facts naturally capable of proof can give should always be present, and is rarely, if ever, absent. The pecuniary loss in any such case may be composed of very different elements. It may consist of special damages, that is of actual, definite loss, capable of proof, and of measurement with approximate accuracy; and also of prospective and general damages, incapable of precise and accurate estimate because of the contingencies of the unknown future."

The recovery by parents for the loss of a child, is the value of its services during minority, less the expense of support. *Schaffer v. Baker T. Co.*, 29 App. Div. 459.

Plaintiff, in an action for death of child, cannot show the wages he himself receives. *Terhune v. Cody &c. Co.*, 76 N. Y. Supp. 255.

It may be shown that deceased was unmarried and frugal; and that his mother was a dependent widow. *Louisville &c. R. Co. v. Jones*, 130 Ala. 456.

Where damages are claimed for the death of a child incapable of earning anything, the loss is a matter of conjecture, and may be determined by the jury without the testimony of witnesses. *Little Rock &c. R. Co. v. Barker*, 39 Ark. 491.

See *Oldfield v. New York &c. R. Co.*, 3 E. D. Smith, 103; *Penn. R. Co. v. Bantom*, 54 Pa. St. 495; *Louisville v. Connor*, 9 Heisk. (Tenn.) 19; *Chicago v. Mayor*, 18 Ill. 349; *Chicago v. Scholton*, 75 id. 469; "Value of Children," 15 Cent. L. J. 286.

A parent is not limited to his actual pecuniary injury in an action for damages for the loss of child's services. *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320.

*Cook v. Clay Street Hill Co.*, 9 Pac. C. L. J. 605; but, see, *March v. Walker*, 48 Tex. 375.

Where action for death of a child is based on loss of services, no recovery can be had for death of a child, too young to render services. *Atlanta &c. Street R. Co. v. Arnold*, 100 Ga. 566; *Southern R. Co. v. Covenia*, id. 46.

The law of master and servant governs such cases. *Fraier v. Georgia &c. R. Co.*, 101 Ga. 70.

Parent was not allowed to recover, where the son was in the penitentiary not actually contributing to his support. *Smith v. Hatcher*, 102 Ga. 158.

Proof of contributions is insufficient; a state of dependency must appear. *Augusta &c. R. Co. v. McDade*, 105 Ga. 134.



And such dependency does not exist, when the parent can support himself, though not others dependent upon him. *Georgia &c. Co. v. Spinks*, 111 Ga. 571.

The law implies a pecuniary loss to a parent from the death of a minor child, for the loss of its services. *Stafford v. Rubens*, 115 Ill. 196.

*Atrops v. Costello*, 8 Wash. 149; *Holton v. Daly*, 106 Ill. 131; *Chicago &c. R. Co. v. Sweet*, 45 id. 197.

Where deceased is a minor, pecuniary loss was presumed. *Chicago &c. R. Co. v. Huston*, 196 Ill. 480; aff'g s. c., 95 Ill. App. 350; *West Chicago &c. R. Co. v. Scanlan*, 68 Ill. App. 626; s. c. aff'd, 168 Ill. 34.

In an action for the death of a minor child, the damages are the value of the services during minority, from which should be deducted the probable cost of support and maintenance. *Penn. Co. v. Lilly*, 73 Ind. 252; *Rockford Co. v. Delaney*, 82 Ill. 198.

Measure of parents' recovery for child's death is the value of child's services from the time of the injury until he would have attained his majority, in connection with his prospects in life, and expenses attending upon the injury, less support and maintenance. *Mayhew v. Burns*, 103 Ind. 328.

*Penn. R. Co. v. Lilly*, 73 Ind. 252; *Ohio &c. R. Co. v. Tindell*, 13 Ind. 366; *Walters v. Chicago &c. R. Co.*, 36 Iowa, 458; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294; *Rains v. St. Louis &c. R. Co.*, 71 Mo. 164; *St. Louis &c. R. Co. v. Freeman*, 36 Ark. 41; *Benton v. Chicago &c. R. Co.*, 55 Iowa, 496. See *Kelly v. Central R. &c.*, 5 McCrary C. C. 653.

The action was not confined to the loss of services during minority. *Mo. Pac. R. Co. v. Peregoy*, 36 Kas. 424; *Gulf &c. R. Co. v. Compton*, 75 Tex. 667; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504. But see, *contra*, *St. Louis R. Co. v. Freeman*, 36 Ark. 41; *Lehigh Iron Co. v. Rupp*, 100 Pa. St. 95; *State v. Baltimore R. Co.*, 24 Ind. 84; *Cooper v. Lake Shore R. Co.*, 66 Mich. 261.

Recovery may be had for death of child after majority. *Atchison &c. R. Co. v. Cross*, 58 Kan. 424; *St. Louis &c. R. Co. v. French*, 56 id. 584.

Parents recovered for the loss of services, the support and comfort contributed, and pain and suffering of deceased. *Erslew v. New Orleans &c. R. Co.*, 49 La. Ann. 86.

Where a parent sues for the death of a son, jury may find damages from proof of the boy's age, and the condition in life of the father. *Grogan v. Broadway &c. Co.*, 87 Mo. 321.

*Nagle v. Missouri Pac. R. Co.*, 75 Mo. 653; *Owen v. Brockschmidt*, 54 id. 289; *International &c. R. Co. v. Kindred*, 57 Tex. 491.

The pecuniary loss of parents, is value of service, less cost of maintenance during minority, and what might reasonably be expected from him by them thereafter. *Ft. Worth &c. R. Co. v. Hyatt*, 12 Tex. Civ. App. 435.

See, also, *Cole v. Parker*, (Tex. Civ. App.) 66 S. W. Rep. 135; *Freeman v. Carter*, 67 id. 527; *Texas &c. R. Co. v. Harby*, id. 541.

Not what they would probably receive had he not been killed, but the present value thereof. *Ft. Worth &c. R. Co. v. Morrison*, (Tex. Civ. App.) 56 S. W. Rep. 931; See, also, *Ft. Worth &c. R. Co. v. Morrison*, (Tex.) id. 735.

Evidence of pecuniary condition of parents, held admissible. *Houston &c. R. Co. v. White*, 23 Tex. Civ. App. 280.

Legal obligation to contribute to the support of parents is not essential. *Atchison &c. R. Co. v. Van Belle*, (Tex. Civ. App.) 64 S. W. Rep. 397.

Error to restrict damages to services during minority; reasonable expectation of pecuniary benefits voluntarily bestowed thereafter, is an item. *Texas &c. R. Co. v. Wilder*, 92 Fed. Rep. 953.

Recovery for loss of services by parent may be had in a statutory action for death, but not at common law. *Sternenberg v. Mailhos*, 99 Fed. Rep. 43.

See, also, *Railway Co. v. Beall*, 91 Tex. 310, "Death by Negligence," *post*, p. 942.

Father who abandoned his family, held not entitled to recover for loss of services of minor in statutory action for his death. *Thompson v. Chicago &c. R. Co.*, 104 Fed. Rep. 845.

Recovery allowed for death of an adult son, contributing pecuniary assistance. *Boyden v. Fitchburg R. Co.*, 70 Vt. 125.

#### (a). FATHER.

Jury may consider whether a son would not, after he became of age, have given his father pecuniary aid, by reason of natural love and affection. *Connaughton v. Sun &c. Asso.*, 76 N. Y. Supp. 755.

In the absence of proof other than that a boy about three years of age was in good health, only nominal damages were allowed. *Silberstein v. William Wicke Co.*, 29 Abb. N. C. 291.

Unless the deceased helped his father or the latter had reasonable expectation of pecuniary benefit, nominal damages are alone recoverable. *Fordyce v. McCants*, 51 Ark. 509.

Father may recover for the loss of services of minor child dying on account of injury, such damages only as accrued intermediate to the injury and the death. *Davis v. St. Louis &c. R. Co.*, 53 Ark. 117.

Upon its appearing that minor son had expressed an intention to contribute to his father's support after arrival at majority, a recovery therefor may be had. *St. Louis &c. R. Co. v. Davis*, 55 Ark. 462.

Damages for death of child rests in sound discretion of the jury. *Illinois Central R. Co. v. Slater*, 129 Ill. 91.

Loss of wages during minority, is not the sole measure of damages. *Illinois C. R. Co. v. Reardon*, 157 Ill. 372.

Jury may, in fixing damages to parents for death of minor son, consider reasonable expectation of pecuniary benefit beyond his majority. *McLain &c. R. Co. v. McVey*, 28 Ill. App. 158.

There is no rule governing damages allowable for death of young children. *Chicago &c. R. Co. v. Wilson*, 35 Ill. App. 346.

Mental suffering of parents for death of child is not recoverable. *Chicago &c. R. L. Co. v. Tietz*, 37 Ill. App. 599.

Evidence of physical condition of father, held inadmissible. *Illinois C. R. Co. v. Bandy*, 88 Ill. App. 629.

The condition of a family, with respect to a child killed, may be considered so far as it bears upon pecuniary loss. *Louisville &c. R. Co. v. Rush*, 127 Ind. 545.

Value of services during minority, less cost of maintenance, held measure of damages to father. Mental and physical condition of child and its usefulness in the family, are elements of consideration. *Elwood v. Addison*, 26 Ind. App. 28.

In absence of evidence of parents' pecuniary condition, or of past or probable future advantage to them from the continuance of the life of their son, only nominal damages are recoverable. *Cherokee &c. Co. v. Limb*, 47 Kas. 469.

No recovery allowed a parent for the expectation of pecuniary benefit from his son's life after he reached majority. *Agricultural & M. Ass'n v. State*, 71 Md. 86.

In an action for death of child, prospective pecuniary loss may be recovered. *Vicksburg v. McLain*, 67 Miss. 4.

Loss of society of child by father, or comfort in bringing him to manhood, cannot be considered. *Mobile &c. R. Co. v. Watley*, 69 Miss. 145.

No deduction should be made for the support of child subsequent to the injury. *Schmitz v. St. Louis &c. R. Co.*, 46 Mo. App. 380.

Father was not allowed to recover for sickness and loss of service of mother, caused by death of child. *Myers v. Holburn*, 58 N. J. L. 193.

In an action for death of child, a father may recover what the child would probably have earned during his minority, with funeral expenses and the value of his time lost by reason of the accident, cost of maintenance of child. *Madara v. Pottsville Iron &c. Co.*, 160 Pa. St. 109.

Inconvenience to other members of the family, solely, is no part of the father's damages. *Woekner v. Erie &c. Motor Co.*, 182 Pa. St. 182.

Recovery for chances of promotion of deceased may be considered. *St. Louis &c. R. Co. v. Johnston*, 78 Tex. 536.

Recovery allowed for reasonable expectation of benefits after majority. *Beaman v. Martha Washington Min. Co.*, 23 Utah, 139.

Reasonable expectation of pecuniary benefits from son's life beyond his majority may be considered in action by mother for his death. *Thompson v. Johnston Bros. Co.*, 86 Wis. 576.

In an action by a father for loss of minor child, pecuniary loss is presumed so far as services during minority is concerned. But benefits reasonably to be expected thereafter must be alleged and proved. Probability of child's illness during minority does not prevent recovery for loss of services. *Luessen v. Oshkosh Electric &c. Co.*, 109 Wis. 94.

#### (b). MOTHER.

In an action under California Code Proc., sec. 377, by the personal representative of one killed by the negligence of another, the mother recovered pecuniary loss and for loss of society, support and protection of child, but not for sorrow, grief or mental suffering. *Munro v. Pacific Coast &c. R. Co.*, 84 Cal. 515.

Mother's damage is for pecuniary loss, and does not cover compensation for loss of society. *Wales v. Pacific &c. Motor Co.*, 130 Cal. 521.

Consideration of whether mother was dependent on her son, and how much he contributed to her support, was proper. *Mulhall v. Fallon*, 176 Mass. 266.

In an action by a married woman for the death of her son, where her husband has abandoned her and contributed nothing to her support, the jury were properly instructed that they might return a verdict for the amount that the father would have received from the son, if anything, and that the mother would have received, and apportion it between them. *Missouri &c. R. Co. v. Henry*, 75 Tex. 220.

No recovery allowed for effects of death of son upon mother. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631; s. c., 46 L. R. A. 367.

### X. Death of Parent, Husband or Wife.

In an action by a husband for the death of his wife, through the defendant's negligence, recovery can only be had for injury to next of kin, and *not for loss of services due* the husband and evidence of value of same is inadmissible. *Dickens v. N. Y. C. R. Co.*, 23 N. Y. 158; rev'g judg't for pl'ff.

In an action by husband, as administrator of his wife, who was killed by the defendant's negligence, leaving children, it was held (1) the jury might consider the nurture, instruction, physical, moral and intellectual

training that the mother would have given her children; (2) the damages were not necessarily confined to the children's minority; (3) the prospective losses might be considered; (4) the business capacity of the mother may be considered, as aiding the jury in determining the pecuniary benefit which the mother was to her children, and as to her capacity to give them such training and education as would be pecuniarily serviceable to them. The habitual employment and value of the earnings of the mother were competent to show general capacity. *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; aff'g judg't for pl'ff.

S. C., 24 N. Y. 471, where judgment for plaintiff was reversed because jury was allowed to consider the value of her earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of their father.

It is proper, in estimating pecuniary damages to the next of kin at death of mother by negligence of defendant, to give such as arise from the loss of personal care, intellectual or moral training, which would have been received if the deceased had lived.

Deceased left three children, two sons and one daughter, all of them over twenty-one years of age, and living away from their mother. It was shown that she was in the habit of making articles of clothing and sending them to her children from time to time.

The question, "what did the deceased usually earn?" is proper, as being an inquiry of importance in forming an estimate of the pecuniary loss sustained by the next of kin. *McIntyre v. N. Y. C. R. Co.*, 37 N. Y. 287; aff'g judg't for pl'ff.

The fact that the children of a person killed through negligence are of full age and live away from the home of the deceased, and supported themselves, does not prevent recovery.

In such an action plaintiff was permitted to prove, under objection and exception, that the children of the deceased, all of whom were adults, had no property of their own, and that a daughter who lived with him, doing household work, receiving nothing therefor, and paying nothing for her board, was afflicted with some disease, in consequence whereof she was not as able to work as she otherwise would have been. Held no error. *Lockwood v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 523; aff'g judg't for pl'ff.

A jury may not take into consideration that the plaintiff would receive property as the next of kin of deceased. *Terry v. Jewett*, 78 N. Y. 338; 17 Hun, 395.

Prospects of advancement and higher salary may be shown. *Geary v. Metropolitan Street R. Co.*, 73 App. Div. 441.

Damages include loss of mental, moral and physical training, but not

society and companionship. *Sternfels v. Metropolitan Street R. Co.*, 73 App. Div. 494.

Next of kin were allowed to show that deceased was laying up earnings for a house at the time of his death. *Louisville &c. R. Co. v. York*, 28 Ala. 305.

A widow allowed to testify, in an action for death, that her family consisted of herself and child only. *Louisville &c. R. Co. v. Banks*, (Ala.) 31 South. Rep. 573.

The pension of a husband and father killed, may be considered, but not the provision entitling the wife, without other means of support, to a certain pension for herself and her child. *St. Louis &c. R. Co. v. Maddry*, 57 Ark. 306.

In estimating damages jury may consider the injury sustained by a wife in the loss of her husband's society. *Beeson v. Green Mountain &c. Mining Co.*, 57 Cal. 20.

*Penn. R. Co. v. Goodman*, 62 Pa. St. 339; *Matthews v. Warner*, 29 Grattan, (Va.) 570; *B. & O. R. Co. v. Noell*, 32 id. 394.

Pecuniary loss is measure of damage. Loss of society not an element. *Burk v. Arcata &c. R. Co.*, 125 Cal. 364.

Loss to husband and children for death of wife and mother, includes the pecuniary loss suffered by them from the loss of her society and protection. *Green v. Southern California R. Co.*, (Cal.) 67 Pac. Rep. 4.

Income from his investments, is not an element of pecuniary loss in action for death of father. *Denver &c. R. Co. v. Spencer*, 25 Colo. 9.

In an action for the benefit of the husband, it may not be shown that he is again married. *Georgia R. Co. v. Garr*, 57 Ga. 277; *Davis v. Guarnieri*, 45 Oh. St. 470.

Or that he is engaged to be married. *Dimmey v. Wheeling R. Co.*, 27 W. Va. 32.

Where measure of damages recoverable by a child for death of parent, is the loss of support until its arrival at full age, such computation should begin from the death of the parent and not the date of the injury. *Atlanta &c. R. Co. v. Venable*, 67 Ga. 697.

That husband and wife were living separate at the time of death, does not effect the latter's right to the full value of the former's life. *Central &c. R. Co. v. Bond*, 111 Ga. 13.

See, also, *Boswell v. Barnhardt*, 96 Ga. 522.

Under Illinois statute, husband may recover for the pecuniary injury resulting to him, as husband, from wife's death. *Cleveland &c. R. Co. v. Baddeley*, 150 Ill. 328.

See *Falkenau v. Rowland*, 70 Ill. App. 20.

The damages to the widow depend upon the basis of the joint life of herself and her husband. *Prest. &c. v. State*, 71 Ind. 573.

Bereavement and pain, not an element of damage. *Commercial Club v. Hilliker*, 20 Ind. App. 239.

Nor is suffering of deceased. *Louisville &c. R. Co. v. Graham*, 98 Ky. 688.

Income of a professional man is to be ascertained by the testimony of witnesses who know his character and his professional reputation and extent of practice, not by experts. *State v. Cecil County*, 54 Md. 425.

Where no pecuniary damages were shown to the son there was no recovery, but the daughter with whom the deceased lived recovered. *Baltimore &c. R. Co. v. Mahone*, 63 Md. 135.

See *Dalton v. Southeastern R. Co.*, 93 Eng. C. L. 296.

In an action by a widow for the death of her husband, the jury may consider the probable duration of their lives when the injury occurred. *Baltimore &c. Road v. State*, 71 Md. 573.

Damages for failure of support by the death of parent are the costs and annuity which would furnish it. *Brockway v. Patterson*, 72 Mich. 122.

Loss of physical care and moral and mental training, held not an element of damage to children. *Walker v. Lake Shore &c. R. Co.*, 111 Mich. 518.

The jury cannot award damages for expectancy of widow and minority of children, without considering the possibility of a death or marriage. *Jones v. McMillan*, (Mich.) 88 N. W. Rep. 206.

Under Missouri statute, infants may recover \$5,000 for the death of a father through negligence, without proof of amount of his earnings. *McPherson v. St. Louis &c. R. Co.*, 97 Mo. 253.

Wife may prove the age and number of her minor children, in action for death of husband. *Fisher v. Central Lead Co.*, 156 Mo. 479.

Probable earnings, is not measure of damage to wife. Loss of society is not included. *Knight v. Sadtler Lead &c. Co.*, 75 Mo. App. 541.

See, also, *Louisiana &c. R. Co. v. Carstens*, 19 Tex. Civ. App. 190.

Loss of services is an element of damage to husband, but not to next of kin during his life. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 63.

Husband need not show that he suffered pecuniary loss on account of wife's death. *Delaware &c. R. Co. v. Jones*, 128 Pa. St. 308.

Children held entitled to share in the recovery, in proportion to the amount of personal property they would receive in case of intestacy. *Allison v. Powers*, 179 Pa. St. 531.

Under Pennsylvania statutes, giving widow and children right to recover in damages for death of head of family, *solatium* is not a proper element of damage. *Penn. R. Co. v. Butler*, 7 P. F. Smith (Pa.) 335.

See *Penn. R. Co. v. Henderson*, 1 P. F. Smith, (Pa.) 315; *Same v. Keller*, 17 id. 300. See *Blake v. Midland R. Co.*, 18 Q. B. 93; *Franklin v. South-East R. Co.*, 3 Hurl. & Nor. 211; *Holton v. Daly*, 106 Ill. 131; *Chicago &c. R. Co. v. Morris*, 26 id. 400; *Chicago &c. R. Co. v. Shannon*, 43 id. 338.

Advice, counsel, comfort and enjoyment are not elements of damages in an action for death of husband. *Illinois &c. R. Co. v. Bentz*, 108 Tenn. 670.

Remarriage is no defense to an action for the death of a wife. Pecuniary condition of father held competent on question of injury to daughter for loss of mother. *Gulf &c. R. Co. v. Younger*, 90 Tex. 387.

Damage to an infant for death of its father, is not limited to age of majority. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

Adult children, receiving nothing from father, were not allowed to recover for his death. *St. Louis &c. R. Co. v. Bishop*, 14 Tex. Civ. App. 504.

Ability of mother in management of an estate, to which children were entitled on her death, held an element of damage. *San Antonio &c. R. Co. v. Long*, 19 Tex. Civ. App. 649.

Calculation of the present worth of future earnings upon a six per cent basis, held improper. *Galveston &c. R. Co. v. Johnson*, 24 Tex. Civ. App. 180.

That the times of gratuitous giving were irregular, does not prevent recovery. *Texas &c. R. Co. v. Martin*, (Tex. Civ. App.) 60 S. W. Rep. 803.

Present compensation for contributions reasonably to be expected, is the measure of damage to father for death of an adult son. *San Antonio &c. R. Co. v. White*, 94 Tex. 468.

Measure of damages for the loss of a father and husband, is not all the pecuniary benefit which would have been received had he not been killed. *Ft. Worth &c. R. Co. v. Sivells*, (Tex. Civ. App.) 67 S. W. Rep. 517.

See, also, *Railway Co. v. Morrison*, (Tex.) 56 S. W. Rep. 735.

Income from flowers and vegetables, raised by deceased, were considered by the jury. *Missouri &c. R. Co. v. Eyer*, (Tex. Civ. App.) 69 S. W. Rep. 453.

In an action by a wife, the jury may consider the husband's improved habits and pecuniary affairs since his marriage. *Simmons v. M'Connell*, 14 Va. L. J. 106.

Physical, moral and intellectual training of children is an element of damage for death of their father. *Hoadley v. International Paper Co.*, 72 Vt. 79.

See, also, *Walker v. McNeill*, 17 Wash. 582.



In action on account of death of father, the physical and moral and intellectual training which would have been received from him should be considered. *Searles v. Kannawha &c. R. Co.*, 32 W. Va. 370.

Probable duration of a parent's life but for the injury, reasonable expectation of increase of her property, and the pecuniary benefit to her children in their support or otherwise, held proper under Wisconsin Revised Statutes, 4256. *Tuteur v. Chicago &c. R. Co.*, 77 Wis. 505.

Damages to widow, limited to support, and such sums as could reasonably have been expected from deceased husband. *Rudiger v. Chicago &c. R. Co.*, 101 Wis. 292.

See, also, *Bauer v. Richter*, 103 Wis. 412.

Where a widow received a pecuniary provision through the death of her husband the jury were entitled to consider same in mitigation of damages. *Grand Trunk R. Co. v. Jennings*, 13 App. Cas. 800.

See "Death from Negligence," *post*, p. 942. For damages in various states, see *Tiffany's Death by Wrongful Act*, secs. 129 to 154.

## XI. Private Premises.

### (a). TREES.

In an action to recover damages for an alleged negligence resulting in setting on fire and destroying certain bearing fruit trees upon plaintiff's premises, plaintiff was allowed to show what the trees were worth at the time they were killed. Held, error; that the evidence tended to show, not the value of the trees severed from the soil, but their value as bearing fruit trees *connected with and dependent upon the soil*; that this was not a proper measure of damages. *Dwight v. The Elmira, C. & N. R. Co.*, 132 N. Y. 199, rev'g judg't for pl'ff.

Distinguishing *Whitbeck v. N. Y. C. R. Co.*, 36 Barb. 644.

**From opinion.**—"Where timber, forming part of a forest, is fully grown, the value of the trees taken or destroyed can be recovered.

In nearly all jurisdictions this is all that may be recovered, and the reason assigned for it is that the realty has not been damaged, because the trees having been brought to maturity, the owner is advantaged by their being cut and sold, to the end that the soil may again be put to productive uses. *Sutherland on Damages*, vol. 3, page 374; *Sedgwick on Damages*, (8th ed.), vol. 3, page 45; *Single v. Schneider*, 30 Wis. 570; *Webster v. Moe*, 35 id. 75; *Webber v. Quaw*, 46 id. 118; *Haseltine v. Mosher*, 51 id. 443; *Tuttle v. Wilson*, 52 id. 643; *W. W. Co. v. U. S.* 106 U. S. 432; *Graessle v. Carpenter*, 70 Iowa, 166; *Ward v. Carson R. W. Co.*, 13 Nev. 44; *Tilden v. Johnson*, 52 Vt. 628; *Adams v. Blodgett*, 47 N. H. 219; *Cushing v. Longfellow*, 26 Me. 306.

In this state it is settled that *even where full grown timber is cut or destroyed, the damage to the land may also be recovered, and in such cases the measure of damages is the difference in the value of the land before and after the cutting, or*

*destruction complained of.* Argotsinger v. Vines, 82 N. Y. 308; Van Deusen v. Young, 29 id. 36; Easterbrook v. Erie R. Co., 51 Barb. 94.

The rule is also applicable to *nursery trees* grown for market, because they have a value for transplanting; the soil is not damaged by their removal, and their *market value* necessarily furnished the true rule of damages. Sedgwick on Damages, (8th ed.), vol. 3, page 48; Birket v. Williams, 30 Ill. App. 451.

Coal furnishes another illustration of the rule making the value of the thing separated from the realty, although once a part of it, the measure of damages where it has a value after removal, and the land had sustained no injury because of it. Sedgwick on Damages, (8th ed.), vol. 3, page 48; Sutherland on Damages, vol. 3, page 374; American & English Ency. of Law, vol. 5, page 36, note 2; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147-152; Dougherty v. Chestnutt, 86 Tenn. 1; Coleman's Appeal, 62 Pa. St. 252; Ross v. Scott, 15 Lea, (Tenn.) 479-488; Forsyth v. Wells, 41 Pa. St. 291; Chamberlain v. Collinson, 45 Iowa, 429; Morgan v. Powell, 3 Adol. & Ellis, (N. R.) 278; Martin v. Porter, 5 M. & W. 351.

On the other hand, cases are not wanting where the value of the thing, detached from the soil, would not adequately compensate the owner for the wrong done, and in those cases a recovery is permitted, embracing all the injury resulting to the land.

*This is the rule where growing timber is cut or destroyed.* Because not yet fully developed, the owner of the freehold is deprived of the advantage which would accrue to him could the trees remain until fully matured. His damages, therefore, necessarily extend beyond the market value of the trees after separation from the soil, and the difference between the value of the land before and after the injury constitutes the compensation to which he is entitled. Longfellow v. Quimby, 33 Me. 457; Chipman v. Hibbard, 6 Cal. 162; Wallace v. Goodall, 18 N. H. 439-456; Hayes v. C. M. & S. P. R. Co., 45 Minn. 17-20.

In Wallace's case, (*supra*), the court said: 'The value of young timber, like the value of growing crops, may be but little when separated from the soil. The land stripped of its trees may be valueless. The trees considered as timber may from their youth be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated, unless he could receive a sum that would be equal to their value to him while standing upon the soil.'

The same rule prevails as to *shade trees*, which, although fully developed, may add a further value to the freehold for ornamental purposes, or in furnishing shade for stock. Nixon v. Stillwell, 52 Hun, 353, and cases cited *supra*.

The current of authority is to effect that *fruit trees and ornamental, or growing trees*, are subject to the same rule. Montgomery v. Locke, 72 Cal. 75; Sedgwick on Damages, (8th ed.), vol. 3, sec. 933.

It is apparent from the authorities already cited, as well as those following, that in cases of injury, to real estate the courts recognize two elements of damages.

1. The value of the tree or other thing taken, after separation from the freehold, if it have any.
2. The damages to the realty, if any, occasioned by the removal. Ensley v. Mayor &c. 2 Baxter (Tenn.) 144; Striegel

The measure of damages for loss of a stack of straw, is the value hereof at the nearest market, plus the cost of cartage. *Chicago &c. R. Co. v. Gitchell*, 95 Ill. App. 1.

Measure of damages for the destruction of meadow and grass land, is the difference in its value before and after its destruction. That of hay and straw; the fair cash value at the time of destruction. *Baltimore &c. R. Co. v. Irwin*, 97 Ill. App. 337.

See, also, *Baltimore &c. R. Co. v. Perryman*, 95 Ill. App. 199.

Damage to land by the escape of fire from railroad, is the difference between its value just before and after such fire. *Baltimore &c. R. Co. v. Countryman*, 16 Ind. App. 139.

See, also, *Pennsylvania Co. v. Hunsley*, 23 Ind. App. 37.

Measure of damage of household goods and wearing apparel destroyed by fire, determined from a consideration of their original cost, extent of use, and present condition. *McMahon v. Dubuque*, 107 Iowa, 62.

Damages for the destruction of a hedge, is the difference in the value of the property with and without it. *Bradley v. Iowa &c. R. Co.*, 111 Iowa, 562.

See, also, *Swanson v. Keokuk &c. R. Co.*, (Iowa) 89 N. W. Rep. 1088; *Thompson v. Keokuk &c. R. Co.*, id. 975.

Value of barn when burned, is the measure of damages. *Atchison &c. R. Co. v. Huitt*, 1 Kan. App. 788.

See, also, *Matthews v. Missouri &c. R. Co.*, 142 Mo. 645; *Damman v. St. Louis*, 152 id. 186.

Value of personalty is to be determined as of the time and place of destruction. *Atchison &c. R. Co. v. Briggs*, 2 Kan. App. 154.

Actual value of personalty destroyed is the measure. *Wall v. Platt*, 169 Mass. 398.

See, also, *Cleveland &c. R. Co. v. McKelvey*, 12 Oh. C. C. 426.

In an action for burning grass, the correct measure, is the value of the grass as it stood upon the ground, and the difference, if any, in the value of the land, without considering the grass, immediately before the fire and immediately thereafter. *Gulf &c. R. Co. v. Reagan*, (Tex. Civ. App.) 32 S. W. Rep. 846.

See, also, *International &c. R. Co. v. McIver*, 40 id. 438.

Measure of damage for loss of personal property without market value, is the pecuniary loss to the owner, not the cost of replacing it. *Dallas v. Allen*, (Tex. Civ. App.) 40 S. W. Rep. 324.

Depreciation in value of the land by the burning of a fence, is to be considered. *International &c. R. Co. v. McIver*, (Tex. Civ. App.) 40 S. W. Rep. 438.

Damages for injury to house and land from cave of railroad cut, is the difference in value of the property, with a proper construction of the cut and that after the cave-in, with expense of repair and protection from further damage. *Nading v. Denison &c. R. Co.*, 22 Tex. Civ. App. 173.

Where land is leased for pasture, in suit by lessee for injury to turf, measure of damage is not the difference in value of land before and after injury, but compensation for injury to turf due to its diminished power to produce grass. *Texas &c. R. Co. v. Rice*, (Tex. Civ. App.) 59 S. W. Rep. 833.

And, when leased for tillage, its diminished power to produce succeeding year's crop. In absence of market value, particular purposes of plaintiff may be considered. *San Antonio &c. R. Co. v. Stone*, (Tex. Civ. App.) 60 S. W. Rep. 461.

Difference in value of property before and after injury, is measure of damages for negligent removal of lateral support. *Jones v. Seattle*, 23 Wash. 753.

#### (c). OTHER PROPERTY.

Damages for loss of personal baggage is its actual worth for use, and not its market value. *Simpson v. New York &c. R. Co.*, 16 Misc. 613.

Damages to violin was cost of repairs, loss of use during repair and difference in value before and after injury. *Schalscha v. Third Ave. R. Co.*, 19 Misc. 141.

Price of a new horse is not an item, where the old fully recovers. *Cady v. Third Ave. R. Co.*, 29 Misc. 741.

Damages for goods in cold storage, is the difference in market value, as they were and as they should have been delivered, less storage. *Western &c. Storage Co. v. Ermeling*, 73 Ill. App. 394.

Expense of care and attention of a mule during sickness, cannot be recovered, in addition to its value. *Cully v. Louisville &c. R. Co.*, 101 Ky. 319.

Where hay destroyed has no value for use to the owner, the measure of damage is market value at nearest market, less cost of cartage. *Watt v. Nevada C. R. Co.*, 23 Nev. 154.

Damages for injury of team, is the difference in value before injury and after cure, plus the expense of cure, and compensation for loss of use in the meantime. *Pittsburg &c. R. Co. v. Kelly*, 12 Oh. C. C. 341.

Cost of restoration to original condition, is measure for partial destruction of building. *Anderson v. Miller*, 96 Tenn. 35; s. c., 31 L. R. A. 604.

In action for hogs killed, no recovery was allowed for time spent for hunting stray hogs to secure their safety, or for feed of those penned

for same reason. *Harmon v. Callahan*, (Tex. Civ. App.) 35 S. W. Rep. 705.

Reduction in value of mares, is measure of damage for premature birth of colts. Error to admit evidence of market value of the colts. *Baker v. Mims*, 14 Tex. Civ. App. 413.

Damages for loss of a beast, is its value at the time of loss, with legal interest from such time. A statute prescribing a rule of damages for stock killed by railway companies, construed not to apply to street railways, or to the case of an animal killed by an electrical wire down across the tracks of a steam railway. *San Antonio &c. Street R. Co. v. Wray*, (Tex. Civ. App.) 37 S. W. Rep. 641.

As to rule of damages for destruction of a private yacht, see *The H. F. Dimock*, 77 Fed. Rep. 226.

## XII. Proximate Cause.

Although a person be in delicate health, yet she is not limited to damages that would have followed if she had been in good health. The injury is the proximate cause. *Tice v. Munn*, 94 N. Y. 621; aff'g judg't for pl'ff.

After the injury the plaintiff drove several miles, exposed to the rain, and caught cold and aggravated the injury. Such exposure was the natural result of the accident. *Ehrgott v. Mayor &c.*, 96 N. Y. 264; aff'g judg't for pl'ff and rev'g judg't general term.

**From opinion.**—"The judge charged the jury that the defendant was liable to the plaintiff, even if the disease from which he suffered were solely due to his exposure to the cold and rain after the accident, provided he was free from fault and negligence in the exposure. I am inclined to think that there was no error in this portion of the charge. The exposure was the direct and proximate result of the accident. The plaintiff and his family were unavoidably forced from his carriage into the rain and cold by the accident, and were thus exposed to those elements in consequence of defendant's wrong. It was in the night time, and they could not remain in the carriage, and he could not avoid the rain. He was bound to exercise reasonable prudence in taking care of himself and avoiding the consequences of the wrong done. He had the option to stand in the street where the accident had placed him, or to go home, exercising reasonable prudence and the best judgment he had. There is thus such a direct connection between the accident and the exposure as to make the defendant liable for the latter. It must, however, be admitted that there is considerable authority in opposition to these views. (*Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111; *McMahon v. Field*, 44 L. T. (N. S.) Ch. Div. 175; *Waller v. M. G. W. Railway Co.*, 12 Ir. L. T. 145; *Pullman Palace Car Co. v. Barker*, 4 Col. 344; *Indianapolis &c. R. Co. v. Birney*, 71 Ill. 391; *Francis v. St. L. Transfer Co.*, 5 Mo. App. 7.) But the views expressed are not condemned by any authority in this state, and are fairly sustained by the cases of *Williams v. Vanderbilt*, (28 N. Y. 217) and *Ward v. Vanderbilt*,

(4 Abb. Ct. of App. Dec. 521.) \* \* \* There were, according to the finding of the jury, two causes operating to produce plaintiff's injuries, each of which was essential to produce the results. The accident without the exposure, and the exposure without the accident, would not have caused them. This case then comes within the principle decided in *Ring v. City of Cohoes*, (77 N. Y. 83), where it was said: 'When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate—one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible—the municipality is liable, provided the injury would not have been sustained but for such defect;' and 'when several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless, without its operation, the accident would not have happened.'"

Injury to product of salt works, by deposit of soot and dirt, held to be the natural and probable consequences of operation of an adjacent railroad. *Syracuse Solar Salt Co. v. Rome &c. R. Co.*, 43 App. Div. 203; s. c. aff'd, 168 N. Y. 650.

Where, through an error or mistake of an employé of a railroad company, a person has been left at a wrong station, such person may recover all damages naturally resulting from the corporation's fault and for any discomfort or inconvenience resulting to her therefrom; but such person should conduct herself prudently in the situation in which she is placed, so that the discomforts and inconveniences shall not be unnecessarily increased, and so that no danger shall be unnecessarily run by her. While the question of the plaintiff's negligence is usually for the jury, there are limitations to its power, and while the jury has a right to determine whether the injury from which the person is suffering is the natural result of an accident, that is not necessarily sufficient; it must find that the accident is the immediate or proximate cause of the injury.

Where a person knowing that any undue exercise or exposure will bring on a recurrence of a difficulty, is left by a railroad company by mistake in the evening and during a rain storm, at a station some two or three miles from her destination, it is her duty, before she undertakes to walk to her destination, to make some inquiries whether she can procure a conveyance, and if not, whether there is a convenient place in the vicinity where she can be cared for over night, and when, failing to make such inquiries, she blindly and heedlessly undergoes the fatigue of the journey by foot, and the exposure to the elements, when there are places near at hand where she can be cared for during the night, she is not entitled to recover damages from the railroad company for the injuries resulting from such exposure. *Childs v. The New York, Ontario & Western Ry. Co.*, 77 Hun, 539.

See *Ohio &c. R. Co. v. Burrows*, 32 Ill. App. 161; *Georgia &c. R. Co. v. Eskew*,

86 Ga. 641; *Serwe v. Mo. P. R. Co.*, 48 Minn. 78; *Texas &c. R. Co. v. James*, 82 Tex. 306.

Through the negligence of defendant's servant, the plaintiff, entering car, was injured, so that she miscarried, and there resulted retroversion of the womb. Request that, if subsequent exposure to the weather, which was calculated to aggravate her disorder, did "produce a subsequent development or condition of her disease which would not have existed but for that, then for that condition the defendant is not liable in any event." was refused. No error. Jury should say whether such exposure was negligent and whether, independently of injury, it caused her disorder. (*Vanderburgh v. Truax*, 4 Denio 464; *Pallett v. Long*, 56 N. Y. 200.) Charge that the test was, whether the plaintiff fairly acted in obedience to her own judgment as to what was prudent in going out. (*Sauter v. New York Central R. Co.*, 66 N. Y. 52.) LEARNED, J., dissents on the ground that the plaintiff should not act imprudently, although she regarded the act as prudent. *Hope v. T. & L. R. Co.*, 40 Hun, 438, aff'g judg't for pl'ff.

The court charged that the plaintiff might recover for injury, if she would suffer more from future ailments than she would have suffered if it had not been for the injury. The evidence was, if she were sick from other causes, this injury would complicate them, and the charge was correct. *Crank v. Forty-second Street R. Co.*, 53 Hun, 425, aff'g judg't for pl'ff; aff'd, 127 N. Y. 648.

A young woman, by stepping through a defective walk, sprained her ankle, and being advised so to do by the doctor, walked upon it and "induced a probably incurable inflammation." It appeared that she acted in good faith, and no medical evidence was given tending to show to what extent her conduct had aggravated the difficulty. The negligent condition of the walk was the proximate cause of the injury, and the defendant was liable for damages naturally following therefrom, if the injured person acted, in respect to the treatment, in good faith and without serious disregard of consequences. *Foels v. Town of Tonawanda*, 59 Hun, 567, aff'g judg't for pl'ff.

Citing *Hickinbottom v. D., L. & R. Co.*, 15 N. Y. St. R. 15; *Lyons v. Erie R. Co.*, 57 N. Y. 489; *Sauter v. N. Y. Cent. R. Co.*, 66 id. 50; *Radman v. Haberstro*, 17 N. Y. St. Rep. 497.

Expert testimony as to an injury to an organ, supported by evidence of pain therein, theretofore unknown, held to warrant an inference that it was caused by the accident. *Wolf v. Third Avenue R. Co.*, 67 App. Div. 605.

See, also, *Eichholz v. Niagara Falls &c. Co.*, 68 App. Div. 441; *Lindeman v. Brooklyn &c. R. Co.*, 69 App. Div. 442.

Plaintiff hired an office of the defendant, the lease containing a covenant by defendant to keep the roof in repair. The premises became damp by reason of leaks in the roof, and in consequence thereof plaintiff contracted pneumonia. Held, that an action for damages caused by such sickness could not be maintained; that such damages were too remote; were not within the reasonable contemplation of the parties, nor the immediate or natural result of the breach. *Eschbach v. Hughes*, 7 Misc. 172.

Failure to deliver trunk for shipment on a certain steamer, held not the proximate cause of expenses of owner pending departure of next steamer, but only repayment of passage money. *De Leon v. McKernan*, 25 Misc. 182.

Where the injured person was afterwards given poison by mistake, from the immediate effects of which he died, upon it appearing that the injury was sufficient to cause the death more quickly than the poison alone, the action was maintained. *Thompson v. Louisville &c. R. R. Co.*, 91 Ala. 496.

Failure to comply with directions of physician, prevents recovery for subsequent damage due to such failure. *Keyes v. Cedar Falls*, 107 Iowa. 509.

Failure to use ordinary care to properly diagnose plaintiff's condition, was held the proximate cause of breach of contract to marry. *Harriott v. Plimpton*, 166 Mass. 585.

Not error to refuse to charge that defendant would not be liable for blood poisoning unless it was the ordinary effect of such injury as plaintiff suffered. *McGarrahan v. New York &c. R. Co.*, 171 Mass. 211.

While one is bound to regulate his conduct only according to normal sensibilities, he is nevertheless liable for the consequences of a wrongful act, which is augmented by abnormal sensibilities. *Spade v. Lynn &c. R. Co.*, 172 Mass. 488.

One already suffering from an injured ankle, may recover for the increase of pain, suffering and expense incurred, by a subsequent fall. *Schwingschlegl v. Munroe*, 113 Mich. 683.

Whether the result was anticipated is immaterial, if the injuries are the direct consequences of the accident. *Watson v. Rhinderknecht*, 82 Minn. 235.

See, also, *Crouse v. Chicago &c. R. Co.*, 104 Wis. 473.

Recovery allowed for injury to dashboard caused by horse kicking, upon the buggy being wrenched, by catching on a railroad spike. *English v. Missouri P. R. Co.*, 73 Mo. App. 232.

That plaintiff would have fared better with a better physician was no



defense, where he used reasonable care in his selection. *New York &c. Teleph. Co. v. Bennett*, 62 N. J. L. 742.

Damages for malpractice, is reasonable for that excess of injury which would not have occurred with the use of ordinary skill. *Miller v. Frey*, 49 Neb. 472.

Profits, not allowed for failure to duly carry machinery. *Sharpe v. Southern R. Co.*, 130 N. C. 613.

Prospective damages are such as may be reasonably certain to follow. *Pennsylvania Co. v. Files*, 65 Oh. St. 403.

No recovery allowed, where injuries complained of, might have been the result of plaintiff's premature departure from hospital. *Richards v. Willard*, 176 Pa. St. 181.

Negligence in carrying passenger by station, not the proximate cause of mental suffering and delay in medical treatment for a sick child. *Chicago &c. R. Co. v. Boyles*, 11 Tex. Civ. App. 522.

Injury by sleeping on a neighbor's floor, was not the proximate result of the burning of plaintiff's dwelling by the defendant; nor is the loss of a dog in such dwelling. *Serafina v. Galveston &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 142.

That decedent was a church member and not addicted to profanity, was too remote, in determining pecuniary loss in action for death. *Houston &c. R. Co. v. Lippscomb*, (Tex.) 64 S. W. Rep. 923; mod'g s. c., 62 id. 954.

Plaintiff not allowed to recover damages for suffering, which could have been prevented, by the exercise of reasonable care. *St. Louis &c. R. Co. v. Ball*, (Tex. Civ. App.) 66 S. W. Rep. 879.

Defendant is liable for indirect damages which are the natural consequences of its negligent act; and it is error to charge a jury that they are to award no damages for "hysteria not directly caused by the accident." *Metropolitan Street R. Co. v. Hudson*, 113 Fed. Rep. 449.

Druggist liable for poison, negligently mislabeled, sold to a customer, and taken as medicine by a third party. *Peters v. Johnson*, 50 W. Va. 644.

#### (a). PREDISPOSITION TO DISEASE.

An original break of a bone was the proximate cause of its rebreakage occurring by reason of turning over in bed upon becoming afflicted with nausea. *Postal Teleg. Co. v. Hulsey*, (Ala.) 31 South. Rep. 527.

Where through an injury the system is more susceptible to disease, and death results therefrom, it is attributable to such injury. *Terre Haute &c. R. Co. v. Buck*, 96 Ind. 346.

*Drake v. Kiely*, 93 Pa. St. 492; *Louisville &c. R. Co. v. Kelly*, 92 Ind. 371. See Wharton on Negligence, sec. 135, and notes.

Although the injury developed into a malady to which the person was predisposed, the person causing the injury is liable. *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409.

*Stewart v. Ripon*, 38 Wis. 584; *Oliver v. LaValle*, 36 id. 592; *Kellogg v. Chicago &c. R. Co.*, 26 id. 223; *Louisville &c. R. Co. v. Jones*, 7 West, (Ind.) 33; *Reading &c. R. Co. v. Eckert*, 2 Cent. (Pa.) 791; *Brown v. C. M. &c. R. Co.*, 54 Wis. 342. See following cases: *Baltimore &c. R. Co. v. Kemp*, 30 Alb. L. J. 92; *Murdock v. B. & A. R. Co.*, 133 Mass. 15; *Beauchamp v. Saginaw M. Co.*, 50 Mich. 163; *McNamara v. Clintonville*, 62 Wis. 207; *Jeffersonville &c. R. Co. v. Riley*, 39 Ind. 568; see, however, *Pullman Palace Car Co. v. Barker*, 4 Col. 344; *Louisville &c. R. Co. v. Kingman*, (Ky.) 35 S. W. Rep. 264.

Where an already existing disease is aggravated by the injury plaintiff is entitled to full compensation. *Chicago &c. R. Co. v. Hecht*, 115 Ind. 443.

See, also, *Denver v. Hyatt*, 28 Colo. 129.

No recovery allowed for fracture of leg, by fall, due to weakness of ankle, produced by accident, caused by defective street, in a statutory action against the municipality. *Raymond v. Haverhill*, 168 Mass. 382.

Previous habits, lessening probability of recovery, held immaterial. *Sullivan v. Marin*, 175 Mass. 422.

Where a latent disease, which might never have exhibited itself, was developed by an injury, it was a proper element of damage. *LaPleine v. Morgan's &c. Co.*, 40 La. Ann. 661.

Recovery may be had for actual damages for injuries, although there was a scrofulous difficulty which rendered it possible or even likely that a slight injury would aggravate. *Shumway v. Walworth*, 98 Mich. 411.

Susceptibility to suffering by reason of rheumatism, does not mitigate damage for suffering caused by the injury. *Hall v. Cadillac*, 114 Mich. 99.

Full recovery may be had although injured person was, on account of previous condition of life, predisposed to injury. *Purcell v. St. Paul &c. R. Co.*, 48 Minn. 134.

Under New Hampshire act of 1879, damages for injuries causing death include those only suffered by the decedent before death. *Clark v. Manchester*, 62 N. H. 577.

Erysipelas was, in the absence of evidence to the contrary, regarded as directly caused by the same injury which caused the wound. *Drekson v. Hollister*, 123 Pa. St. 421.

But there was no recovery to the representatives where the injury brought on insanity, and after eight months of suffering the person committed suicide. *Scheffer v. R. Co.*, 105 U. S. 249.

See *McDonald v. Snelling*, 14 Allen, 249.

If disability already existed, then the defendant is only liable for such

additional disability as resulted from the injury caused by him. *Whelan v. N. Y. &c. R. Co.*, 38 Fed. Rep. 15.

Plaintiff sustained no substantial damages by the fall; his detention in hospital being for rheumatism. No recovery. *The Ed. Roberts*, 93 Fed. Rep. 988.

Damage should not include the condition not caused by the injury but by a chronic physical weakness of the plaintiff. *Abbott v. Tolliver*, 71 Wis. 64.

Although the physical condition of the person injured may have aggravated the injury by negligence, recovery may be had therefor. *Vosburg v. Putney*, 86 Wis. 278.

#### (b). MEDICAL TREATMENT.

Plaintiff's intestate, at first, rejected the advice of his physician and refused to have his leg amputated; he died about ten days after the accident. The physician, being called as a witness, swore that amputation would have improved "S.'s" chances, but also said that, within his own experience, there had been cases where, under advice and in the face of such objection, amputation had been omitted and the limb saved. The refusal of "S." could not be said to be, as matter of law, negligence. *Sullivan v. Tioga R. Co.*, 112 N. Y. 643.

**MISTAKE OF PHYSICIAN.**—Where a person who, through the negligence of another, has received an injury which, without a surgical operation, would cause his death, employs a competent and skillful surgeon, by whose mistake the operation is unsuccessful, and the patient dies, the wrongdoer is not shielded from liability by the surgeon's error, although the operation is the immediate cause of the death. *Sauter v. N. Y. C. & H. R. Co.*, 66 N. Y. 50.

**From opinion.**—"The employment of a surgeon was proper, and may be regarded as a natural consequence of the act, and the mistake which it is evident might be made by the most skillful, may be regarded of the same character. In *Lyons v. The Erie Railway*, (57 N. Y. 489) the Commission of Appeals held, if one who is injured by the negligence of another, acts in good faith under advice of a competent physician, even if it is erroneous, he may recover, and that the error is no shield to the wrongdoer. The rule is laid down in *Commonwealth v. Hackett*, (2 Allen, 137) that one who has willfully inflicted upon another a dangerous wound from which death ensued is guilty of murder or manslaughter, as the case may be, although, through want of due care, or skill, the improper treatment of surgeons may have contributed to the result."

Unskillful treatment does not affect recovery, where due care is shown in the selection of a physician. *Baker v. Borello*, 136 Cal. 160.

See, also, *McGarrahan v. New York &c. R. Co.*, 171 Mass. 211.

Increased injury, due to mistakes of physician, may be included in

recovery, provided plaintiff has used due care in his selection. *Chicago &c. R. Co. v. Cooney*, 196 Ill. 466; aff'g s. c., 95 Ill. App. 471.

See, also, *Columbia City v. Langohr*, 20 Ind. App. 395; *Heintz v. Cardwell*, 16 Oh. C. C. App. 630.

An injured person must use the care that a prudent person would use under the circumstances in employing medical aid. *Elgin v. Riordan*, 21 Ill. App. 600.

One who is injured by the negligence of another must use ordinary diligence in obtaining medical aid; and failure to do so should be taken into account in estimating damages. *Louisville &c. R. Co. v. Falvey*, 104 Ind. 409.

*Tuttle v. Fermington*, 58 N. H. 13; *Boynnton v. Somersworth*, id. 321, (see *Eastman v. Sanborn*, 3 Allen, 594; *Tuttle v. Holyoke*, 6 Gray, 447); *Osborne v. Detroit*, 32 Fed. R. 36; *Bradford v. Downs*, 126 Pa. St. 622.

Damages caused by plaintiff's negligence in the employment of medical aid, are not chargeable to defendant. *Crete v. Childs*, 11 Neb. 252.

And where plaintiff, or those in charge of him, disregarded the reasonable directions of a physician, there can be no recovery. *Potter v. Warner*, 91 Pa. St. 362.

Where due care was used in selecting a physician, improper treatment by him will not diminish the damages. *Loeser v. Humphrey*, 41 Ohio St. 378.

*Stover v. Bluehill*, 51 Me. 439, (see *Bardwell v. Jamaica*, 15 Vt. 438; *Collins v. Council Bluffs*, 32 Iowa, 324; *Ric v. Des Moines*, 40 id. 638; *Page v. Bucksport*, 64 Me. 51); *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653; *Page v. Sumpter*, 53 Wis. 652; *Texas &c. R. Co. v. Orr*, 46 Ark. 182.

Where reasonable care was used in selecting a physician, aggravation of the injury was no defense. *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

See, also, *Selleck v. Janesville*, 100 Wis. 157; s. c., 41 L. R. A. 563.

### XIII. Exemplary.\*

Exemplary damages may be allowed in actions based upon negligence, where such negligence is so gross and culpable as to evince utter recklessness.

Plaintiff was a passenger on a steamboat, an explosion of the boiler took place, and plaintiff was scalded. *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, aff'g judg't for pl'ff.

Exemplary damages are not allowed in a case where there has been

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\*NOTE.—As to Liability of Master for willful acts of agents: see "Agency: Willful and Malicious Acts of Agents," *ante*, p. 22; and "Carriers of Passengers," *ante*, p. 360.

no intentional offense committed, but where defendant has only done what he honestly believed to be his duty.

A person, having paid his fare, was transferred from one car to another, and upon his refusal to pay again was, without unnecessary force, ejected. The defendant was liable for compensatory, but not exemplary, damages. *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 25, rev'g judg't for pl'ff.

Punitive damages are never given for the negligence of a servant, however gross or culpable, unless the act be reckless or of a criminal nature.

Such misconduct may be established, however, by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant, knowing that he was incompetent, or, from bad habits, unfit for the position he occupied. *Cleghorn v. N. Y. C. R. Co.*, 56 N. Y. 44, rev'g judg't for pl'ff.

A master is not liable in exemplary damages for the act of his servant unless such damages would have been recoverable had the suit been against the servant. A railroad conductor, in the *bona fide* discharge of his duty, removed a passenger who refused to produce a ticket or pay the fare. The damages could only be compensatory, although removal was unlawful. *Townsend v. N. Y. C. & C. R. Co.*, 56 N. Y. 295, rev'g judg't for pl'ff; distinguishing *Caldwell v. N. J. S. Co.*, 47 id. 282; and following *Townsend v. N. Y. Central R. Co.*, 53 id. 25.

Punitive damage for negligence or willful act of defendant's servant cannot be given unless the defendant be guilty of gross negligence or misconduct. *Fisher v. Met. Elevated R. Co.*, 34 Hun, 433.

A person will not be permitted to recover exemplary damages against a master for the act or negligence of his servant, unless the master has authorized or ratified his servant's misconduct, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is shown to the master, and the like rule is applicable in an action against the master for the act of his servant, when the latter would not be chargeable with punitive damages if he were the party defendant. *Muckle v. Rochester Railway Co.*, 79 Hun, 32.

**From opinion.**—"The rule adopted by the courts of this state is such as not to permit the recovery of exemplary damages against the master for the act or negligence of his servant, unless he has authorized his misconduct, or ratified it, or unless the conduct complained of is that of the servant while he is in the service, after his unfitness for it is known to the master. *Cleghorn v. N. Y. C. & H. R. R. Co.*, 56 N. Y. 44; *Hendricks v. Sixth Ave. R. R. Co.*, 12 J. & S. 8; *Murphy v. Central P. & C. R. Co.*, 16 id. 96; *Fisher v. M. E. R. Co.*, 34 Hun, 433; *Donivan v. M. Ry. Co.*, 49 N. Y. St. Rep. 722.

And the like rule is applicable in an action against the master for the act of the servant, where the latter would not be chargeable with punitive damages, if

Not allowed for malicious ejection of passenger, without proof of authorization or ratification. *Warner v. Southern P. Co.*, 113 Cal. 105.

Nor for wanton negligence toward deceased in action for death. *Lange v. Schoettler*, 115 Cal. 388.

COLORADO.—Not allowed. *Greeley &c. R. Co. v. Yeager*, 11 Col. 345.

Not allowed for malicious ejection of passenger, without proof of authority or subsequent ratification. *Ristine v. Blocker*, 15 Colo. App. 224.

CONNECTICUT.—Not allowed against master, without proof of authority or ratification. *Maisenbacher v. Society Concordia*, 71 Conn. 369.

DELAWARE.—Allowed for gross negligence of servant. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88.

FLORIDA.—Allowed only for gross and willful negligence evincing a reckless disregard of human life. *Florida &c. R. Co. v. Mooney*, 40 Fla. 17.

GEORGIA.—Not allowed for negligence of carrier. *City &c. R. Co. v. Finley*, 76 Ga. 11. Even causing death. *Louisville &c. R. Co. v. Chaffin*, 84 Ga. 519.

Nor for gross negligence, unless there be willful misconduct or conscious indifference to consequences. *Chattanooga R. Co. v. Liddell*, 85 Ga. 482.

But allowed for the expulsion of a passenger, accompanied by insult. *Georgia R. Co. v. Olds*, 77 Ga. 673.

And where a passenger, without cause, was rudely assaulted and insulted, and threatened with shooting, etc. *East Tenn. &c. R. Co. v. Fleetwood*, 90 Ga. 23.

ILLINOIS.—A direction to allow such damages as will compensate plaintiff, does not permit punitive damages. *Salem v. Webster*, 192 Ill. 369.

But such damages as the jury think plaintiff ought to recover, does. *Galesburg &c. Co. v. Barlow*, 98 Ill. App. 334.

Allowed for willfulness, wantonness, or maliciousness. *Kirton v. North Chicago Street R. Co.*, 91 Ill. App. 554.

INDIANA.—Not allowed in Indiana. *Taber v. Hutson*, 5 Ind. 322; *Humphries v. Johnson*, 20 id. 190.

Not allowed for mistake of conductor inducing passenger to get off at wrong station. *Cleveland &c. R. Co. v. Quillen*, 22 Ind. App. 496.

IOWA.—Not allowed against a municipality. *Bennett v. Marion*, 102 Iowa, 425.

KANSAS.—Allowed for gross negligence amounting to wantonness or maliciousness in the failure to transmit a message. *West v. Western Union Tel. Co.*, 39 Kan. 93.

Not allowed for starting car while passenger was alighting, in absence of malice or willful disregard of her rights. *Atchison &c. R. Co. v. Stewart*, 55 Kan. 667.

Allowed for gross and wanton negligence in wrongful ejection of passenger. *Atchison &c. R. Co. v. Long*, 5 Kan. App. 644.

But not when no malice or wantonness accompanies the ejection. *Atchison &c. R. Co. v. Lamoroux*, 5 Kan. App. 813.

KENTUCKY.—Exemplary damages allowed for carrying a female passenger beyond her station, with accompanying insults in words and manner. *Louisville &c. R. Co. v. Ballard*, 88 Ky. 159; and not allowed for mere indecorous conduct towards a female passenger. *Louisville &c. R. Co. v. Ballard*, 85 Ky. 307.

For gross negligence. *Louisville &c. R. Co. v. Mitchell*, 87 Ky. 327.

Not for killing a child through negligence of employés. *Gibbins v. Kentucky C. R. Co.*, 89 Ky. 231.

Allowed for injuries resulting from willful neglect of carrier, in carrying

passenger beyond his destination. *Memphis &c. Packet Co. v. Nagel*, 15 Ky. L. R. 742.

Not allowed, in absence of malice or wantonness. *McHenry Coal Co. v. Sheddon*, 98 Ky. 684.

Where conductor apologized for carrying a lady past her station and attempted to have her carried back from the next station, a charge, as to "willful misconduct" evincing reckless disregard of the consequences, held error. *Kentucky C. R. Co. v. Biddle*, (Ky.) 34 S. W. Rep. 904.

Exemplary damages permissible, where the negligence of servants shows a wanton disregard of human life. *Louisville &c. R. Co. v. Kingman*, (Ky.) 35 S. W. Rep. 264; *Louisville &c. R. Co. v. Kelly*, 100 Ky. 421.

See, also, *Louisville &c. R. Co. v. Simpson*, (Ky.) 64 S. W. Rep. 733.

Punitive damages recoverable in statutory action for death by negligence. *East Tennessee Teleg. Co. v. Simms*, (Ky.) 38 S. W. Rep. 131; 99 Ky. 404; *Louisville &c. R. Co. v. Kelly*, 100 Ky. 421; *Louisville &c. R. Co. v. Ward*, (Ky.) 44 S. W. Rep. 1112; *Cincinnati &c. R. Co. v. Cook*, 67 id. 383.

Use of insulting language and force, justified punitive damages. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Defendant held liable for punitive damages, for unjustifiable assault by conductor upon passenger. *Lexington &c. R. C. v. Cozine*, (Ky.) 64 S. W. Rep. 848.

Allowed to passenger for gross negligence. *Louisville &c. R. Co. v. McClain*, (Ky.) 66 S. W. Rep. 391.

Allowed to traveler at crossing, for gross negligence, defined as failure to use slight care. *Chesapeake &c. R. Co. v. Dodge*, (Ky.) 66 S. W. Rep. 606.

LOUISIANA.—Not allowed against a railroad company. *Rutherford v. Schreerport R. Co.*, 41 La. 793; except in case of willful or outrageous negligence. *McFee v. Vicksburg R. Co.*, 42 La. Ann. 790.

MAINE.—*Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 228.

MARYLAND.—Not allowed for use of violence in ejecting passenger, not accompanied with malice. *Smith v. Philadelphia &c. R. Co.*, 87 Md. 48.

MASSACHUSETTS.—In Massachusetts, *quære*. *Austin v. Wilson*, 58 Mass. 273. See *Murdock v. Boston &c. R. Co.*, 133 Mass. 15; *Barnard v. Poor*, 21 Pick. 378; *Hawes v. Knowles*, 114 Mass. 518; *Meagher v. Driscoll*, 99 id. 281.

MINNESOTA.—Not allowed unless there be malicious or wanton indifference to the rights of the person injured. *Hoffman v. Missouri P. R. Co.*, 45 Minn. 53.

Not allowed for negligence, not amounting to bad faith. *Peterson v. Western &c. Teleg. Co.*, 72 Minn. 41; s. c., 40 L. R. A. 661.

MISSISSIPPI.—Not allowed for mere negligence, although compensatory damages be allowed. *Alabama &c. R. Co. v. Purnell*, 69 Miss. 652.

Allowed a passenger not given a reasonable time to find his ticket, and expelled from train with abuse and insult. *Louisville &c. R. Co. v. Maybin*, 66 Miss. 83.

But not for negligence to allow a passenger to alight safely at a station, unless willfully or wantonly done. *Dorrah v. Illinois &c. R. Co.*, 55 Miss. 14.

Not allowed for willful act of servant, when master did not know him to be disqualified for service. *Southern Express Co. v. Brown*, 67 Miss. 260.

Defence of malicious act of servant, is sufficient ratification to charge master. *Pullman Palace-Car Co. v. Lawrence*, 74 Miss. 782.

Not allowed for ejection of passenger riding on ticket, misdated by ticket agent in the confusion of hurried sale. *Illinois C. R. Co. v. Moore*, 79 Miss. 766.

Not allowed for four days delay, due to washouts, known when ticket was sold. *Illinois C. R. Co. v. Pearson*, (Miss.) 31 South. Rep. 435.

MISSOURI.—Allowed for ejecting a passenger, regardless of his safety. *St. Clair v. Missouri P. R. Co.*, 29 Mo. App. 76.

Allowed under Missouri statute for causing death by wrongful act. *Gray v. McDonald*, 104 Mo. 303.

Not allowed for wrongful expulsion of a passenger from a car, where carrier was not negligent in the selection of employes, or of directions and authority given them. *Rouse v. Metropolitan &c. R. Co.*, 41 Mo. App. 298.

Not allowed where teamster opened door of elevator shaft and was injured by stepping into it, negligence of owner not being willful nor gross. *Leahy v. Davis*, 121 Mo. 227.

See *Franz v. Hilterbrand*, 45 Mo. 121; *Graham v. R. Co.*, 66 id. 536; *Seibel v. Siemon*, 72 id. 526; *Brown v. R. Co.*, 89 id. 152; *Parsons v. R. Co.*, 94 id. 286.

Not allowed for mere refusal to carry, though informed of desire to reach death bed of brother. *Barnett v. Chicago &c. R. Co.*, 75 Mo. App. 446.

Under a statute permitting the jury to consider aggravating circumstances in an action for death, exposure to dangerous machinery was held an "aggravating circumstance." *Fischer v. Heitzberg Packing &c. Co.*, 77 Mo. App. 108.

Not allowed for throwing passenger to floor by sudden stop, in absence of malice or wantonness. *Dorsey v. Atchison &c. R. Co.*, 83 Mo. App. 528.

NEBRASKA.—Not allowed in Nebraska. *Boyer v. Barr*, 8 Neb. 68.

NEW HAMPSHIRE.—An insane person cannot be mulcted in exemplary damages in an action against him for negligence. *Jewell v. Colby*, 66 N. H. 399.

*Quære. Fay v. Parker*, 53 N. H. 342.

*Bixby v. Dunlap*, 56 N. H. 456.

NEW JERSEY.—Not allowed for use of necessary force in enforcing a rule of a carrier. *Bullock v. Delacare &c. R. Co.*, 81 N. J. L. 550.

Nor for wrongful arrest for riding beyond destination, on train not stopping there, and refusing to pay extra fare. *Cone v. Central R. &c.*, 62 N. J. L. 99.

Not allowed against master, without proof of authorization or ratification. *Forhmann v. Consolidated T. Co.*, 63 N. J. L. 391.

NEW MEXICO.—Allowed for aggravating circumstances, in statutory action for death. *Cerillos Coal R. Co. v. Deserant*, 9 N. M. 49.

NORTH CAROLINA.—Not allowed on account of expulsion from train, unless accompanied with rudeness, insult or other aggravating circumstances. *Rose v. Wilmington R. Co.*, 106 N. C. 168.

Nor, in absence of insult or malicious and willful wrong. *Tomlinson v. Wilmington R. Co.*, 107 N. C. 327.

Allowed for disregard of statutory duty to stop train at station as advertised, where there was opportunity to gather passengers. *Purcell v. Richmond R. Co.*, 108 N. C. 414.

Not allowed for failure to carry passenger on return trip, due to negligent defect in machinery. *Handley v. Jamesville &c. R. Co.*, 117 N. C. 565.

Not allowed for passing intending passenger at a flag station, unless engineer actually saw signal. *Thomas v. Southern R. Co.*, 122 N. C. 1005.

Not allowed in statutory action for death by malpractice. *Gray v. Little*, 127 N. C. 304.

OHIO.—A corporation may be subjected to exemplary damages for tortious acts of its agents or servants done within the scope of their employment, in all cases



where natural persons, acting for themselves, if guilty of like tortious acts, would be liable to such damages. *Atlantic &c. R. Co. v. Dunn*, 19 Oh. St. 162, 590.

May be awarded against a person actually guilty of malicious or wanton wrong. *Roberts v. Mason*, 10 Oh. St. 277.

Allowed for malicious ejection of passenger with intent to injure and humiliate. *Guy v. Pittsburg &c. R. Co.*, 6 Oh. N. P. 3.

See, also, *Pittsburg &c. R. Co. v. Ensign*, 6 Oh. C. D. 616.

Not allowed for exaction of illegal fare, in absence of such intention. *Carr v. Toledo T. Co.*, 19 Oh. C. C. 281.

OKLAHOMA.—Not allowed for injuries received while alighting from train on an unsufficiently lighted platform. *Atchison &c. R. Co. v. Chamberlain*, 4 Okla. 542.

OREGON.—Allowed for making a public wagon bridge unsafe for passage. *Hamerlunck v. Banfield*, 36 Or. 436.

PENNSYLVANIA.—Not allowable for ejection of passenger from train by mistake, but for malicious injury inflicted by servant. *Phila. T. Co. v. Orbann*, 119 Pa. St. 37.

Allowed for refusal to sell a ticket or check baggage to a regular station in wanton disregard of the rights of the passenger. *Pittsburg &c. R. Co. v. Lyon*, 123 Pa. St. 140.

RHODE ISLAND.—Unless proof implicates the principal, and, however wicked the servant, unless the former expressly or impliedly authorizes or ratifies the act, and the criminality of it is as much against him as any other member of society, exemplary damages not allowed. *Higgin v. Providence &c. R. Co.*, 3 R. I. 88, 91.

SOUTH CAROLINA.—Allowed against a railroad company for injuries caused by the malicious or reckless negligence of its servants, although not authorized or approved. *Quinn v. So. Car. R. Co.*, 29 S. C. 381.

Or for wanton or willful refusal to carry goods. *Avinger v. So. Car. R. Co.*, 29 S. C. 265.

Or for willfully carrying a passenger, who refused to pay his fare, away from his home and ejecting him at an improper place. *Hall v. So. Car. R. Co.*, 28 S. C. 261.

Or for reckless conduct of those in charge of train. *Hart v. Charlotte R. Co.*, 33 S. C. 427; *Mack v. South Bound R. Co.*, 52 id. 323; s. c., 40 L. R. A. 679.

Allowed for failure of conductor to hold train while passenger purchased a ticket, as promised. *Gillman v. Florida &c. R. Co.*, 53 S. C. 210.

Not allowed in statutory action for death by negligence. *Garrick v. Florida &c. R. Co.*, 53 S. C. 448.

Allowed for backing cars against train while passengers were alighting. *Glover v. Charleston &c. R. Co.*, 57 S. C. 228.

Error to charge that "the intentional doing of an unlawful act would be construed as malicious," so as to give right to punitive damages. *Kibler v. Southern R. Co.*, 62 S. C. 252.

But wanton, careless and reckless violation of an ordinance, warrants an award of punitive damages. *Brasington v. South Bound R. Co.*, 62 S. C. 325.

TENNESSEE.—Allowed in case of gross negligence. *Kansas City &c. R. Co. v. Daughtry*, 88 Tenn. 721.

Allowed for insulting conduct to passenger, though responsibility denied and act repudiated. *Knoxville T. Co. v. Lane*, 103 Tenn. 376.

Allowed for injury to traveler, due to trolley car, run at high speed over switches and curves, jumping the track. *Nashville Street R. Co. v. O'Bryan*, 104 Tenn. 28.

TEXAS.—Allowed where the injury arose from gross negligence. *Missouri P. R. Co. v. Johnson*, 72 Tex. 95; or from willful act of servant, *Int. R. Co. v. McDonald*, 75 Tex. 41; but not from mere negligent failure to send a telegraph message, the importance of which was not indicated. *McAllen v. Western Union Tel. Co.*, 70 Tex. 243.

Nor where a railroad company's only negligence consisted in calling name of station too soon and refusing to stop on learning that plaintiff had been left behind. *Gulf &c. R. Co. v. McFadden*, 25 S. W. (Tex.) 451.

Not recoverable at common law in an action for negligence. *Houston &c. R. Co. v. Baker*, 57 Tex. 419.

See *R. Co. v. Le Gierse*, 51 Tex. 203; *Campbell v. H. & T. &c. R. Co.*, 2 Pos. Unrep. Cas. 473; *Kentucky Central R. Co. v. Gastineau*, 83 Ky. 119; see *Ratteree v. Chapman*, 79 Ga. 574.

Allowed where driver of an express wagon, when asked to deliver a crate of chicken through side gate, threw it back into his wagon. *Gary v. Wells &c. Co.* (Tex. Civ. App.) 40 S. W. Rep. 845.

Not allowed where petition alleged negligence in employment and retention, but did not allege ratification or adoption of his acts. *Gulf &c. R. Co. v. Holzheuer*, (Tex. Civ. App.) 45 S. W. Rep. 188.

Allowed for collection of illegal fare by a carrier. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

Allowed for failure to provide statutory private crossing after notice. *San Antonio &c. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

Not allowed against corporation for act of servant, without showing that it was the act of the corporation by a controlling officer with authority. *Arkansas Const. Co. v. Eugene*, 20 Tex. Civ. App. 601.

UNITED STATES.—Exemplary damages are not allowed against a carrier for the illegal, wanton or oppressive conduct of a train agent towards a passenger.

Punitive or vindictive damages, or smart money, are not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.

A corporation, like a natural person, may be held liable in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent, necessary to warrant the imposition of such damages, is brought home to the corporation. *Lake Shore & Michigan Southern R. Co. v. Prentice*, 147 U. S. 101.

From opinion.—“In actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages. *The Amiable Nancy*, 16 U. S. 3 Wheat. 546, 558, 559; *Day v. Woodworth*, 54 U. S. 13 How. 363, 371; *Philadelphia, W. & B. R. Co. v. Quigley*, 62 U. S. 21 How. 202, 213, 214; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 493, 495; *Missouri Pac. R. Co. v. Humes*, 115 U. S. 512, 521; *Barry*

*Dillingham v. Anthony*, 73 Tex. 47. May be allowed for failure to stop train. *Purcell v. Richmond &c. R. Co.*, 47 Am. & Eng. Cas. 451.

Allowed where injury arose from electric light wire through the mischief or criminal indifference of the defendant's workmen, though known to them, or arising through negligence in their selection as skillful and careful persons. *Henning v. Western Union Tel. Co.*, 41 Fed. Rep. 864.

Not allowed for unlawfully ejecting a passenger from a sleeping car, where it was done in good faith and not insultingly or maliciously. *Lemon v. Pullman P. C. Co.*, 52 Fed. Rep. 262.

Allowed for ejection of passenger riding on a ticket issued by authority of, but subsequently repudiated by a general passenger agent. *Winters v. Cowen*, 90 Fed. Rep. 99; s. c. aff'd, 96 id. 929.

Not allowed for death of child, which ran out on tracks when depot agent assaulted its mother. *McGehee v. McCarley*, 91 Fed. Rep. 462.

VIRGINIA.—Not allowed for dishonor of check due to mistake where defendant apologized and offered any assistance possible to remove any injurious consequences. *Wood v. American Nat. Bank*, (Va.) 40 S. E. Rep. 931.

VERMONT.—Not allowed against municipality. *Willet v. St. Albans*, 69 Vt. 330.

WASHINGTON.—Not allowed in Washington. *Spokane Truck Co. v. Hoefer*, 2 Wash. 45.

WEST VIRGINIA.—Allowed for wantonness, violence or oppression. *Downey v. R. Co.*, 28 W. Va. 732.

See *Frey v. Swartwout*, 10 Pet. 81; *P. R. Co. v. Brooks*, 57 Pa. St. 339.

Not allowed for wanton or malicious act of servant unless expressly or impliedly authorized or ratified. *Ricketts v. Chesapeake &c. R. Co.*, 33 W. Va. 433.

Not allowed in absence of malice or reckless indifference to rights of others. *Talbott v. West Virginia &c. R. Co.*, 42 W. Va. 560.

Allowed for refusal to honor a valid excursion ticket on return trip. *Scott v. Chesapeake R. Co.*, 43 W. Va. 484.

Not allowed, in absence of allegation of malice. *Davis v. Western &c. Teleg. Co.*, 46 W. Va. 48.

Nor for wrongful arrest of passenger, without malice. *Claiborne v. Chesapeake &c. R. Co.*, 46 W. Va. 363.

WISCONSIN.—Awarded for aggravated assault on passenger by conductor. *Hinkley v. Chicago &c. R. Co.*, 38 Wis. 194.

Not allowed against master for malicious act of agent, unless authorized or ratified. *Robinson v. Superior &c. R. Co.*, 94 Wis. 345; s. c., 34 L. R. A. 205; *Vassau v. Madison Electric R. Co.*, 106 Wis. 301.

#### XIV. Nominal Damages.

A judgment entered on a verdict for nominal damages will not be reversed on the ground of the inadequacy of the damages, where, although the damages would be inadequate, if the plaintiff was entitled to recover, it appears from the plaintiff's evidence, that the defendant was not negligent, and that the accident was caused solely by the negligence of

the plaintiff and of the co-employé. *Alberts v. Bache*, 69 Hun, 255; aff'g judg't for def't; aff'g judg't for pl'ff for six cents damages.

See *O'Neill v. Brooklyn Heights R. Co.*, 71 Hun, 114, aff'g judg't for pl'ff for six cents damages, where plaintiff and his horse were injured by a street car, according to his evidence.

Proof of loss of time from injury, is ground for nominal damages, though no value be shown. *Niendorff v. Manhattan R. Co.*, 4 App. Div. 46.

See, also, *Pickett v. West Monroe*, 47 App. Div. 629.

Evidence of the bare killing and age of an employé justifies only nominal damages. *Louisville &c. R. Co. v. Orr*, 91 Ala. 548.

But where there was proof of his wages, more than nominal damages should be awarded. *James v. Richmond &c. R. Co.*, 92 Ala. 231.

Nominal damages only, for negligence in misquoting price of cotton in telegram, when no loss is shown to have resulted. *Western &c. Teleg. Co. v. Aubrey*, 61 Ark. 613.

Or for loss of time of passenger, carried by destination, in absence of proof of its value. *Terarkana &c. R. Co. v. Anderson*, 67 Ark. 123.

Nominal damages only for ejection pursuant to orders of quarantine guard to allow no one within the quarantined district. *St. Louis &c. R. Co. v. Linam*, 68 Ark. 621; s. c., 60 S. W. Rep. 951.

A verdict for nominal damages for death of a human being, is inadequate. *Wolford v. Lyon Grand &c. Co.*, 63 Cal. 483.

See *Hall v. Bark Emily Banning*, 33 Cal. 522.

Where a holder of a ticket boards a car, under the apprehension that his ticket will not be accepted, for the purpose of being ejected, he can only recover nominal damages for the ejection. *Southern R. Co. v. Barlow*, 104 Ga. 213.

Nominal damages only for death, in absence of proof of pecuniary interest of brothers and sisters. *Falkenau v. Rowland*, 70 Ill. App. 20.

Nominal damages allowed, for failure of title searcher to return recorded mortgage, in search for holder of tax title. *Williams v. Hanly*, 16 Ind. App. 464.

Not error to refuse to charge, that only nominal damages can be recovered for the death of a female child. *Eginoire v. Union County*, 112 Iowa, 558.

When life of a person was of no pecuniary value to his next of kin nominal damages may be recovered. *Atchison &c. R. Co. v. Weber*, 33 Kas. 543.

No damages allowed for destruction by fire of a neglected orchard

which results in benefit to owner. *Bossu v. New Orleans &c. R. Co.*, 49 La. Ann. 1593.

Failure to ship goods by the route specified, is ground for nominal damages, though due delivery is made. *Commission Co. v. Nashville &c. R. Co.*, 64 Mo. App. 144.

Proof of loss from negligence is sufficient for nominal damages without proof or extent of loss. *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500.

A complaint alleging refusal to carry on coupon ticket, negligently made out by agent in wrong name, held not demurrable because no damage was alleged. *Holden v. Rutland R. Co.*, 72 Vt. 156.

### XV. Excessive Damages.

The Court of Appeals, in an action for negligence, cannot reverse judgment on account of excessive damages. *Gale v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 594; aff'g judg't for pl'ff.

Plaintiff recovered a verdict for \$5,000, which was set aside as excessive. Upon the second trial a verdict was recovered of \$4,000. The second verdict, rendered upon substantially the same facts as were presented to the first jury, was accepted as final. *Peck v. N. Y. C. & H. R. R. Co.*, 8 Hun, 286, aff'g judg't for pl'ff.

The following cases, selected from the large number existing, illustrate the holdings of courts on this subject:

#### (a). VERDICTS NOT EXCESSIVE.

**Loss of or injury to hand.**—Five thousand dollars to a boy of 19, dependent on manual labor for a permanent impairment of the use of his hand, and a painful operation thereon. *Gray v. Commutator Co.*, 85 Minn. 463.

One thousand two hundred dollars, for permanent loss of use of left hand. *Harvard v. Stiles*, 54 Neb. 26.

Seven thousand dollars, to switchman of 31, earning \$75 to \$100 a month, for loss of his hand, causing great pain for four months. *International &c. R. Co. v. Bonatz*, (Tex. Civ. App.) 48 S. W. Rep. 767.

See, also, *Ft. Worth &c. R. Co. v. Bowen*, (Tex. Civ. App.) 68 S. W. Rep. 700.

Three thousand five hundred dollars, for mangling right hand, requiring its amputation. *Greenville Oil &c. Co. v. Harkey*, 20 Tex. Civ. App. 225.

**Loss of or injury to fingers.**—Plaintiff lost three fingers; hand did not get well in eight months; doctor probed and took out bone and some of the bone came out of the wrist. The hand continued stiff and plaintiff suffered pain, was nervous, excitable and delirious. Six thousand dollars not excessive. *Murtaugh v. N. Y. C. & H. R. R. Co.*, 49 Hun, 456, rev'g judg't for pl'ff on other grounds.

Three thousand five hundred dollars to tailor for injury to his thumb, interfering with his trade, and for spinal trouble. *North Chicago Street R. Co. v. Broms*, 62 Ill. App. 127.

Four thousand dollars to boy of 15, for loss of three fingers on right hand. *Barg v. Bousfield*, 65 Minn. 355.

Seven thousand five hundred dollars, to experienced switchman of 44, earning \$80 to \$90 a month, for loss of all fingers of right hand. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 33 S. W. Rep. 1010.

Five thousand dollars to a switchman of 44, earning \$80 per month, for loss of fingers of right hand, rendering him practically helpless. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 43 S. W. Rep. 1078.

Three thousand three hundred dollars to railroad section hand for loss of two of his fingers of the left hand and the permanent disability of the rest. *Chapman v. Southern P. Co.*, 12 Utah, 30.

**Loss of or injury to arm.**—Eight thousand five hundred and thirty-seven dollars for right arm and permanent injury to leg. *Barrett v. New York &c. R. Co.*, 45 App. Div. 225.

Eighteen thousand dollars for arm broken beyond healing, and fractured skull with nervous and other complications. *Stewart v. Long Island R. Co.*, 54 App. Div. 623.

One thousand dollars for broken arm. *Wahlgren v. Market Street R. Co.*, 132 Cal. 656.

Fifteen thousand dollars for loss of arm and consequent suffering. *Illinois C. R. Co. v. O'Connor*, 90 Ill. App. 142; s. c., rev'd, 189 Ill. 559.

Seven thousand dollars to a young man in a foundry, earning a few dollars a week extra as a musician, for the loss of an arm; cutting off both vocations and causing permanent suffering. *Gundlach v. Schott*, 95 Ill. App. 110.

Seven thousand five hundred dollars, to laboring man of 47, earning from \$1.25 to \$1.50 per day, for loss of arm. *Gibson v. Glizozinski*, 76 Ill. App. 400.

Twelve thousand dollars to street car conductor, for compound fracture of an arm; resulting in a permanent loss of almost its entire use. *North Chicago Street R. Co. v. Dudgeon*, 83 Ill. App. 528.

Four hundred dollars for scalded arm; preventing work for a month and requiring eight months to heal. *Regan v. Reed*, 96 Ill. App. 460.

Two thousand dollars for injury lowering one shoulder, causing loss of position as teacher. *Illinois C. R. Co. v. Mizell*, 100 Ky. 235.

Ten thousand dollars for loss of arm by boy belonging to the family of a laborer. *Ketchem v. Texas R. Co.*, 38 La. Ann. 777.

Four thousand dollars to boy of 14 for loss of an arm. He was poor, black, illegitimate and ignorant; but earned small sums about a barber shop, and as a bootblack. *Jackson v. St. Louis &c. R. Co.*, 52 La. Ann. 1706.

One thousand seven hundred and forty-one dollars and sixty-six cents to man of 51, for complete paralysis of right arm. *Hastings v. Stetson*, 91 Me. 229.

Three thousand five hundred dollars for a stiffened arm. *Detzur v. Stroh Brev. Co.*, 119 Mich. 282; s. c., 44 L. R. A. 500.

Seven thousand two hundred dollars, for total paralysis of left arm. *Schultz v. Faribault &c. Electric Co.*, 82 Minn. 100.

Two thousand nine hundred and fifty dollars, to man of 56, earning \$1.75 per day for loss of use of arm. *Toledo &c. Street R. Co. v. Rohner*, 9 Oh. C. C. 702.

One thousand two hundred dollars, for painful fracture of arm, made permanently weaker. *Toledo v. Higgins*, 12 Oh. C. C. 646.

Seven hundred and fifty dollars, for breaking an arm of a painter. *Ritt v. True &c. Co.*, (Tenn.) 69 S. W. Rep. 324.

Nine thousand one hundred and nineteen dollars to brakeman of 35, earning \$55 a month, for loss of forearm; causing great physical pain and mental anguish. *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528.

Ten thousand dollars, to brakeman of 43, for loss of right arm; besides other serious and permanent injuries. *Galveston &c. R. Co. v. Slinkard*, 17 Tex. Civ. App. 585.

Two thousand and twenty-three dollars, to a father and husband, for the permanent impairment of the use of the forearm of his wife, and for the straining of the elbows of his daughter; rendering one stiff and crooked.

One thousand five hundred dollars was allowed to the daughter. *Gulf &c. R. Co. v. Sandifer*, (Tex. Civ. App.) 69 S. W. Rep. 461.

Three thousand five hundred dollars, for loss of arm, to strong young man of 21, earning good wages, dependent on manual labor. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

One thousand three hundred and fifty, to married woman of 69, for painful and permanent injuries to arm and wrist. *Bading v. Milwaukee Electric R. &c. Co.*, 105 Wis. 480.

**Loss of or injury to foot.**—Where the plaintiff at the time of the accident was a young man of about twenty-three, and the injury rendered amputation of three toes of his left foot necessary, confining him to the house for five months and rendering him permanently lame and disabled, so as to be unable to work for more than three-fourths of his time, a verdict for \$8,500 is not excessive. *Commersford v. The Atlantic Ave. R. Co.*, 8 Misc. 599.

Twelve thousand five hundred dollars to a small child for the loss of one foot and two toes from the other. *Fullerton v. Metropolitan Street R. Co.*, 61 App. Div. 1; s. c. aff'd, 170 N. Y. 592; See, also, *Heldmaier v. Rchor*, 90 Ill. App. 96 (\$5,500). Also *Chipman v. Union P. R. Co.*, 12 Utah, 68.

Nine thousand dollars for two painful amputations of leg and reduction of earning capacity. *Manley v. New York &c. R. Co.*, 18 Misc. 502.

Nine thousand dollars to farmer of 40, making \$500 a year, for the loss of a foot. *Georgia &c. R. Co. v. Keating*, 99 Ga. 308.

Five thousand dollars to salesman, earning \$18 a week, for permanent injury to foot. *Grossman v. Cosgrove*, 75 Ill. App. 385; s. c. aff'd, 174 Ill. 383.

Five thousand dollars to a miner, earning from \$1.65 to \$1.70 per day, for loss of his right foot. *Consolidated Coal Co. v. Oeltjen*, 91 Ill. App. 123; s. c. aff'd, 189 Ill. 85.

Two thousand dollars for painful injury to foot, slightly crippling plaintiff for life. *Bowling Green Stone Co. v. Capshaw*, (Ky.) 64 S. W. Rep. 507.

Ten thousand dollars to boy of nine for loss of foot. *Chesapeake &c. R. Co. v. Davis*, (Ky.) 58 S. W. Rep. 698; s. c. aff'd, 60 id. 14.

Two thousand five hundred dollars to girl of 7, for permanent injury to her foot. *Dublin Cotton Oil Co. v. Jarrard*, (Tex. Civ. App.) 40 S. W. Rep. 531; s. c. aff'd, 91 Tex. 289.

Eight thousand dollars to healthy young man of 18, earning \$60 a month, for loss of foot, and loss of earning capacity at his employment. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

Fifteen thousand dollars to a railroad drawbridge tender, earning \$50 per month, for loss of one foot, and crippling of the other. *Galveston &c. R. Co. v. Newport*, (Tex. Civ. App.) 65 S. W. Rep. 657.

Sixteen thousand dollars to a railway engineer of 35, earning \$175 per month, for loss of foot at the ankle. *Galveston &c. R. Co. v. Abbey*, (Tex. Civ. App.) 68 S. W. Rep. 293.

**Loss of or injury to toes.**—Where plaintiff sustained injury to his side and foot, necessitating amputation of the large toe, a verdict of \$2,000 is not excessive, although he was not disabled thereby for more than two months and a half; especially where it appears that he still suffers occasionally and is at times temporarily disabled by reason of the injuries. *Reynolds v. Van Buren*, 10 Misc. 703.

Five thousand dollars to boy of 14, for severe mutilations of foot and loss of two toes. *Galveston &c. R. Co. v. Kief*, (Tex. Civ. App.) 58 S. W. Rep. 625.

**Loss of or injury to leg or hip.**—One thousand five dollars to boy of 13 months. *Kalfur v. Broadway Ferry*, 34 App. Div. 267; s. c. aff'd, 161 N. Y. 660.

Ten thousand dollars to boy of 10. *Ramsey v. National Contracting Co.*, 49 App. Div. 11.

Twenty-two thousand five hundred dollars to a boy of 11, suffering two amputations. *Williamson v. Brooklyn &c. R. Co.*, 53 App. Div. 399.

Eleven thousand five hundred dollars to a roundsman of 54, earning \$10 a week for the loss of a leg at the knee. *Hill v. Starin*, 65 App. Div. 361.

Four thousand dollars to street sweeper, 73 years of age, for pain, shortening of one leg, and impairment of earning capacity. *Roche v. Redington*, 125 Cal. 174.

Five thousand dollars to brakeman for injury resulting in chronic hip joint disease. *Elgin &c. R. Co. v. Esclin*, 68 Ill. App. 96.

Ten thousand dollars for brakeman, earning \$60 a month, for loss of right leg by two amputations. *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207.

Four thousand five hundred dollars for permanent enlargement of knee. *Chicago v. Fitzgerald*, 75 Ill. App. 174.

Five thousand dollars to a strong healthy woman for painful injury to hip joint. *North Chicago Street R. Co. v. Brown*, 76 Ill. App. 654.

Three thousand dollars for a cut of the leg to the bone, resulting in permanent injury. *West Chicago Street R. Co. v. Johnson*, 77 Ill. App. 142; s. c. aff'd, 180 Ill. 285.

Three thousand dollars to child of five, for painful fracture of thigh bone, resulting in a shortening of the limb. *Metropolitan &c. R. Co. v. Kersey*, 80 Ill. App. 301.

Five thousand dollars to boy of fourteen for compound comminuted fracture of the leg, resulting in shortening. *North Chicago Street R. Co. v. Kaspars*, 85 Ill. App. 316; s. c. aff'd, 186 Ill. 246; *Chicago v. O'Malley*, 95 id. 355.

Three thousand dollars to a factory girl of sixteen or seventeen for a broken ankle bone, burned shin, resulting in a long continued suppurated wound, which left a scar, puffiness and swelling. *Western Screw Co. v. Johnson*, 86 Ill. App. 89.

Five thousand dollars for permanent lameness from a broken leg, leaving an enlarged and stiffened ankle. *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337.

Three thousand five hundred dollars to a photographer of 68, for the permanent shrinking and stiffening of his leg, requiring the use of crutches. *Joliet R. Co. v. McPherson*, 96 Ill. App. 286; s. c. aff'd, 193 Ill. 629. See, also, *Illinois Steel Co. v. Hanson*, 97 Ill. App. 469; s. c. aff'd, 195 Ill. 106 (\$5,000).



Fifteen thousand dollars to a railroad employé for a painful injury, resulting in three amputations, the last above the knee. *Chicago &c. R. Co. v. Spurney*, 97 Ill. App. 570; s. c. aff'd, 197 Ill. 471.

Ten thousand dollars for the loss of a leg a few inches below the knee. *Pennsylvania R. Co. v. Reidy*, 99 Ill. App. 477.

Nine thousand dollars for the loss of a leg of a fireman. *L. R. Co. v. Moore*, 83 Ky. 675.

One thousand six hundred and fifty dollars, for sprained ankle causing permanent weakness, diminishing working capacity. *Chesapeake &c. R. Co. v. Friel*, (Ky.) 39 S. W. Rep. 704.

One thousand two hundred dollars for permanent shortening of leg by breakage. *Rhoades v. Varney*, 91 Me. 222.

Three thousand dollars for serious injury to ankle joint. *Christian v. Minneapolis*, 69 Minn. 530.

Twelve thousand dollars to a girl of six for loss of right leg. *Sloniker v. Great Northern R. Co.*, 76 Minn. 306.

Seven thousand five hundred dollars, to a man of 40 for loss of right leg absolutely preventing his following his vocation. *Thompson v. Great Northern R. Co.*, 79 Minn. 291.

Five thousand one hundred and sixty-six dollars for broken leg permanently affecting its use. *Meiners v. St. Louis*, 130 Mo. 274.

Ten thousand dollars to brakeman of 32, earning \$65 per month, for loss of leg, requiring three amputations, causing long and severe suffering. *Hollenbeck v. Missouri &c. R. Co.*, 141 Mo. 97.

Five thousand dollars to a robust laborer of 40, for the fracture of both bones of the leg above the ankle, producing permanent injury and preventing his working for more than a week at a time. *Pauk v. St. Louis &c. Co.*, 166 Mo. 639.

Three thousand dollars to a boy of 12 for the loss of a leg. *Ornamental Iron &c. Co. v. Green*, (Tenn.) 65 S. W. Rep. 399.

Five thousand dollars to girl of eight, for broken leg, making her a permanent cripple, and liable to continual pain. *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 37 S. W. Rep. 771.

Eight thousand dollars to railroad employé for loss of leg. *Galveston &c. R. Co. v. Dehnisch*, (Tex. Civ. App.) 57 S. W. Rep. 64.

Sixteen thousand dollars to an engineer of 41, earning \$135 to \$150 per month, for the possibly permanent crippling of one leg. *San Antonio &c. R. Co. v. Connell*, (Tex. Civ. App.) 66 S. W. Rep. 246.

Seven thousand five hundred dollars, to man, earning \$200 a month, for five to seven-inch thigh wound, requiring skin grafting and crippling him for life. *Louvy v. Mt. Adams &c. R. Co.*, 68 Fed. Rep. 827.

Three thousand dollars to seaman of 20 for loss of leg. *The Iroquois*, 113 Fed. Rep. 964.

Two thousand five hundred dollars for a broken leg and much suffering. *Neuport News &c. E. Co. v. Bradford*, (Va.) 40 S. E. Rep. 900.

Eight thousand dollars to girl of eight for shortening leg four to six inches. *Lorence v. Ellenburgh*, 13 Wash. 341.

Fifteen thousand dollars to boy of nine, for loss of leg. *Roth v. Union Depot Co.*, 13 Wash. 525.

Ten thousand dollars to night yard foreman, earning \$80 per month for loss of a leg. *Yerkes v. Northern P. R. Co.*, 112 Wis. 184.

**Injury about head.**—Seven thousand dollars for permanent injuries about the head, causing unconsciousness for ten or twelve days and permanent injury. *Dolan v. Sierra R. Co.*, 135 Cal. 435.

Three thousand dollars for loss of eye by an engineer. *East St. Louis v. Dougherty*, 74 Ill. App. 490.

Two thousand five hundred dollars for permanent dislocation of collar bone, preventing performance of household duties. *Calumet &c. Street R. Co. v. Jennings*, 83 Ill. App. 612.

One thousand seven hundred dollars for a burn, destroying the hearing in one ear, and impairing the sight of one, and perhaps both eyes. *Illinois &c. Steel Co. v. Sitar*, 98 Ill. App. 300.

Three thousand three hundred dollars to a machinist of 36 for the loss of one eye. *Famous Man. Co. v. Harmon*, 28 Ind. App. 117.

Two thousand five hundred to a child of eight for the loss of his left eye and incidental pain. *Van Camp Hardware &c. Co. v. O'Brien*, 28 Ind. App. 152.

Two hundred and twenty dollars for laceration of lips and gums. *Glasgow v. Gillenwaters*, (Ky.) 67 S. W. Rep. 381.

Five thousand dollars for loss of eye. *Texas &c. R. Co. v. Bowlin*, (Tex. Civ. App.) 32 S. W. Rep. 918.

Ten thousand dollars to healthy man of 28, earning \$80 to \$95 per month, permanently incapacitated from labor by the crushing in of the skull and the destruction of an eye. *Missouri &c. R. Co. v. Parker*, 20 Tex. Civ. App. 470.

Three hundred and thirty dollars for a broken nose and loss of front teeth. *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114.

Five thousand dollars to shipwright of 48, earning \$94 to \$96 per month, for loss of hearing of one ear and impairment of his working capacity. *The Pioneer*, 78 Fed. Rep. 600.

Six thousand dollars to longshoreman of 29, earning \$3 per day for fracture of skull, resulting in paralysis and loss of earning capacity. *The Joseph B. Thomas*, 81 Fed. Rep. 578.

Three thousand five hundred dollars to a man of 44, capable of earning \$30 per month at ordinary labor, and \$75 at his trade, for fracture of bones of face, permanent injury to nerves and to the brain, preventing the pursuit of his trade. *Nicoud v. Wagner*, 106 Wis. 87.

**Loss of or injury to several members.**—Fifteen thousand dollars for injury to limb, back and nervous system of a doctor. *Woodbury v. District of Columbia*, 5 Macky, 127.

Two thousand five hundred dollars for loss of ear, causing deafness besides continued suffering in head and arm. *West Chicago Street R. Co. v. Lups*, 74 Ill. App. 420.

Eight thousand four hundred dollars to a man of 40, for the loss of his business, his sense of smell, one foot and the hearing in one ear, besides severe suffering for many months. *Central R. Co. v. Bannister*, 96 Ill. App. 332; s. c. aff'd, 195 Ill. 48.

One thousand five hundred dollars for a running sore, severe contusion of flesh, and bone of leg; resulting in permanent lameness, coughing and spitting of blood, pain in chest and leg and impairment of earning power. *West Chicago St. R. Co. v. Williams*, 87 Ill. App. 548.

Seven thousand five hundred dollars to a healthy woman of 36, distortion of foot, hip and shoulder. *West Chicago St. R. Co. v. Tuerk*, 90 Ill. App. 105.

Two thousand five hundred dollars to a woman for permanent lameness in ankle and arm. *Lake Street &c. R. Co. v. Burgess*, 99 Ill. App. 499.

Four thousand dollars for sprain of ankle and injury to back (possibly permanent), causing miscarriage. *Covington v. Diehl*, (Ky.) 59 S. W. Rep. 492.

Two thousand five hundred dollars to a married woman for a double fracture of arm, fracture of two ribs, resulting in traumatic pleurisy, severe contusion of knee, resulting in synovitis and abrasion of the body. *Terhune v. Koellisch*, (N. J. L.) 43 Atl. Rep. 655.

Ten thousand dollars for permanent disability to perform manual toil, from fracturing and splintering of leg, resulting in an abscess, besides injury about the head and shoulder. *Lake Shore &c. R. Co. v. Starkey*, 18 Oh. C. C. 700.

Three thousand five hundred dollars to laborer whose lifting capacity is permanently impaired. *Ferries Co. v. White*, 99 Tenn. 256; s. c., 38 L. R. A. 427.

One thousand two hundred dollars for a broken nose and a cut head. *Walton v. Chattanooga Rapid Transit Co.*, 105 Tenn. 415.

Six thousand five hundred dollars to healthy man of 32 for the permanent impairment of mind, body and earning power, besides prospective suffering. *Atchison &c. R. Co. v. Click*, (Tex. Civ. App.) 32 S. W. Rep. 226.

Five thousand dollars to newsboy for a broken leg, making it shorter than the other; broken ribs, causing a curvature of the spine, and continual pain. *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Two hundred and fifty dollars each for physical pain and for a permanent injury to thumb of a child. *Texas &c. R. Co. v. Malone*, 15 Tex. Civ. App. 56.

Four thousand six hundred dollars to a fireman, earning \$75 to \$100 per month for injuries to back, side, elbow and shoulder, causing suffering and reducing earning capacity. *International &c. R. Co. v. Elkins*, (Tex. Civ. App.) 54 S. W. Rep. 931.

Ten thousand dollars to a brakeman of 28, earning from \$100 to \$125 a month, for loss of arm, permanent impairment of vision, fracture of collar bone, and probably a broken nose, causing great pain. *Galveston &c. R. Co. v. Collins*, 24 Tex. Civ. App. 143.

One thousand dollars for loss of front teeth, injury to knee, and loss of earning capacity for six or eight months. *Richmond &c. R. Co. v. Garthright*, 92 Va. 627; s. c., 32 L. R. A. 220.

Twelve thousand dollars for fractured ankle, dislocation of hip, strain in back and pelvis, partial paralysis of the leg and hands, miscarriage, injury to kidneys. *Durham v. Spokane*, 27 Wash. 615.

**Other bodily injury.**—A woman of twenty-seven years of age was run over by defendant's horse car and recovered a verdict of \$15,000. In consequence of accident she suffered a permanent injury. The trial was conducted in such a way as to arouse neither prejudice or passion against the defendant, and while the court considered the verdict large and would have been better satisfied had a less sum been awarded, it did not feel justified in setting it aside. *Mitchell v. Broadway & Seventh Ave. R. Co.*, 70 Hun, 387, aff'g judg't for pl'ff.

Where the injuries complained of consisted of an injury to plaintiff's side and a serious injury to his foot, causing loss of sensation and a partial loss of motion, and he was confined thereby to his house for six weeks and rendered unable to do hard work, a verdict for \$2,500 is not excessive. *Fox v. The Brooklyn City R. Co.*, 7 Misc. 285.

As plaintiff was leaving a street car it started up suddenly and threw her down in such a manner that her limb was badly bruised, the bruise resulting in a sloughing off of the integuments down to the muscles, rendering it necessary to graft pieces of skin from other parts of her body. She was confined to her bed for two weeks and to the house for four or five more, and remained lame for several months, and is still unable to walk as much as usual. Held, that a verdict for \$3,000 was not excessive. *Dedmon v. Brooklyn City R. Co.*, 8 Misc. 610.

Where the result of the injury is a contraction of the fingers of plaintiff's right hand caused by a permanent impairment of the nerves, so that there is a loss of muscular power in grasping with that hand, intense pain and an expense of \$175 for medical attendance, a verdict for \$3,250 is not excessive. *Wilson v. Broadway & Seventh Ave. R. Co.*, 8 Misc. 451.

One thousand dollars, where, though not visibly injured, there was conflict of expert evidence as to nature and permanence of injuries. *Simonsen v. Brooklyn &c. R. Co.*, 53 App. Div. 478.

Six thousand dollars to a girl of eight for permanent facial disfigurement, broken collar bone, fracture of four ribs and injury to pelvis. *Bennett v. Brooklyn &c. R. Co.*, 1 App. Div. 205.

Five thousand dollars for injury in the groin and abdomen, necessitating a surgical operation of six weeks' confinement in a hospital. *Niendorf v. Manhattan R. Co.*, 4 App. Div. 46.

Twenty-five thousand dollars to a strong, healthy man of 28, earning \$3,000 a year for broken arm and fracture of five ribs. *Dieffenbach v. New York &c. R. Co.*, 5 App. Div. 91.

One thousand one hundred dollars for a broken leg, kept in a plaster of paris cast for five weeks and causing discomfort for more than a year. *Stapleton v. Newburgh*, 9 App. Div. 39.

Six thousand dollars to a roof helper permanently disabled. *Bryer v. Foerster*, 9 App. Div. 542.

Five thousand dollars to a strong, healthy man of 38, earning \$18 a week for permanent incapacity to perform ordinary work. *Mayer v. Liebmann*, 16 App. Div. 54.

Twelve thousand five hundred dollars to a cab driver of 32, earning \$12 per week, for a compound fracture of jaw and a comminuted fracture of both legs. *McDonnell v. Elias Brew. Co.*, 16 App. Div. 223.

Seven thousand five hundred dollars to a gauger, earning about \$60 a month, for an injury shortening his leg and impairing his capacity in such business. *Thomas v. Union R. Co.*, 18 App. Div. 185.

Six thousand five hundred dollars for a badly broken jaw, permanently disfiguring and painful. *Miller v. Erie R. Co.*, 34 App. Div. 217.

Three thousand seven hundred and fifty dollars to a healthy woman for painful bruises and sprains, and injuries resulting in permanent female troubles. *Rippe v. Metropolitan Street R. Co.*, 35 App. Div. 321.

Seven hundred dollars to a woman for the fracture of a rib, causing permanent injury. *Aslen v. Charlotte*, 35 App. Div. 625.

Ten thousand dollars to a girl of five for injury resulting in chronic cystitis and concussion of the spine. *McTague v. Doucet*, 51 App. Div. 206.

Two thousand five hundred dollars to one able to earn \$11 a week, for fracture of three ribs, resulting in an adhesion, reducing his earning capacity to \$9 per week. *Keiffert v. Nassau &c. R. Co.*, 51 App. Div. 301.

Three thousand five hundred dollars to a man of 65, in good health, for injuries, resulting in insomnia, hernia and partial paralysis in left leg. *McCready v. Staten Island &c. R. Co.*, 51 App. Div. 338.

Seven thousand two hundred and fifty dollars to man of 47 for the loss of practically all the household services of a wife of 48. *Zingrebe v. Union R. Co.*, 56 App. Div. 555.

Twelve thousand seven hundred and fifty dollars to a capable woman of 31, for a sprained back and bad sprain of right ankle and laceration of its ligaments, three fractures of left ankle and a laceration, making victim permanently crippled, and crutches necessary. *Leonard v. Brooklyn &c. R. Co.*, 57 App. Div. 125.

Four hundred dollars to a man of 70, capable of supporting himself, for loss of earning capacity. *French v. Brooklyn &c. R. Co.*, 57 App. Div. 204.

One thousand nine hundred dollars for injury causing tumors and an injury at the place from which they were removed. *Jarvis v. Metropolitan Street R. Co.*, 65 App. Div. 490.

Three thousand five hundred dollars for the shortening of left leg, loss of cartilage of hip joint and the contracting of a permanent progressive disease. *Napier v. Brooklyn &c. R. Co.*, 68 App. Div. 200.

Four thousand dollars to a young man for the permanent crippling of his limb. *Bertsch v. Metropolitan Street R. Co.*, 68 App. Div. 228.

Four thousand five hundred dollars to a man of 45, earning \$10 a week, for fracture of four ribs, which were pushed in so as to cause permanent injury and constant pain in breathing and the loss of his earning capacity. *Perry v. Metropolitan Street R. Co.*, 68 App. Div. 351.

One thousand five hundred dollars to a washerwoman of 63, supporting herself and dependent daughter by her earnings of \$8 to \$11 per week, for injury rendering her bent, decrepit and dependent on another daughter. *Sidmonds v. Brooklyn &c. R. Co.*, 69 App. Div. 471.

One thousand two hundred dollars for fracture of bones of wrist cramping the fingers, requiring plaster for five weeks and a sling for two months and impairing its strength and lifting power. *Mohr v. Wetherill*, 33 Misc. 791.

Fifteen thousand dollars for the fracture of a hip bone, resulting in its permanent stiffening and shortening, besides impairment of health in general. *Southern R. Co. v. Crowder*, 130 Ala. 256.

Two thousand five hundred dollars for an assault upon passenger by conductor. *Birmingham R. &c. Co. v. Baird*, 130 Ala. 334; s. c., 54 L. R. A. 752.

Two thousand six hundred and twenty-five dollars for permanent injury to head, skull. *St. Louis &c. R. Co. v. Baker*, 67 Ark. 531.

Two thousand dollars for impairment of hearing in one ear, sight of one eye, of nervous system, and loss of earning power. *Clure v. Sacramento Electric &c. Co.*, 122 Cal. 504.

Five thousand dollars for injury to spinal cord, likely to cause permanent paralysis. *Chicago &c. R. Co. v. Blaul*, 70 Ill. App. 518.

One thousand dollars for serious and probably permanent injuries, causing considerable expense and loss of time. *St. Louis &c. R. Co. v. Rogan*, 75 Ill. App. 35.

Ten thousand dollars for permanently impaired vision, irregular heart action and nervous prostration. *Illinois C. R. Co. v. Trent*, 75 Ill. App. 327.

Two thousand five hundred dollars for permanent injury to spine. *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; s. c., aff'd, 175 Ill. 325.

Two thousand dollars for severe external and internal injuries, under circumstances justifying punitive damages. *Illinois C. R. Co. v. Davenport*, 75 Ill. App. 579; s. c. aff'd, 177 Ill. 110.

One thousand five hundred dollars for permanent injuries to strong healthy man of 33, confined to bed for five weeks and unable to work and suffering pain up to the time of trial, a year. *Spring Valley v. Gavin*, 81 Ill. App. 456; s. c. aff'd, 182 Ill. 232.

Eleven thousand dollars to a strong healthy stone cutter of 44 years, earning from \$70 to \$75 a month for a rupture nearly 23 inches in circumference tending to grow larger and result in strangulation, attended with a hernia. *Chicago v. Gillett*, 91 Ill. App. 287.

Five thousand dollars to a healthy woman of 19 for displacement of internal organs, probably permanent, though possibly remediable by a dangerous operation, causing nervous weakness. *Chicago &c. R. Co. v. McDonnell*, 91 Ill. App. 488.

Two thousand five hundred dollars where plaintiff was confined to hospital for two months, and to crutches for four years; and where her ultimate recovery was doubtful. *Chicago &c. R. Co. v. Cooney*, 95 Ill. App. 471; s. c. aff'd, 196 Ill. 466.

Two thousand dollars to a bookkeeper of 33 for serious and permanent inguinal hernia. *Chicago &c. R. Co. v. Morse*, 98 Ill. App. 662.

Fifteen thousand dollars for permanent lameness, injury to spine and nervous centers, and disability as mother and wife. *Terre Haute &c. R. Co. v. Sheeks*, 155 Ind. 74.

One thousand dollars where the injury is serious and liable to be permanent. *Osborn v. Jenkinson*, 100 Iowa, 432.

Twelve thousand dollars for injury to spinal column causing great pain. *Louisville &c. R. Co. v. McEvan*, (Ky.) 51 S. W. Rep. 619.

Seven hundred and fifty dollars to a boy, seriously injured by falling from trolley car, where complete recovery is doubtful. *Jackson v. St. Paul City R. Co.*, 74 Minn. 48.

Thirteen thousand five hundred dollars for permanent and progressive injuries to spine, impairment of memory, insomnia, hernia, loss of virility and incontinence of urine. *Fullerton v. Fordyce*, 144 Mo. 519.

Two thousand three hundred dollars to able-bodied woman of 59, for painful injuries impairing working capacity. *Hill v. Sedalia*, 64 Mo. App. 494.

Five hundred dollars where plaintiff was thrown from his bicycle by collision with horse car under circumstances justifying punitive damages. *Nashville &c. R. Co. v. O'Byran*, 104 Tenn. 28.

Five thousand dollars to salesman of 43 earning \$190 per month and expenses, for serious injuries impairing eyesight and earning capacity. *Missouri &c. R. Co. v. Huff*, (Tex. Civ. App.) 32 S. W. Rep. 551.

Ten thousand dollars to farmer of 30 earning \$75 per month for partial paralysis of lower limbs and internal injuries. *Missouri &c. R. Co. v. Cook*, 12 Tex. Civ. App. 203.

Ten thousand dollars for permanent bodily injuries making plaintiff a mental wreck. *International &c. R. Co. v. Dalrigh*, (Tex. Civ. App.) 56 S. W. Rep. 136.

Twenty thousand dollars to a strong healthy man of 29, earning \$90 a month, for permanent injuries making him a physical and nervous wreck. *Galveston &c. R. Co. v. Nass*, (Tex. Civ. App.) 57 S. W. Rep. 910.

See, also, *Postal Teleg. &c. Co. v. Coote*, (Tex. Civ. App.) 57 S. W. Rep. 912.

Eight thousand four hundred and thirty dollars for permanent injury to woman's spine affecting her nervous system. *Missouri &c. R. Co. v. Nail*, 24 Tex. Civ. App. 114.

Five thousand dollars to a locomotive fireman for injuries requiring a serious operation in his side and the wearing of an abdominal support; and an abscess, which, at the time of the trial, had not healed. *Galveston &c. R. Co. v. Sanders*, (Tex. Civ. App.) 65 S. W. Rep. 889.

Ten thousand dollars to a girl of five for permanent disfigurement. *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783.

Twelve thousand dollars to young man having life expectancy, of 30 years, for injury causing permanent paralysis of lower limbs. *The Homer*, 99 Fed. Rep. 795.

Five thousand dollars to a child for double fracture of leg, injury to spine and probably permanent partial paralysis of lower limbs and organs. *Roanoke v. Shull*, 97 Va. 419.

Ten thousand five hundred dollars to woman of 38, earning \$75 per month, for permanent painful internal injuries; besides the possible necessity of amputation of a leg. *Smith v. Spokane*, 16 Wash. 403.

One thousand two hundred dollars to one stunned, bruised and otherwise injured in an explosion. *Rush v. Spokane Falls &c. R. Co.*, 23 Wash. 501.

Three thousand dollars for injuries from malpractice resulting in the loss of an ovary. *Allen v. Voje* (Wis.) 89 N. W. Rep. 924.

**Loss of time and loss or impairment of earning capacity.**—Two thousand dollars to a woman earning \$1.00 to \$1.50 per day, rendered unfit to perform her ordinary duties. *Colorado City v. Smith*, (Colo. App.) 67 Pac. Rep. 909.

Five thousand dollars for permanent disability in any remunerative employment. *Brush Electric &c. Co. v. Simonsohn*, 107 Ga. 70.

Three thousand dollars to law student of 23, permanently incapacitated for working mentally or physically. Had expended \$1,465.45 in trying to effect a cure. *Salem v. Webster*, 95 Ill. App. 120; s. c. aff'd, 192 Ill. 369.

Three thousand dollars for conversion of a strong healthy woman into a physical wreck. *De Kalb v. Ashley*, 61 Ill. App. 647.

Five thousand dollars to engineer earning \$125 per month for total incapacity for four months and permanent partial disability. *Illinois C. R. Co. v. Cole*, 62 Ill. App. 480.

Fourteen thousand dollars to baggageman of 34 years of age, in good health, and earning about \$58 per month, for injuries destroying his power of walking, shortening his life, and causing constant pain. *Chicago &c. R. Co. v. Sican*, 70 Ill. App. 331.

Six thousand dollars to brakeman of 32, earning about \$90 per month, incapacitated for physical labor. *Lake Shore &c. R. Co. v. Ryan*, 70 Ill. App. 45.

One thousand five hundred dollars to woman of 41, supporting herself and children by washing, which injuries render her unable to continue for any length of time without great pain. *Joliet v. Johnson*, 71 Ill. App. 423.

Seven thousand five hundred dollars to an able-bodied man of 42, earning \$12 to \$18 a week, disabled for life. *Alton Paving &c. Co. v. Hudson*, 74 Ill. App. 612; s. c. aff'd, 176 Ill. 270.

Sixteen thousand five hundred dollars to street car conductor of 45 years, earn-

ing \$80 to \$90 a month, for total loss of earning power in any capacity. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354.

Eight hundred dollars to boarding house keeper of 42 years, confined to bed for two months and causing a continuous decline in physical ability. *Lockport v. Richards*, 81 Ill. App. 533.

One thousand four hundred and seventy-five dollars to boy of 12 for cut on leg requiring 18 stitches and causing permanent impairment of earning capacity. *Illinois Iron &c. Co. v. Weber*, 89 Ill. App. 368.

Five thousand dollars for injuries resulting in alternative of loss of earning power or serious operation of doubtful efficacy. *Swift & Co. v. O'Neill*, 88 Ill. App. 162; s. c. aff'd, 187 Ill. 337.

Nine thousand dollars to a switchman under 50, in good health and earning from \$75 to \$80 per month for total incapacity since. *Chicago &c. R. Co. v. Rathburn*, 90 Ill. App. 238.

\$6,500 to strong and healthy farmer, permanently disabled to perform his work by injury to hip and spine. *Huntington County v. Bonebrake*, 146 Ind. 311.

One thousand dollars to woman of 48, in good health, for permanent incapacity to work and for constant pain. *Frankfort v. Coleman*, 19 Ind. App. 368.

Four thousand to stenographer of 21, averaging \$70 to \$75 a month, for probably permanent injury and pain. *Bryant v. Omaha &c. R. Co.*, 98 Iowa, 483.

One thousand seven hundred and fifty dollars for permanent disability. *Pence v. Wabash R. Co.*, (Iowa) 90 N. W. Rep. 59.

Six thousand six hundred and fifty dollars for commercial traveler over 50, and earning \$100 per month, for painful injury to knee resulting in reduction, if not destruction of his earning capacity. *Baltimore &c. R. Co. v. Hausman*, (Ky.) 54 S. W. Rep. 841.

Two thousand five hundred dollars for painful injury resulting in loss of power of locomotion. *Louisville &c. R. Co. v. Cooper*, (Ky.) 65 S. W. Rep. 795.

Two thousand and thirty-seven dollars and fifty cents to mill hand for being crippled for life by hot pulp and acid. *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268.

Six thousand five hundred dollars to an engineer of 31, earning \$100 per month, disabled from following his profession and probably from all work. *Woods v. Chicago &c. R. Co.*, 108 Mich. 396.

Fourteen thousand five hundred dollars for injuries to young man leaving him permanently a deformed and practically a physical wreck. *Hove v. Minneapolis &c. R. Co.*, 62 Minn. 71; s. c., 30 L. R. A. 684.

Four thousand five hundred dollars to conductor of 37, earning \$75 per month, for permanent incapacity to follow his calling and medical expenses of \$750. *Geary v. Kansas City &c. R. Co.*, 138 Mo. 251.

Eleven thousand four hundred dollars to expressman of 27 for compound fracture of skull making him a mental and physical wreck. *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609.

Two thousand dollars for permanent impairment of ability to labor, besides great bodily pain and mental suffering. *Covell v. Wabash R. Co.*, 82 Mo. App. 180.

Seven thousand two hundred and eight dollars to a school teacher of 48, earning \$450 a year for permanent injury causing confinement to bed for three months and the use of crutches thereafter, besides physical and mental pain and medical expense. *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.



Five thousand dollars to a carpenter earning \$2.50 a day for injury to spine permanently affecting his ability to work at his trade. *Wheeling &c. R. Co. v. Suhrwiar*, 20 Oh. C. C. 558.

Two thousand nine hundred and fifty dollars to mechanic for injury preventing him from following his trade, at which he earned \$1.75 a day. *Street R. Co. v. Rohner*, 6 Oh. C. D. 706.

Four thousand dollars to comparatively young man for injury lowering his earning capacity one-half; the injury also causing suffering and permanent disfigurement. *Packet Co. v. Hobbs*, 105 Tenn. 29.

Six thousand five hundred dollars to healthy railroad employe for impairment of health and earning capacity. *Galveston &c. R. Co. v. Waldo*, (Tex. Civ. App.) 32 S. W. Rep. 783.

Eight thousand dollars to bookkeeper of 18, earning \$50 a month, for loss of foot incapacitating him at his vocation. *San Antonio &c. R. Co. v. Green*, 20 Tex. Civ. App. 5.

Eleven thousand five hundred dollars to a brakeman of 27, earning \$60 to \$75 per month, for permanent impairment of health and loss of earning capacity and suffering of considerable physical and mental pain. *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487.

Nine thousand dollars to printer 42 years of age and earning \$60 to \$125 per month for unusually severe, permanent injuries. *Houston City Street R. Co. v. Medlenka*, 17 Tex. Civ. App. 621.

Eleven thousand dollars to railway laborer of 46, earning \$1.50 per day, for practical loss of earning capacity. *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677.

Fifteen thousand dollars to healthy man of 37, earning \$1,800 to \$2,400 a year for total disability and severe pain. *Galveston &c. R. Co. v. Scott*, 21 Tex. Civ. App. 24.

Ten thousand dollars to railway switchman of 33 or 34, earning \$1,080 a year, for loss of earning capacity by amputation of leg. *Gulf &c. R. Co. v. Warner*, 22 Tex. Civ. App. 167.

Thirteen thousand five hundred dollars to a locomotive engineer of 45 for loss of earning capacity. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

Six thousand dollars to a healthy man of 44, earning three dollars per day, for reduction of earning capacity to very light work. *The Anchoria*, 113 Fed. Rep. 982.

**Pain, suffering and disease.**—One thousand dollars as damages to a man 56 years old, previous to his injury in good health and earning \$2 per day, and rendered practically unable to perform manual work by injury, was not excessive. *Soderman v. Troy Steel & Iron Co.*, 70 Hun, 449; aff'g judg't for pl'ff; s. c. rev'd, 145 N. Y. 427.

Five thousand dollars for fracture of knee cap, one of the bones of the heel, and an injury resulting in a tumor and permanent kidney disease resulting in loss of earning capacity. *Koehne v. New York &c. R. Co.*, 32 App. Div. 419; s. c. aff'd, 165 N. Y. 603.

Three thousand five hundred dollars to a young man earning \$25 a week for loss of time during his two months' confinement in a hospital, severe pain and doctor's bill of \$290. *Williams v. Brooklyn*, 33 App. Div. 539.

Ten thousand dollars to young man with a wife and child for injury to hip joint and kidneys breaking down his health and rendering him permanently lame. *Boyce v. Shauangunk*, 40 App. Div. 593.

Eight thousand dollars for injuries to woman resulting in three months' confinement to bed, a year and a half of bad health which would probably continue longer. *Denning v. Terminal R. Co.*, 49 App. Div. 493.

One thousand and fifty-four dollars for injuries to a farmer resulting in pain, dizziness, and nausea, causing loss of earning power for one summer and partially for another. *Smith v. Nassau &c. R. Co.*, 57 App. Div. 152.

Three thousand dollars to a woman of 29, for injuries causing two and one-half years' pain, and requiring an operation on internal organs. *Wolf v. Third Avenue &c. R. Co.*, 67 App. Div. 605.

Six thousand dollars to a stoneman for an injury causing diabetes, resulting in loss of earning power. *Eicholz v. Niagara Falls &c. Co.*, 68 App. Div. 441.

Four thousand dollars for permanent curvature of the spine and permanent paralysis of the large muscle that caps shoulder. *Degman v. Brooklyn City R. Co.*, 14 Misc. 38.

Ten thousand dollars for loss of services of wife of 38, strong and healthy, made a confirmed invalid. *Cannon v. Brooklyn City R. Co.*, 14 Misc. 400.

One thousand five hundred dollars where there has been several months' medical treatment and there is likely to be permanent spine and liver trouble. *Ferguson v. Ehret*, 14 Misc. 454.

Two thousand dollars for abandonment by a physician of a case of child delivery at midnight causing physical and mental suffering. *Lathrope v. Flood*, (Cal.) 63 Pac. Rep. 1007.

Seven thousand dollars to strong active woman of 35, where for pain and impairment of her physical and nervous system. *Illinois C. R. Co. v. Robinson*, 58 Ill. App. 181.

Three thousand five hundred dollars to a laborer of 51, earning \$1.50 a day, for pain and division of earning capacity. *Frazer v. Schrader*, 60 Ill. App. 519.

Fifteen thousand dollars to a horse car driver for pain and permanent loss of earning capacity and physical suffering. *Chicago City R. Co. v. Taylor*, 68 Ill. App. 613; s. c. aff'd, 170 Ill. 49.

Five hundred dollars to one of 80 years of age, in good health and able to walk without a cane, for bruises from which he suffered pain for four days, required a physician for 16 and was confined for 90. *Underwood v. Vail*, 69 Ill. App. 679.

One thousand dollars for injury to child resulting in imbecility. *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283.

Four thousand two hundred and fifty dollars to a young woman for continuous suffering from nervous prostration for six or seven months. *West Chicago &c. R. Co. v. Lieserowitz*, 99 Ill. App. 591.

Seven thousand dollars to a child for disfigurement, loss of earning capacity and pain and suffering was an element. *Allen v. Ames &c. R. Co.*, 106 Iowa, 602.

Five thousand six hundred and sixty-seven dollars for permanent injury causing long suffering. *Louisville &c. R. Co. v. Lyon*, (Ky.) 58 S. W. Rep. 434.

One thousand five hundred dollars for pain and suffering caused by broken leg confined plaintiff to bed for many weeks. *Shidet v. Dreyfuss Co.*, 50 La. Ann. 296.

Two thousand five hundred dollars for injury resulting in septicæmia. *Miller v. St. Paul City R. Co.*, 66 Minn. 192.

Six thousand five hundred dollars to strong laborer of 46, earning \$40 to \$45 per month, for permanent disease of the nervous system, and possibly loss of earning capacity. *Olson v. Great Northern R. Co.*, 68 Minn. 155.

One thousand dollars to woman for a nervous shock causing a general impairment of health. *Herbert v. St. Paul & C. R. Co.*, 85 Minn. 341.

Six hundred dollars to a young farmer for acute peritonitis, confining him to his bed for three weeks. *Mabrey v. Cape Girardeau & C. Co.*, (Mo. App.) 69 S. W. Rep. 394.

Nineteen thousand dollars to a railroad engineer of 34, earning \$110 a month, for pain and suffering, and loss of earning capacity. *Lake Shore & C. R. Co. v. Toppliff*, 18 Oh. C. C. 709. .

Two thousand five hundred dollars for ejection of passenger, feeble and subject to fits, intensifying a subsequent attack of pneumonia, and done under circumstances justifying punitive damages. *Nashville Street R. Co. v. Griffin*, 104 Tenn. 81; s. c., 49 L. R. A. 451.

Four thousand dollars for injury to back, resulting in traumatic fever for several weeks and a permanent disease of the spine. *International & C. R. Co. v. Mulliken*, 10 Tex. Civ. App. 663.

Seven hundred dollars to female passenger for mental and physical suffering, caused by conduct of fellow passenger. *Texas & C. R. Co. v. Hughes*, (Tex. Civ. App.) 41 S. W. Rep. 821.

See, also, *Texas & C. R. Co. v. Sherbert*, (Tex. Civ. App.) 42 S. W. Rep. 639 (\$500).

Fifteen thousand dollars for shattering leg bone, requiring painful operations to remove many pieces, and leaving painful wound through which other pieces worked out. *Western & C. Teleg. Co. v. Engler*, 75 Fed. Rep. 102.

Five thousand dollars for injury resulting in incurable progressive paralysis. *McMahon v. Eau Claire Waterworks Co.*, 95 Wis. 640.

**Death.**—Verdict of \$5,000 for the death of a young unmarried man of twenty-five years, leaving parents and two brothers and one sister abroad, was not set aside as excessive. *Bierbauer v. N. Y. C. & H. R. R. Co.*, 15 Hun, 559, aff'g judg't for pl'ff.

Daughter was killed by the defendant's negligence; she was thirty-six years old and had contributed \$300 to \$400 per year for several years towards the support of her father, who was in infirm health. Her next of kin and heirs-at-law, were her father and his wife, aged 58, who were both without property. At the time of her death she was receiving \$8 or \$9 per week and had been for some years. Four thousand dollars was not an excessive verdict. *Boules v. Rome, W. & O. R. Co.*, 46 Hun, 324; aff'g judg't for pl'ff.

Five thousand dollars for death of a healthy woman of 63, who performed all the duties of a household, leaving husband and adult daughters. *Lyons v. Second Ave. R. Co.*, 89 Hun, 374.

One thousand five hundred dollars to woman of 72, leaving two children. *Wells v. Rochester R. Co.*, 92 Hun, 581.

One thousand three hundred and twenty-five dollars to a woman of 63, for being deprived of the support received from her son, and left dependent on charity of friends. *Dy Puy v. Cook*, 90 Hun, 43.

Three thousand dollars for the death of a sober industrious unmarried man of

Three thousand dollars to mother for death of a boy of five. *West Chicago Street R. Co. v. Waniata*, 68 Ill. App. 481; s. c. aff'd, 169 Ill. 17.

Two thousand five hundred dollars for a son of 21, who gave \$18 a week to father. *Webster Man. Co. v. Mulvany*, 68 Ill. App. 607; s. c. aff'd, 168 Ill. 311.

Five thousand dollars to widow and four children, eldest 14, youngest 3, dependent upon support of deceased. *Chicago Edison Co. v. Moren*, 86 Ill. App. 152; s. c. aff'd, 185 Ill. 575.

Five thousand dollars for employe of foundry, middle-aged, strong and healthy and earning \$3.50 per day, leaving wife and two children. *Economy Light &c. Co. v. Stephen*, 87 Ill. App. 220; s. c. aff'd, 187 Ill. 137.

Two thousand five hundred dollars to dependent son for the death of father, strong, healthy, in his prime, and able to earn good wages. *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13.

Five thousand dollars for boy of seven, leaving father, mother, and eight brothers and sister. *Cicero &c. R. Co. v. Boyd*, 95 Ill. App. 510.

Five thousand dollars for a postal clerk of 50, earning \$1,150, leaving a widow and two sons. *Malott v. Shimer*, 153 Ind. 35.

Four thousand five hundred dollars for brakeman, 34 years, earning \$60 to \$75 a month and leaving a dependent mother. *St. Louis &c. R. Co. v. French*, 56 Kan. 584.

Ten thousand dollars for a brakeman, where negligence was willful. *L. R. Co. v. Brooks*, 83 Ky. 129.

Six thousand nine hundred and eight dollars and ninety-eight cents for father, with expectancy of 26 years, earning \$630 a year. *Louisville &c. R. Co. v. Graham*, 98 Ky. 688.

Twelve thousand dollars for willfully causing death. *Union Warehouse Co. v. Preicitt*, (Ky.) 50 S. W. Rep. 964.

Nine thousand dollars for a man of 32, of good habits and of good business ability. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674; s. c., 50 L. R. A. 381.

Five hundred dollars for a man of 68 or 70, able to work. *Chesapeake &c. R. Co. v. Dupee*, (Ky.) 67 S. W. Rep. 15.

Two thousand five hundred dollars to father for son of good health and habits, and earning \$60 to \$70 per month. *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

Two thousand four hundred dollars for boy of 17, earning \$4 per day as a compositor, his father being poor and having four dependent children. *Post v. Olmsted*, 47 Neb. 893.

Two thousand eight hundred and fifty dollars for son of 10. *Omaha v. Richards*, 49 Neb. 244.

One thousand five hundred and twenty-five dollars to a mother for the loss of a boy of seven. *Omaha v. Bowman*, (Neb.) 88 N. W. Rep. 521.

One thousand dollars for boy of five. *Ashtabula Rapid-Transit Co. v. Dagenbach*, 11 Oh. C. D. 307.

Five thousand dollars reduced to \$3,500, to father for death of son of 22, one of eight children not contributing to his support. *Flaherty v. New York &c. R. Co.*, 19 R. I. 604.

Seven thousand five hundred dollars for son of 17, of excellent character and industrious habits. *Southern Queen Man. Co. v. Morris*, 105 Tenn. 654.

Sixteen thousand dollars to widow and children for an engineer. *San Antonio &c. R. Co. v. Harding*, 11 Tex. Civ. App. 497.

Eleven thousand dollars to wife and two children for death of locomotive hostler of 47, in good health and earning \$60 per month. *Tyler &c. R. Co. v. McMahon*, (Tex. Civ. App.) 34 S. W. Rep. 796.

Fourteen thousand dollars to mother, wife and child for death of fireman in good health, with expectancy of 35 years, earning \$80 per month. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

Five thousand dollars for death of healthy young man, supporting a family: fact that he was temporarily out of work immaterial. *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229.

Ten thousand dollars for brakeman of 43, of excellent habits and earning \$60 per month, which supported family. *Missouri &c. R. Co. v. Ransom*, 15 Tex. Civ. App. 689.

Two thousand dollars to a mother of 69, for a son, having an expectancy of 36 years, who contributed to her support \$20 to \$30 per month. *Gulf &c. R. Co. v. Royall*, 18 Tex. Civ. App. 86.

Two thousand dollars to parent for death of a seven-year-old son. *Missouri &c. R. Co. v. Gilmore*, (Tex. Civ. App.) 53 S. W. Rep. 61.

Eight hundred and seventy dollars to father and mother of 68 and 67 respectively for death of son of 35, contributing to their support. *Texas &c. R. Co. v. Spence*, (Tex. Civ. App.) 52 S. W. Rep. 562.

Five thousand dollars to widow and same to boy of 10, by a divorced wife for death of father of 31, healthy and industrious, and earning \$60 per month. *Gulf &c. R. Co. v. Delancy*, 22 Tex. Civ. App. 427.

Ten thousand dollars for death of husband and father, a farmer of 39. *Missouri &c. R. Co. v. Ferris*, 23 Tex. Civ. App. 215.

One thousand seven hundred and seventy-seven dollars for death of son of eight. *Citizens' R. Co. v. Washington*, 24 Tex. Civ. App. 422.

Three thousand seven hundred and fifty dollars to parents for death of bright, healthy, industrious boy of seven. *Taylor &c. R. Co. v. Warner*, (Tex. Civ. App.) 60 S. W. Rep. 442.

Twenty-five hundred dollars for death of boy seven years old. *Johnson v. Chicago &c. Co.*, 64 Wis. 425.

Two thousand dollars for the killing of a boy eighteen months old. *Schrier v. Milwaukee &c. R. Co.*, 65 Wis. 457.

Two thousand dollars for death of unskilled laborer of fifty-five years. *Mulcairns v. Juncville*, 67 Wis. 24.

**Miscellaneous injuries.**—Fifteen thousand dollars for severe injuries from a fall caused by a shock of electricity. *Tedford v. Los Angeles E. Co.*, 134 Cal. 76; s. c., 54 L. R. A. 85.

Four hundred and fifty dollars for wrongful expulsion of passenger held up to ridicule as trying to steal a ride. *Southern R. Co. v. Wood*, 114 Ga. 140; s. c., 55 L. R. A. 536.

Eight hundred and fifty dollars for the bite of a vicious dog, confining plaintiff to the house for two months. *Chicago &c. R. Co. v. Kuckkuck*, 98 Ill. App. 252.

Two hundred and sixty dollars to a passenger wrongfully expelled, for exposure to rain and ridicule of employés. *Louisville &c. R. Co. v. Keller*, (Ky.) 47 S. W. Rep. 1072.

Five hundred dollars for ejection from train four or five miles from a station at night and in a dangerous locality, while in a weak physical condition. *Louisville &c. R. Co. v. Joplin*, (Ky.) 55 S. W. Rep. 206.

Six hundred and fifty dollars to a passenger wrongfully ejected in presence of a crowd, and compelled to walk five miles. *Chamberlain v. Lake Shore &c. R. Co.*, 122 Mich. 477.

One hundred and fifty dollars to passenger wrongfully expelled with insulting language, and compelled to walk 10 miles on a cold night. *Gieson v. Minneapolis &c. R. Co.*, 85 Minn. 329.

Two thousand dollars to man of 70, for painful permanent injury to arm and shoulder, not interfering with his occupation. *Fleming v. Kansas &c. R. Co.*, 89 Mo. App. 129.

Verdict not excessive because larger than the value of an annuity, yielding deceased's income during his expectancy. *Lake Shore &c. R. Co. v. Schultz*, 19 Oh. C. C. 639.

Ten thousand dollars on retrial after two years, excessive, because only \$5,000 was allowed on first trial before injuries had fully developed. *Wheeling &c. R. Co. v. Suhrciar*, 22 Oh. C. C. 560.

One thousand five hundred and twenty-nine dollars and ninety-two cents for 50 acres of meadow land burned. *Gulf &c. R. Co. v. Jagoe*, (Tex. Civ. App.) 32 S. W. Rep. 1061.

One hundred dollars to passenger ejected without force and taken back when mistake discovered. *Gulf &c. R. Co. v. Barnett*, (Tex. Civ. App.) 34 S. W. Rep. 449.

One thousand dollars for an ejection by carrier of a woman compelled to walk two miles in a storm to reach her destination and contracting bronchitis as a result. *Texas &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 34 S. W. Rep. 1057.

One thousand two hundred and fifty dollars for ejection with violence and insult in presence of a crowd. *Gulf &c. R. Co. v. Moody*, (Tex. Civ. App.) 39 S. W. Rep. 987.

See, also, *Atchison &c. R. Co. v. Cuniffe*, (Tex. Civ. App.) 57 S. W. Rep. 692 (\$500).

Fifty dollars for being left behind while buying a ticket, pursuant to conductor's directions and compelled to walk 16 miles, resulting in suffering from a physical infirmity. *St. Louis &c. R. Co. v. Germany*, (Tex. Civ. App.) 56 S. W. Rep. 586.

One thousand two hundred dollars for the burning of pasture, resulting in a reduction monthly of rental value from \$60 to \$25. *San Antonio &c. R. Co. v. Isaac*, (Tex. Civ. App.) 59 S. W. Rep. 564.

Two hundred and twenty-five dollars for improvements costing \$400 and shown not to have deteriorated much, though no witness testified that they were worth more than \$150. *Smith v. Frio County*, (Tex. Civ. App.) 66 S. W. Rep. 711.

#### (b). VERDICTS INADEQUATE.

One hundred and fifty dollars grossly inadequate for the death of a wife strong and healthy, and of help in her husband's milk business, besides attending to her household duties, plaintiff having already paid \$120 for funeral expenses. *Meyer v. Hart*, 23 App. Div. 131.

Verdict for nominal damages for injuries, causing unconsciousness, nervous-

ness, two weeks' confinement, and medical expense of \$150, set aside. *De La Torre v. Metropolitan Street R. Co.*, 48 App. Div. 126.

So of such a verdict for death of healthy, well educated son of 12. *Morris v. Metropolitan Street R. Co.*, 51 App. Div. 512.

One thousand dollars inadequate for loss of leg reducing earning capacity from \$20 to \$5 per month. *Eberhardt v. Metropolitan Street R. Co.*, 69 App. Div. 560.

Six hundred dollars to parent for the death of a child under six, held not inadequate. *Terhune v. Joseph W. Cody & Co.*, 72 App. Div. 1.

Six hundred dollars not inadequate for death of a bachelor son of 22, living with parents and giving them his wages of \$9 a week. *Sicanton v. King*, 72 App. Div. 578.

Three hundred dollars to a mother for the death of a boy of six set aside as grossly inadequate, where special damage amounted to \$180. *Willson v. Metropolitan Street R. Co.*, 74 N. Y. Supp. 774.

Five dollars for a lacerated scalp. *Lerinson v. Bernheimer*. 31 Misc. 26.

Nominal damages, for injury, requiring amputation of thumb at a cost of \$35. *Aiello v. Aaron*, 33 Misc. 580.

Six cents for fracture of knee cap, causing great pain and permanent injury. and loss of 120 days' time, at \$1.50 per day. *Sloane v. McCauley*, 33 Misc. 652.

Two hundred dollars for son of six held grossly inadequate. *Gubbitosi v. Rothschilds*, 37 Misc. 99.

One cent for a dog, the value of which no one estimated at less than \$250. *Henderson v. Louisville & C. R. Co.*, (Ky.) 68 S. W. Rep. 645.

Nominal damages for broken skull, three weeks confinement with pain and suffering. *Chouquette v. Southern Electric R. Co.*, 152 Mo. 257.

One dollar for substantial damage to person and property. *Carpenter v. Red Cloud*, (Neb.) 89 N. W. Rep. 637.

One thousand dollars for permanent injuries besides special damage of \$985. *McNeil v. Lyons*, 20 R. I. 672.

Verdict for amount less than the damage testified to by each and all of the witnesses, set aside. *Nading v. Denison & C. R. Co.*, 22 Tex. Civ. App. 173.

See, also, *May v. Hahn*, 22 Tex. Civ. App. 365.

### (c). VERDICTS EXCESSIVE.

**Loss of or injury to hand.**—Eight thousand dollars was excessive where plaintiff, a cooper and teamster, had lost his left hand. Reduced to \$6,000. *Murray v. H. R. R. Co.*, 47 Barb. 200.

Eight thousand dollars loss of imperfect left hand. *Pittsburg & C. R. Co. v. Blair*, 11 Oh. C. C. 579.

**Loss of or injury to fingers.**—Eight thousand dollars to a man of 43 years for loss of the middle finger, causing the stiffening of the joints and partial loss of the use of the first and third fingers. Reduced to \$5,000. *Borgeson v. United States Projectile Co.*, 2 App. Div. 57.

Four thousand two hundred and fifty dollars for the loss of three fingers, a portion of a fourth and the outside of the hand. Reduced to \$2,500. *Saicyer v. Rumford Falls Paper Co.*, 90 Me. 354.

One thousand eight hundred dollars to a boy of eight or nine, for the amputation of the two middle fingers of left hand near first joint. *Gahagan v. Aermotor Co.*, 67 Minn. 252.

Three thousand five hundred dollars to young man of 20 for loss of first finger of left hand, permanent injury to joints of second and injury to joints of thumb probably not permanent. Reduced to \$2,500. *Stiller v. Bohn Man. Co.*, 80 Minn. 1.

**Loss of or injury to arm.**—Four thousand five hundred dollars for small fracture of upper arm bone and rupture of ligaments of shoulder, resulting in stiffness of the joint. Reduced to \$2,000. *Joly v. New York &c. R. Co.*, 48 App. Div. 624.

The plaintiff was knocked down and run over and her right arm fractured in two places and she was laid up for nine weeks. It was claimed that her injuries were likely to be permanent, \$1,500 was held to be excessive and verdict reversed unless plaintiff stipulated to reduce it to \$500. *Diblin v. Murphy*, 3 Sandf. 19.

Twenty thousand dollars to man of 20, earning \$1 a day, for loss of right arm, subsequently employed at \$35 a month. *Chicago &c. R. Co. v. Kane*, 70 Ill. App. 676.

Thirteen thousand dollars to a man of 34, earning \$1 per day for the loss of an arm. *Louisville &c. R. Co. v. Lowe*, (Ky.) 66 S. W. Rep. 736.

Three thousand dollars for fracture of left arm, though the injury is permanent, and caused a considerable expense and loss of time. Reduced to \$2,500. *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36.

**Loss of or injury to toes.**—Two thousand five hundred dollars for loss of first joint on second and third toes of right foot and the severing of the under tendon of the big toe. Should be reduced to \$1,500. *Torske v. Commonwealth &c. Co.*, (Minn.) 90 N. W. Rep. 532.

**Loss of or injury to foot.**—In an action by a brakeman against his employer for negligence the court reduced the damages from \$13,500 to \$7,000, where it appeared he was fifty-nine years old and unmarried; that the injury, which was to his leg, healed in six months, but the leg was permanently shortened; that his physician's bill was nearly \$1,000. *Coppins v. N. Y. C. & H. R. R. Co.*, 48 Hun, 292.

Verdict for \$9,000 for the loss of a leg by a mason's tender, whose wages were \$2 a day, was excessive. *Morris v. Eighth Ave. R. Co.*, 68 Hun, 39.

Four thousand five hundred dollars to one whose legs were badly bruised, but no bones broken or any deformity or disfigurement aside from a scar. Reduced to \$2,000. *Meade v. Brooklyn &c. R. Co.*, 3 App. Div. 432.

Twenty-five thousand dollars to a man of 28, earning \$12 a week, for an injury requiring the amputation of a leg. Reduced to \$15,000. *Tulley v. New York &c. R. Co.*, 10 App. Div. 463; *aff'd*, 162 N. Y. 614.

Fifteen thousand dollars to a dressmaker of 52, earning \$2 per day, for fracture of upper extremity of left thigh bone, constituting a permanent injury likely to impair her business capacity. Reduced to \$10,000. *Coxhead v. Johnson*, 20 App. Div. 605; *s. c. aff'd*, 162 N. Y. 640.

Eight thousand dollars to a bachelor of 50, earning \$2.75, for contusion of back, and injury to knees. Reduced to \$6,000. *Campbell v. North American Co.*, 22 App. Div. 414.

Seven thousand dollars to a carpet sewer, earning \$8 per week, for fracture of



right fibula and a sprain of the ankle, attended with the swelling and discoloration, and giving rise to ankylosis. Reduced to \$5,000. *Downer v. Metropolitan Street R. Co.*, 54 App. Div. 315.

Eight thousand dollars was reduced to \$4,000 for injury to leg and knee not resulting in loss of use. *Austin v. Bartlett*, 67 App. Div. 312.

Six thousand dollars to keeper of a grocery store and livery stable; his leg was broken, causing curvature and permanent shortening and deformity. Reduced to \$4,000. *Clapp v. H. R. R. Co.*, 19 Barb. 461.

Plaintiff's knee-pan was broken, causing stiffness in the joint which, her physician said, would probably last two years but might possibly be permanent. She was three months in the hospital and underwent great pain, afterwards she was unable to return to her occupation of coloring photographs because it was painful for her to sit any length of time; \$6,000 was held excessive. *Langley v. Sixth Ave. R. Co.*, 48 N. Y. Super Ct. 542.

Five thousand dollars to a man of 67 for broken leg; reduced to \$2,500. *North Chicago Street R. Co. v. Wiswell*, 68 Ill. App. 443; s. c. aff'd, 168 Ill. 613.

Six hundred dollars to a strong, healthy woman for painful injury to knee, requiring use of plaster cast and confining her to the house. *Belvidere v. Crich-ton*, 81 Ill. App. 595.

Five thousand dollars to farmer for an incomplete fracture of the left leg bone, causing two months' confinement. *Chicago &c. R. Co. v. Stickman*, 95 Ill. App. 4.

Fourteen thousand five hundred dollars to a brakeman of 39 for loss of leg six inches below the knee; reduced to \$8,000. *Wimber v. Iowa C. R. Co.*, 114 Iowa. 551.

Ten thousand dollars for brakeman's leg, in the absence of evidence of his earning power, &c. *Missouri R. Co. v. Dwyer*, 36 Kas. 58.

Seventeen thousand dollars to conductor of electric car, of 23, earning \$480 a year for loss of leg below knee. Reduced to \$10,000. *Stucke v. Orleans R. Co.*, 50 La. Ann. 173.

Eight thousand five hundred dollars for loss of leg. Reduced to \$6,000. *Con-way v. New Orleans &c. R. Co.*, 51 La. Ann. 146.

Ten thousand dollars to a brakeman. Reduced to \$6,000. *Bell v. Globe Lum-ber Co.*, 107 La. 725.

Two thousand dollars for sprained ankle. Reduced to \$1,250. *Bennett v. Backus Lumber Co.*, 77 Minn. 198.

Twenty-five thousand dollars to switchman. Reduced to \$18,000. *Galveston &c. R. Co. v. Bernard*, (Tex. Civ. App.) 57 S. W. Rep. 686.

Seven hundred dollars to boy of 15 for bruises of the hip, causing temporary lameness but no disease. Reduced to \$400. *Durose v. St. Paul City R. Co.*, 80 Minn. 512.

Fifteen thousand dollars to a boy of 14 for a leg crushed, shortened, deformed but used in walking by padding. Reduced to \$10,000. *Chitty v. St. Louis &c. R. Co.*, 166 Mo. 435.

Two thousand eight hundred dollars for simple fracture of the small bones of the ankle, not affecting earning capacity, after \$1,700 was held excessive on former appeal. *Collins v. Janesville*, 111 Wis. 348.

**Injury about head.**—Seven thousand dollars reduced to \$3,000 for permanent facial scars from burning and from nervousness. *Kilmer v. Reckitt & Sons*, 77 N. Y. Supp. 395.

Five thousand dollars, reduced to \$2,500, where permanent brain trouble was claimed. *Anderson v. Man. R. Co.*, 1 Misc. 504.

Thirty-seven thousand five hundred dollars for loss of eyesight. *Deep Min. & Co. v. Fitzgerald*, 21 Colo. 533; *De La Verne & Co. v. Stahl*, (Tex. Civ. App.) 60 S. W. Rep. 319 (\$8,000 to man of 24).

Fifteen thousand dollars for loss of sight of one eye, reducing earning capacity from \$1.60 per day to \$15 or \$20 per month. Reduced to \$10,000. *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401; s. c., 48 L. R. A. 649.

**Loss of or injury to several members.**—Where it was shown that the plaintiff's leg was injured to the extent requiring its amputation about eight inches below the knee, and that his right arm, and leg above where it was amputated, were cut, and that his knee joint stiffened, and he was suffering pain from his injuries down to the time of the trial, the court held, that the plaintiff, who had formerly been a brakeman on a railway was not in the human estimation for damages entitled to a verdict of \$16,000, and reduced the same to \$9,000. *Bailey v. Rome & Co. R. Co.*, 55 Hun, 509.

Twenty-five thousand dollars to a workman for loss of his right arm, half way up to the elbow. Reduced to \$15,000 and again to \$10,000. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307.

One thousand dollars to dressmaker for sprained ankle. Reduced to \$500. *Corcoran v. Ulster & Co. R. Co.*, 40 N. Y. Supp. 1117.

Forty thousand dollars to child of two and one-half, for loss of both hands and one foot. *St. Louis & Co. R. Co. v. Warren*, 65 Ark. 619.

Two thousand five hundred dollars for sprained wrist, black and blue marks on one thumb, back and sides, and resulting pain. *Lake Street El. R. Co. v. Johnson*, 70 Ill. App. 413.

Seventeen thousand five hundred dollars, compensatory damages to a woman of 35 for fracture of skull and hip and impairment of health. *Louisville & Co. v. Creighton*, 106 Ky. 42.

Five thousand five hundred and twenty-five dollars, where a woman had been injured by the upsetting of a carriage, and part of her eye, and of the flesh about it, torn away and her sight permanently injured, and she was disfigured and her body otherwise bruised. *Gleason v. Brennan*, 50 Me. 222.

Four thousand dollars for dislocation of shoulder, cut in the ear, temporarily affecting hearing, and confinement to bed for four weeks. Reduced to \$2,500. *Lammers v. Great Northern R. Co.*, 82 Minn. 120.

Eight thousand dollars to switchman for loss of one foot and four toes of the other. Reduced to \$4,000. *Wood v. Louisville & Co. R. Co.*, 88 Fed. Rep. 44.

Twenty thousand dollars to a boy of 16, earning \$1 a day for the loss of one arm and the permanent impairment of the other. Reduced to \$12,000. *Renne v. United States Leather Co.*, 107 Wis. 305.

**Other bodily injury.**—Twenty-five thousand dollars for loss of use of arm, painful operation and impairment of health. Reduced to \$15,000. *De Wardner v. Metropolitan Street R. Co.*, 1 App. Div. 240.

Twenty-eight thousand five hundred dollars for injuries resulting in premature confinement, and paralysis of side. *Faudrey v. Brooklyn & Co. R. Co.*, 64 App. Div. 418.

One thousand five hundred dollars for facial bruises, discoloration, and a slight jar from a fall. *Dixon v. Scott*, 74 Ill. App. 277.

Fifteen thousand dollars to a stenographer, earning \$4 per week for severe nervous shock. Within a year she was able to ride a bicycle three miles. *Chicago &c. R. Co. v. Mochell*, 96 Ill. App. 178.

Six thousand dollars for injuries, not permanent. Reduced to \$3,000. *Chicago &c. R. Co. v. Murphy*, 99 Ill. App. 126.

Nine thousand dollars to a woman for the permanent dislocation and probable injury to internal organs. *Chicago v. Doolan*, 99 Ill. App. 143.

Ten thousand dollars where plaintiff is confined for but three weeks, and the only evidence of permanency, is a slight stiffness. *Louisville &c. R. Co. v. Mattingly*, (Ky.) 38 S. W. Rep. 686.

Nine thousand dollars as compensation for damages where plaintiff recovered from effects of a fall within three weeks. *Covington &c. Bridge Co. v. Goodnight*, (Ky.) 60 S. W. Rep. 415.

Three hundred and fifty dollars for some contusions and lacerations but no broken bones, sprains or loss of time from business. Reduced to \$200. *Weiner v. Minneapolis Street R. Co.*, 80 Minn. 312.

Twenty thousand dollars to a married woman of 32 for internal complications which though painful are curable. Reduced to \$7,500. *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, 351.

Eight thousand dollars to a machinist of 29, earning \$47 to \$75 per month for fractured skull from fall of 30 feet, resulting in injuries as to permanency of which there was conflict of evidence. Reduced to \$6,000. *McKenna v. North Hudson Count R. Co.*, 64 N. J. L. 106.

One thousand seven hundred dollars though reduced from \$2,500, to girl of 13, for broken leg, fully healed. *Collins v. Janesville*, 107 Wis. 436.

**Loss of time and loss or impairment of earning capacity.**—Eight thousand dollars to a strong, healthy switchman 32 years old, for a rupture, reducing earning capacity by \$25 per month, reduced to \$5,000. *Bosworth v. Standard Oil Co.*, 92 Hun, 485.

Four thousand three hundred dollars to a boy for painful injuries, curable in three or four years, reducing earning capacity one half. Reduced to \$3,300. *Leritt v. Nussau &c. R. Co.*, 14 App. Div. 83.

Fifteen thousand dollars to a school teacher for permanent impairment of health and earning capacity and loss of position as superintendent. Reduced to \$7,000. *Kraemer v. Metropolitan Street R. Co.*, 51 App. Div. 475.

Five thousand dollars for injuries not affecting earning capacity. Reduced to \$2,500. *Kaplan v. Metropolitan Street R. Co.*, 52 App. Div. 296.

See, also, *Sullivan v. Metropolitan Street R. Co.*, 54 App. Div. 632.

Six thousand five hundred dollars to fireman for permanent curvature of the spine not affecting earning capacity for more than two months. Reduced to \$4,000. *Mullady v. Brooklyn &c. R. Co.*, 65 App. Div. 549.

See, also, *Shortsleeves v. New York &c. R. Co.*, 40 N. Y. Supp. 1105. One thousand seven hundred and twenty-five dollars under similar circumstances. *Louisville &c. R. Co. v. Banks*, (Ky.) 33 S. W. Rep. 627.

Fifteen thousand dollars to one earning \$12 per week, for permanent impairment of use of leg. Reduced to \$8,000. *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. 404.

Seven thousand dollars, reduced to \$3,500 to a woman of 59, earning \$12 to \$15 per week, nursing, whose injuries, except temporarily, were wholly of the

subjective sort. *Chicago &c. R. Co. v. Anderson*, 182 Ill. 298; aff'g s. c., 80 Ill. App. 71.

Ten thousand dollars for aggravation of infirmities causing suffering and incapacity to work, though not incurable. Reduced to \$5,000. *Missouri &c. R. Co. v. Turley*, (Ind. T.) 37 S. W. Rep. 52.

Eight hundred dollars, where plaintiff was struck on the head by a piece of ice and laid up only three weeks, though judgment was entered on voluntary remittance of half. A new trial was ordered. *Atchison &c. R. Co. v. Plunkett*, 61 Kan. 297.

See, also, *Forkman v. Consolidated Traction Co.*, (N. J. L.) 46 Atl. Rep. 783.

Six thousand three hundred dollars to a farmer of 24, where for laceration of heel and loss of year's time. Reduced to \$5,000. *Fremont &c. R. Co. v. French*, 48 Neb. 638.

**Pain, suffering and disease.**—Ten thousand dollars for pain and suffering, not permanent. Reduced to \$4,000. *Becker v. Albany &c. R. Co.*, 35 App. Div. 46.

Seven thousand five hundred dollars for confinement for three weeks and nervousness of probably a year's duration. Reduced to \$3,500. *Henn v. Long Island R. Co.*, 51 App. Div. 292.

Fifteen thousand dollars, reduced to \$7,500 for injury attended with bruises and pains, and resulting in nervous disorder, impaired knee and kidney trouble. *Quirk v. Sigel-Cooper Co.*, 26 Misc. 244.

Four thousand dollars for pain and suffering where the interval of conscious suffering before death was momentary. *St. Louis &c. R. Co. v. Dawson*, 68 Ark. 1. See *The Robert Graham Dun*, 70 Fed. Rep. 270 (\$3,500, reduced to \$350.)

Four thousand dollars to woman of 75 for broken ankle, causing constant pain and requiring permanent use of crutches. Reduced to \$2,500. *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; s. c., 36 L. R. A. 586.

Ten thousand dollars to a woman of advanced age, though her injuries are painful and probably permanent. Reduced to \$7,000. *Taylor v. Chicago &c. R. Co.*, 103 Wis. 27.

**Death.**—Evidence that the deceased was unmarried, aged thirty-three, of good habits and industrious; that he lived on his father's farm and had since boyhood, and that he had two brothers living with the father on the farm—not a large farm; that deceased drove a team; age of father, &c., not appearing; held, not to be enough to sustain verdict for \$4,000. *Carpenter v. B. & N. Y. & P. R. Co.*, 38 Hun, 116, rev'g judgt for pl'ff.

Six thousand dollars for daughter of 19, earning and giving to mother's family \$7 a week. Father was 61. Reduced to \$4,000. *Sceley v. New York &c. R. Co.*, 8 App. Div. 402.

Four thousand dollars for daughter of 16, keeping house for her father, of 55. Reduced to \$2,500. *Hinnihan v. Lake Ontario &c. Co.*, 8 App. Div. 509.

Ten thousand dollars, a man 53 years, earning \$2.50 per day. Reduced to \$7,500. *Taylor v. Long Island R. Co.*, 16 App. Div. 1.

Fifteen thousand dollars for a locomotive fireman of 34, earning \$2 a day, leaving a widow of 32, a son of 10 and a daughter of 8. *Cooper v. New York &c. R. Co.*, 25 App. Div. 383.

Six thousand dollars for a son of eight and a half. Reduced to \$3,000. *Schaffer v. Baker T. Co.*, 29 App. Div. 459.

Seven thousand dollars was excessive for a street sweeper. Reduced to \$5,000. *O'Connor v. Union R. Co.*, 67 App. Div. 99.

Twelve thousand dollars for a boy of 12, earning three dollars per week, which was given to his mother. Reduced to \$7,500. *McDonald v. Metropolitan Street R. Co.*, 36 Misc. 703.

Six thousand dollars for a boy of four and one-half. *Fox v. Oakland &c. R. Co.*, 118 Cal. 55.

Four thousand dollars for a man of 68, with annual income above expenses of \$1,000. *Denver &c. R. Co. v. Spencer*, 27 Colo. 313.

Four thousand one hundred and forty dollars for an adult daughter who had never given her parents more than \$75 a year. *Armour v. Czischki*, 59 Ill. App. 17.

Five thousand dollars to parents over 70 for death of a bachelor son of 33, who supported them. Reduced to \$3,000. *Leiter v. Kinnare*, 68 Ill. App. 538.

Three thousand five hundred dollars for child of four. Reduced to \$2,000. *West Chicago Street R. Co. v. Scanlan*, 68 Ill. App. 626; s. c. aff'd, 168 Ill. 34; *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42 (\$10,500.); *Rice v. Crescent City R. Co.*, 51 La. Ann. 108 (\$12,500); *Graham v. Consolidated T. Co.*, 64 N. J. L. 10 (\$5,000).

Five thousand dollars for husband and father of four grown children, who had not lived with or contributed to the support of his family. *Chicago &c. R. Co. v. Downey*, 96 Ill. App. 398.

One thousand five hundred dollars for a man of 81. *Chicago &c. R. Co. v. Helbreg*, 99 Ill. App. 563.

One thousand dollars for a capable woman of 59, mother of five children, not shown to be dependent upon her. *St. Louis &c. R. Co. v. Blinn*, 10 Kan. App. 468.

Fifteen thousand dollars for a girl of 14. *Board &c. v. Moore*, (Ky.) 66 S. W. Rep. 417.

Two thousand and thirty-one dollars and eighty-one cents for a man of 64, not earning more than \$150 a year over and above his support. Reduced to \$1,250. *Ward v. Maine C. R. Co.*, 96 Me. 136.

Nine hundred dollars for boy of 16 where father had not supported him for the past five years. Reduced to \$500. *Grieve v. North Jersey Street R. Co.*, 61 N. J. L. 409.

Five thousand dollars to husband and two grown sons. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 63.

Three thousand dollars for son of fifteen, a farm hand, earning \$20 per month. Reduced to \$1,500. *May v. West Jersey &c. R. Co.*, 62 N. J. L. 67.

Two thousand five hundred dollars for woman of 68, frail and suffering from an organic disease. *Bond Hill v. Atchison &c. R. Co.*, 16 Oh. C. C. 470.

Five thousand dollars for son of 22, contributing nothing to parents. Reduced to \$3,500. *Flaherty v. New York &c. R. Co.*, 19 R. I. 604.

Nine thousand dollars for death of son. *Houston v. Couser*, 57 Tex. 293.

Ten thousand dollars to widow and \$5,000 each to two children. *Galveston &c. R. Co. v. Miller*, (Tex. Civ. App.) 57 S. W. Rep. 702.

Seventeen thousand five hundred dollars for husband and father, an engineer of 46 or 47. *Galveston &c. R. Co. v. Johnson*, 24 Tex. Civ. App. 180.

One thousand five hundred dollars for husband of fifty, deaf mute, separated from wife, in poor health, in debt, supported by friends, and earning \$8 per

month. Reduced to \$500. *International &c. R. Co. v. Jones*, (Tex. Civ. App.) 60 S. W. Rep. 978.

Eight thousand dollars for the death of a son, where the father and mother, his beneficiaries, were respectively of the age of 64 and 50. Reduced to \$4,000. *Atchison &c. R. Co. v. Van Belle*, 64 S. W. Rep. 397.

Twenty thousand dollars for death of a brakeman of 29, earning \$70 to \$150 a month, though he turned over all his earnings except \$67 to the support of his wife and child. *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

One thousand dollars to a mother of 73, for the death of a married son who contributed \$50 a month to her support; where she lived with her married daughter. *Southern P. Co. v. Winton*, (Tex. Civ. App.) 66 S. W. Rep. 477.

Thirteen thousand dollars, though deceased was a healthy man of 38, and earned \$50 per month, which he contributed to the support of his family; (wife and seven children; the eldest being 17). Reduced to \$10,000. *English v. Southern P. Co.*, 13 Utah, 407; s. c., 35 L. R. A. 155.

Forty thousand dollars for death of a railroad engineer, though in good health with an expectancy of 38 years and earning \$150 a month. Reduced to \$25,000. *Walker v. McNeill*, 17 Wash. 582.

Three thousand five hundred dollars to a woman of 54 for the death of an unmarried son paying her \$5 a week, (she having six others from 12 to 22 years of age). Reduced to \$1,500. *Innes v. Milwaukee*, 103 Wis. 582.

**Miscellaneous injuries.**—Where a portion of the verdict was limited so as to come within the measure of damages proved, a new trial was properly refused. *Central R. Co. v. Crosby*, 74 Ga. 737.

Two hundred and fifty dollars for carrying a young lady by her station, entailing a loss of only three hours, comfortably cared for and politely treated. *Southern R. Co. v. Bryant*, 105 Ga. 316.

Five hundred dollars under similar circumstances where passenger walked back causing slight illness. *Southern R. Co. v. Humphries*, 108 Ga. 591.

Question of the weight of evidence and the reasonableness of the damages, belong to the appellate court. *Chicago &c. R. Co. v. O'Connor*, 119 Ill. 586.

Two thousand dollars for loss of services of a boy of 13 or 14 by the loss of a leg. *Baltimore &c. R. Co. v. Keck*, 89 Ill. App. 72.

Three hundred dollars for indignities suffered in being ejected from a train, without unnecessary violence. *Atchison &c. R. Co. v. Hogue*, 50 Kas. 40.

Five hundred dollars for ejection where there was no physical injury, insult or loss of time. *Louisville &c. R. Co. v. Breckinridge*, 99 Ky. 1; \$225 for an ejection of a passenger, where there was no force or wrongful intent and only a loss of seven or eight hours. Reduced to \$125. *Kleven v. Great Northern R. Co.*, 70 Minn. 79; \$400 for ejection from a train where there is no violence or indignity and only a loss of a day's time and expense of \$2 or \$3. *Louisville &c. R. Co. v. Blair*, 104 Tenn. 212.

Two hundred and fifty dollars where, as the result of defendant's failure to hold a train, plaintiff's delay was only for a night. He lacked no comfort and his only expense was \$22.50. *Southern R. Co. v. Marshall*, (Ky.) 64 S. W. Rep. 418.

Verdict based on testimony as to what an untrained horse would be worth properly trained, should be regarded as excessive. *Illinois C. R. Co. v. Radford*, (Ky.) 64 S. W. Rep. 511.

Two hundred and fifty dollars where a child, set off at the wrong station, but was delayed only a few hours, and was well cared for during the time. *Louisville &c. R. Co. v. Jordan*, (Ky.) 66 S. W. Rep. 27.

One thousand six hundred and forty dollars for a few hours' delay in the shipment of a corpse. *Louisville &c. R. Co. v. Hull*, (Ky.) 68 S. W. Rep. 433.

Seven hundred and fifty dollars to a man of 63 for an ejection 40 miles from home; where most of the injuries were due to unnecessary exposure. Reduced to \$250. *Buder v. Southern P. R. Co.*, 52 La. Ann. 1060.

One hundred dollars to one whose ticket had been declared forfeited; when, though spoken harshly to by the conductor, it was not within the hearing of the other passengers. Reduced to \$50. *Mueller v. Chicago &c. R. Co.*, 75 Minn. 109.

One hundred dollars for a horse, the amount asked, where the value is shown to be only \$30 to \$50. (Being evidently a mistake.) *Vicksburg &c. R. Co. v. Laurenec*, 78 Miss. 86.

Two hundred and fifty dollars for medical aid where the evidence only disclosed \$50 spent. \$200 taken off. *Cullar v. Missouri &c. R. Co.*, 84 Mo. App. 347.

Trial judge has authority under 1 S. C. R. S. 1893, secs. 2315-16, to grant a new trial where the verdict is excessive. *Stuckey v. Atlantic Coast-Line Co.*, 57 S. C. 395.

New trial is not necessary to reduce a verdict so grossly excessive as to indicate prejudice. *Western Union Tel. Co. v. Frith*, 105 Tenn. 167.

Two hundred dollars for failure to stop for an intending passenger who thereupon walked to his destination instead of hiring a conveyance or staying all night. *Gulf &c. R. Co. v. Cleveland*, (Tex. Civ. App.) 33 S. W. Rep. 687. See, also, *Gulf &c. R. Co. v. Gardecke*, 39 id. 312.

One hundred and fifty dollars for refusal to sign and stamp a return trip ticket for a passenger for whom a friend bought another ticket. *New York &c. R. Co. v. Leander*, (Tex. Civ. App.) 46 S. W. Rep. 843.

Five hundred dollars actual and \$1,500 exemplary damages for exacting extortionate fare of \$.50 and for rudeness. Reduced to \$250 and \$500 respectively. *Galveston &c. R. Co. v. Patterson*, (Tex. Civ. App.) 46 S. W. Rep. 848.

## XVI. Mitigation of Damages.

That plaintiff refused to submit to an operation recommended by his physicians did not affect his recovery, where he acted as a reasonably prudent man. He is not required to submit blindly, being only bound to the exercise of ordinary care. *Williams v. Brooklyn*, 33 App. Div. 539.

See, also, *Blate v. Third Ave. R. Co.*, 44 App. Div. 163.

Damages for death were reduced by widow's pension from fire department. *Geary v. Metropolitan Street R. Co.*, 73 App. Div. 441.

Refusal to receive goods from a carrier did not mitigate damage for total loss. *Brand v. Weir*, 27 Misc. 212.

No recovery for injury that could have been prevented by exercise of reasonable care by plaintiff after becoming aware of it. *Hartford Deposit Co. v. Calkins*, 186 Ill. 104; rev'g s. c., 85 Ill. App. 627.

Failure to at once secure medical aid did not prevent recovery where

the injuries were apparently slight. *Kennedy v. Busse*, 60 Ill. App. 440.

Plaintiff is bound only to exercise of ordinary care in treatment of injury. *Mt. Sterling v. Crummy*, 73 Ill. App. 572.

See, also, *Fullerton v. Fordyce*, 144 Mo. 519; *Webb v. Metropolitan Street R. Co.*, 89 Mo. App. 604.

But if he fails to use reasonable effort to prevent further injury he cannot charge the consequences to defendant as the natural and probable result of the injury. *Scherrer v. Baltzer*, 84 Ill. App. 126.

No recovery for continued suffering, if a slight surgical operation attended with no danger, would have cured the injury. *Bailey v. Centerville*, 108 Iowa, 20.

An injured person is held only to use of ordinary care to prevent further injury. He need not use the utmost care. *Illinois &c. R. Co. v. Gheen*, (Ky.) 68 S. W. Rep. 1087; modifying s. c., 66 id. 639.

No mitigation of damage for being carried by destination because passenger did not at once get off and return instead of going further where she had friends. *Airey v. Pullman Palace-Car Co.*, 50 La. Ann. 648.

Consignee cannot refuse to receive damaged goods and sue carrier for total loss. *Silverman v. St. Louis &c. R. Co.*, 51 La. Ann. 1785.

Failure of physician to give best treatment will not reduce damages where plaintiff used reasonable care in his selection. *Reed v. Detroit*, 108 Mich. 224.

Owner of stock killed must use ordinary care to reduce his damage by selling it for beef. Where defendant took and disposed of it he recovered full value. *Clem v. Wabash R. Co.*, 72 Mo. App. 433.

Expense of reasonable efforts to mitigate damage is recoverable. *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36.

Remarriage of widow does not reduce damage for death of first husband. *Philpott v. Philadelphia T. Co.*, 175 Pa. St. 570.

Nor does distributive share of child in estate of parent. *Stahler v. Philadelphia &c. R. Co.*, 16 Montg. Co. L. Rep. 198.

Where a surgical operation was reasonably necessary, it was plaintiff's duty to procure it. *Mattis v. Philadelphia T. Co.*, 6 Pa. Dist. 94.

Contributory negligence held only to mitigate damages for violation of a statute requiring those in charge of a train to look for, and take precautions against collision with, obstructions on railway tracks. *Artenberry v. Southern R. Co.*, 103 Tenn. 29.

Defendant negligently failed to deliver telegram, forbidding sheriff to sell plaintiff's land. His failure to employ counsel to set aside the sale for lack of means was held not a violation of his duty to lessen his loss. *Western &c. Teleg. Co. v. Wofford*, (Tex. Civ. App.) 42 S. W. Rep. 119.



Passenger is not under obligation to prevent or lessen his damage by the payment of an extra fare. *Gulf &c. R. Co. v. Copeland*, 17 Tex. Civ. App. 55.

Plaintiff delayed seeking medical assistance and subjected himself to severe physical strain. He was not allowed to recover for aggravation of injury thus caused. *Texas &c. R. Co. v. White*, 101 Fed. Rep. 928.

(a). INSURANCE.

Recovery of insurance on life destroyed by the defendant's negligence, does not diminish the damages. *Althorf v. Wolfe*, 22 N. Y. 355, aff'g judg't for pl'ff.

*Kellogg v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 72, aff'g recovery by pl'ff; *Terry v. Jewett*, 78 id. 338.

Same as to inquiry to property. Insurance received cannot be proved. *Briggs v. N. Y. C. & H. R. R. Co.*, 72 N. Y. 26, aff'g judg't for pl'ff.

Citing *Merrick v. Brainard*, 38 Barb. 589, aff'd 34 N. Y. 208, aff'g judg't for pl'ff; *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503.

In an action to recover the value of property destroyed by a fire occasioned by the negligence of the defendant, the fact that the property was insured and that the insurance company has paid the loss, cannot be given in evidence in mitigation of damages. *Collins v. N. Y. C. & H. R. R. Co.*, 5 Hun, 503, rev'g judg't for pl'ff.

Where the claim is that the injury disables from work, the defendant may show the plaintiff to have been so drunken, before the accident, as to disqualify him for work independently of injury. *De Voe v. Van Vranken*, 29 Hun, 201, rev'g judg't for pl'ff.

Damages not reduced by payment on an accident insurance policy. *Cox v. Chicago*, 83 Ill. App. 540.

See, also, *Louisville &c. R. Co. v. Caruthers*, (Ky.) 65 S. W. Rep. 833.

Nor on a fire insurance policy. *Allen v. Barrett*, 100 Iowa, 16.

Nor of sick benefits. *Baltimore &c. R. Co. v. Baer*, 90 Md. 97.

See, also, *Matthews v. Missouri P. R. Co.*, 142 Mo. 645; *Lake Erie &c. R. Co. v. Falk*, 62 Oh. St. 297.

A statute permitting deduction of fire insurance from damages by fires set by locomotives, held not retroactive. *Wild v. Boston &c. R. Co.*, 171 Mass. 245.

A statute imposing liability for fires set by railroads upon railway companies and permitting the reduction of damages by the amount of insurance less cost of premium and recovery, construed to apply to insurance issued prior to statute. *Lyons v. Boston &c. R. Co.*, (Mass.) 64 N. E. Rep. 404.

Damages not reduced by life insurance. *Houston &c. R. Co. v. Weaver*, (Tex. Civ. App.) 41 S. W. Rep. 846; *Houston &c. R. Co. v. Lippscomb*, (Tex.) 64 S. W. Rep. 923; modifying s. c., 62 id. 954.

Nor accident insurance. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185; *Missouri &c. R. Co. v. Rains*, (Tex. Civ. App.) 40 S. W. Rep. 635.

(b). MONEY EXPENDED FOR INJURED PERSON.

It is improper in an action for death by the defendant's negligence, to show pecuniary aid or valuable services rendered the deceased after his injury, or even \$2,000 expended for his comfort and support by defendant. *Murray v. Usher*, 46 Hun, 404, aff'g judg't for pl'ff; distinguishing *Littlewood v. Mayor &c.*, 89 N. Y. 24.

*Payment of, by employer.*

If the plaintiff's employer paid his wages, while he was sick from an injury by another, it is proper in a reduction of damages. *Drinkwater v. Dinsmore*, 80 N. Y. 390, reversing 16 Hun, 250, and judg't for pl'ff.

Distinguishing *Yates v. White*, 4 Bing. (N. S) 272; *Althorf v. Wolfe*, 22 N. Y. 355; *Harding v. Townsend*, 43 Vt. 536.

## XVII. Interest.

Interest is added to the verdict for death, under the statute in force when the verdict was rendered. Sec. 1 of chap. 538, L. 1871, exempting from the act contracts, etc., made before the act, does not apply to tort created by the statute. *Salter v. U. & B. R. Co.*, 86 N. Y. 401; affirming 13 Hun, 187.

Overruling *Erwin v. Neversink S. Co.*, 23 Hun, 578.

Denial of motion to strike out interest added to judgment by clerk, sustained though the jury stated in court that they included interest in their verdict. *Manning v. Pt. Henry Iron Co.*, 91 N. Y. 664; rev'g s. c., 27 Hun, 219.

Although the jury may consider the time elapsed since death in fixing damages, they cannot fix upon a sum and add interest from death. Chap. 78, L. 1870, does not affect actions pending at its enactment. *Cook v. N. Y. C. & H. R. R. Co.*, 10 Hun, 426, rev'g judg't for pl'ff.

In an action sounding in damages, the jury may allow interest or not, in its discretion. It is error for court to charge that interest must be allowed. *Home Insurance Co. v. P. R. Co.*, 11 Hun, 182.

Horse killed on track for lack of guards. Interest on damages properly allowed by referee. *Lackin v. D. & H. C. Co.*, 22 Hun, 309, citing on subject of interest.

Parrott v. Knickerbocker &c. Co., 46 N. Y. 361; Whitehall &c. Co. v. New York &c. Co., 51 id. 369; but, see, White v. Miller, 9 Week. Dig. 153.

Warner v. New York Central R. Co., 52 N. Y. 437.

In an action by a husband for wife's injury, recovery of the wife for her damages from same injury cannot be shown. *Neeson v. City of Troy*, 29 Hun, 173, rev'g judg't for pl'ff.

In an action for negligence in causing, as alleged, permanent injury to a horse, the jury may give interest upon the sum found by them to represent the depreciation in its value, from the date of such injury.

The charter of the city of Troy (Laws of 1872, chap. 129) provided that no action could be maintained upon a claim against the city unless it was presented to the city comptroller, and the latter did not audit it within sixty days.

Held, that no interest could be recovered upon such claim until sixty days after the date at which it had been duly presented as required by the act. *Wilson v. The City of Troy*, 60 Hun, 183, modifying judg't for pl'ff; s. c. aff'd, 135 N. Y. 96.

Subject of allowing interest considered and cases cited.

See, also, Gray v. Central R. Co. &c., 89 Hun, 477.

Where interest in an action for death under a foreign statute is discretionary with the jury, the clerk cannot add it pursuant to local statute. *Frounfelker v. Delaware &c. R. Co.*, 76 N. Y. Supp. 745.

Interest allowed on cost of repair of railroad track, washed out through break in reservoir on adjoining land, from date of injury, but, on cost of transferring passengers around the washout during repair, only from time the amount was stated in the bill of particulars. *New York &c. R. Co. v. Ansonia Land &c. Co.*, 72 Conn. 703.

Interest allowed on value of property from date of loss by carrier. *Baltimore &c. R. Co. v. Dougherty*, 7 App. D. C. 378.

See, also, Mobile &c. R. Co. v. Jurey, 111 U. S. 584; *Mote v. Chicago &c. R. Co.*, 27 Iowa, 22.

In actions *ex delicto* for value of property destroyed, it is within the discretion of the jury to add a sum equal to interest from the time of destruction, which, however, must be called damages, not interest. *Western &c. R. Co. v. Brown*, 102 Ga. 13.

Interest from date of shipment is a matter of right in an action on contract for injuries to goods in transit over a railroad. *Goodman v. Missouri &c. R. Co.*, 71 Mo. App. 460.

See, also, Dun v. Railway, 68 Mo. 278; Gray v. Packet Co., 64 id. 50.

Interest on value of property lost by carrier runs from date when delivery should have been made. *Lachner Bros. v. Adams Ex. Co.*, 72 Mo. App. 13.

Not allowed in common law action for negligently killing stock. *Meyer v. Atlantic &c. R. Co.*, 64 Mo. 542. Nor for setting fires by locomotive. *De Steiger v. Hannibal &c. R. Co.*, 73 id. 33.

In an action based on negligence, where no pecuniary benefit has or could have accrued to the defendant, interest is not allowed. Not allowed for negligent failure to properly present a draft. *Gray's Harbor &c. Co. v. Continental Nat. Bank*, 74 Mo. App. 633.

Interest allowed on property negligently destroyed by fire from the time of destruction. *Union P. R. Co. v. Ray*, 46 Neb. 750.

See, also, *Fremont v. Railway Co.*, 25 Neb. 138.

Allowed on damage to adjacent property from negligent construction and maintenance of sewer from time of injury as part of the damages, not as interest. *Toledo v. Grasser*, 12 Oh. C. C. 520.

See, also, *Zipperlein v. Pittsburg &c. R. Co.*, 8 Oh. S. & C. P. 587 (personal injuries).

Not allowed on damage from time of personal injury. *Texas &c. R. Co. v. Carr*, 91 Tex. 332.

Not allowed on value of cattle killed before judgment in statutory action. *St. Louis &c. R. Co. v. Chambliss*, 93 Tex. 62.

See, also, *International &c. R. Co. v. Barton*, 93 Tex. 63; *Texas &c. R. Co. v. Payne*, (Tex. Civ. App.) 35 S. W. Rep. 297.

But allowed from date of killing in common law action. *San Antonio &c. R. Co. v. Wray*, (Tex. Civ. App.) 37 S. W. Rep. 461; *Houston &c. R. Co. v. Jones*, 16 Tex. Civ. App. 179.

Allowed on value of goods destroyed while in hands of carriers. *Texas &c. R. Co. v. Payne*, 15 Tex. Civ. App. 58.

And on damages for delay from time when delivery should have been made. *Texas &c. R. Co. v. Truesdale*, 21 Tex. Civ. App. 125.

Interest from commencement of action allowed as part of damages for failure to deliver telegram. *Western &c. Teleg. Co. v. Carver*, 15 Tex. Civ. App. 547.

## DEATH FROM NEGLIGENCE.

### I. RULES.

### II. CAUSE OF ACTION IS CREATED BY STATUTE.

### III. STATUTES IN NEW YORK AND OTHER STATES.

- (a) By whom and in whose behalf action may be brought.
- (b) For what recovery may be had.

### IV. FORMER ADJUDICATION.

### V. JURISDICTION. \*

- (a) Jurisdiction—injuries on high seas, ports, bays, etc.

### I. Rules.

At common law no action for personal injuries causing death survived in behalf of the decedent's estate.

Lord Campbell's Act, passed in England in 1846, first created such a cause of action, and most of the American states have passed similar acts. Frequently special provisions in behalf of particular persons, such as minors, or for the death of persons of a particular description as against master for death of a servant, persons killed by or on railways, etc., have been enacted. In all the states, save Connecticut, Iowa, Louisiana, New Hampshire, and Tennessee, where the statute provides that the cause of action shall survive (Tiffany's Death by Wrongful Act, § 26), the cause of action is created by the statute, but in no case can the action be maintained for injuries causing death, unless the injured person might have maintained the action, if death has not ensued. Hence, any act or omission of the injured person that would have precluded his maintenance of the action, operates to defeat it after his death. This is not the rule in Kentucky, where death results from willful neglect. The rule is that, if the negligence of a beneficiary contributed to the injury, he cannot recover, and the usual rules as to the contributory negligence of parents prevail. See "Contributory Negligence, Infants."

It is immaterial whether the death was instantaneous or otherwise, if it resulted from the injury the action will lie. In Maine the remedy cannot be enforced if the death be not instantaneous. *State v. Grand Trunk R. Co.*, 6 Me. 114.

In Massachusetts, Maine, Kentucky, it has been held that under the statutes involved no cause of action survived, if the death was instantaneous.

Tiffany's Death by Wrongful Act, sec. 74.

In New York and in many states the action may be maintained for death arising from any tort, although the act amount to a felony. Tiffany's Death by Wrongful Act, sec. 79.

The cause of action abates by the death of the wrong-doer. This is not the case in Alabama, Arizona, Georgia, Iowa, Mississippi, North Carolina, Texas and Virginia.

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\*NOTE—As to death from mob violence, see "Municipality," post.

The proper person to sue is oftener the personal representative, but in several states the beneficiaries may bring the action for their own benefit or for themselves and others entitled to share in the distribution. The damages are very much within the discretion of the jury; but are usually, confined to compensation for the pecuniary loss; but in some states exemplary damages are allowed, and frequently the damages cannot be less or greater than a sum allowed in the statute.

An action under a statute for negligent killing has no extra territorial jurisdiction, and therefore an action cannot be maintained in one state for damages for death caused by injury happening in another state or a foreign country, unless it be proved that the laws of such latter state or country are of similar character to those of the state where the remedy is sought.

For statutes of limitation, see "Limitation of Action."

## II. Cause of Action is Created by Statute.

In the absence of a statute, damages cannot be recovered for death caused by the wrongful act of another. *Sullivan v. Union Pac. R. Co.*, 1 McCrary, (U. S.) 301.

*Insurance Co. v. Brame*, 95 U. S. 754; *Baker v. Bolton*, 1 Camp. 493; *Connecticut &c. Ins. Co. v. N. Y. &c. R. Co.*, 25 Conn. 265; *Kramer v. Market St. R. Co.*, 25 Cal. 434; *Indianapolis &c. R. Co. v. Keely*, 23 Ind. 133; *Cincinnati &c. R. Co. v. Chester*, 57 Ind. 297; *Hyatt v. Adams*, 16 Mich. 180; *Shields v. Yonge*, 15 Ga. 349; *Peoria &c. Ins. Co. v. Frost*, 37 Ill. 333; *Eden v. Lexington &c.*, 14 B. Mon. (Ky.) 204; *Hubgh v. New Orleans &c. R. Co.*, 6 La. Ann. 495; *Hermann v. Carrollton R. Co.*, 11 id. 5; *Carey v. Berkshire R. Co.*, 1 Cush. 475; *McNamara v. Slavens*, 76 Mo. 330. See *Cutting v. Seabury*, 1 Sprague (U. S.) 522; *Ford v. Monroe*, 20 Wend. 210; *James v. Christy*, 18 Mo. 162; if recovery is had, it is for loss of service; see *Edgar v. Castello*, 14 S. C. 20; see, also, *Osborn v. Gillet*, L. R., 8 Exch. 88.

Such statutes are constitutional, *Carroll v. Mo. Roc. R. Co.*, 80 Mo. 239.

The right being unconditional it is unaffected by the common law presumption that if a person live for a year and a day the injury was not the proximate cause of the death. *Western &c. R. Co. v. Bass*, 104 Ga. 390.

At common law a widow had no right of action for death of her husband. Nor is such a right created by an employer's liability act making an employer liable to servant for negligence of fellow servant. *Major v. Burlington &c. R. Co.*, 115 Iowa, 309.

Father cannot recover for loss of services of minor son whose death was the instantaneous result of the negligent act. *Bligh v. Biddeford &c. R. Co.*, 94 Me. 499.

The common law does not give parents an action for the loss of services upon the death of their minor child. *Gulf &c. R. Co. v. Beall*, 91 Tex. 310; s. c., 41 L. R. A. 807.

premises of parent. *Hughes v. City of Auburn*, 161 N. Y. 96; rev'g s. c., 21 App. Div. 311.

Statutory action maintainable where deceased was killed on a highway by flying piece of wood from blast on adjoining property. *Sullivan v. Durham*, 161 N. Y. 290, aff'g s. c., 35 App. Div. 342.

The statute gives no right of action for death of child resulting from malpractice by a physician. *Sorenson v. Balaban*, 11 App. Div. 164.

An executrix of the administratrix and statutory beneficiary of deceased held not entitled to continue the statutory action. A successor of the administratrix of deceased should have been appointed. *Hodges v. Weber*, 65 App. Div. 180.

In *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, an administratrix of a sole administrator and beneficiary was allowed to recover on reviving the original action. See, also, *Mundt v. Glokner*, 24 App. Div. 110, 223.

Section 1903. FOR WHOSE BENEFIT RECOVERY HAD.—The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands after payment of all debts and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action and his commissions upon the residue; which must be allowed by the surrogate, upon notice given in such a manner and to such persons, as the surrogate deems proper. L. 1847, chap. 450; L. 1849, chap. 256; L. 1870, chap. 78. *Stuber v. McEntee*, 142 N. Y. 200.

The right of action is a property right survives the beneficiary and becomes an asset of his estate. *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145; s. c., 51 L. R. A. 235.

The act creates a new cause of action for the benefit of the husband or wife and next of kin as a class. Widow was compelled to divide with father of deceased. *Matter of Snedeker v. Snedeker*, 164 N. Y. 58.

Recovery for death of an unmarried son belongs to a father, when there is no mother or next of kin. *Doyle v. New York &c. R. Co.*, 66 App. Div. 398.

A husband is not the next of kin of his wife so as to share with the next of kin on account of her death. *West. Union Tel. Co. v. McGill*, 57 Fed. Rep. 699.

*Drake v. Gilmore*, 52 N. Y. 389; *Dickins v. N. Y. C. R. Co.*, 23 id. 158; *Warren v. Engelhart*, 13 Neb. 283; but contrary rules exist in Ohio. *Steele v. Kurtz*, 28 Oh. St. 191; and in Tennessee, *Trafford v. Adams Ex. Co.*, 8 Lea, 96.

The word "heir" under Kentucky statute, means "children," and does not include other relatives. *Jordan v. Cincinnati R. Co.*, 11 Ky. L. R. 204.

Complaint must allege existence of widow or next of kin. *Safford v. Drew*, 3 Duer, 627.

Lucas v. R. Co., 21 Barb. 245; 2 Abb. Ct. App. 480.

Tiffany's Death by Wrongful Act, sec. 80, citing numerous cases. Under statutes of Virginia, West Virginia, North Carolina the rule is otherwise.

Tiffany's Death by Wrongful Act, sec. 81.

If there are no children, wife, or next of kin, the action does not survive. *Indianapolis &c. R. Co. v. Keeley*, 23 Ind. 133.

*Stewart v. Terre Haute &c. R. Co.*, 103 Ind. 44. See, *Jeffersonville &c. R. Co. v. Swayne*, 26 Ind. 477; *Jeffersonville &c. R. Co. v. Hendricks*, 41 id. 48.

Missouri statute gives right of action to husband, wife, or minor children, or father and mother, or either of them; if all these beneficiaries perish in the same disaster the right of action does not survive. *Gibbs v. Hannibal*, 82 Mo. 143.

The usual rule is that the action abates by the death of the beneficiary. If there be more than one it survives for the benefit of the others. In Indiana, Arizona, Georgia and Texas, by a provision of the statute a different rule prevails.

Tiffany's Death by Wrongful Act, sec. 87.

In the several states the recovery is usually for the benefit of the surviving family or persons dependent on the deceased for support, and is distributed to the widow or husband alone, or to the widow or husband and next of kin, or heirs, or to parents in the case of a minor child. But the recovery is not for the benefit of creditors of the deceased and hence no action can be maintained unless there be beneficiaries in existence entitled to receive. This is not the rule, however, in the states of Iowa, Virginia, Oregon and Washington, where, if there be no beneficiary, the creditors may participate, and North Carolina, where, in such case, it goes to the university.

The beneficiary's interest is assignable, but such assignment does not interrupt the prosecution of the action. *Quin v. Moore*, 15 N. Y. 432.

A right of action for negligently causing the death of another does not survive in behalf of his creditors or for the benefit of the estate, under Tennessee act. 1851, chap. 17, amended act of 1871, chap. 78. *East Tenn. &c. R. Co. v. Lilly*, 90 Tenn. 563.

Section 1904. AMOUNT OF RECOVERY.—“The damages awarded to the plaintiff may be such a sum, *not exceeding five thousand dollars* (see next paragraph), as the jury, upon a writ of inquiry, or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons, for whose benefit the action is brought. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report, or decision, may specify the day from which interest is to be computed; if it omits so to do, the day may be determined by the clerk upon affidavits.”

N. Y. Const., art. 1, sec. 18, provides: “The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.” (Amendment of 1894.)



The provision of N. Y. Const. 1894, art. 1, sec. 18, prohibiting the abrogation of the right of action for injuries resulting in death or the limitation of the amount of recovery is not retractive. *Isola v. Weber*, 147 N. Y. 329.

Held error to charge that if a verdict is found for plaintiff it must be for more than nominal damages. Recovery is for pecuniary loss. *Sciurba v. Metropolitan Street R. Co.*, 73 App. Div. 170.

The constitutional removal of limitation of amount of recovery held to apply where injury occurred before death after it went into effect. *Smith v. Metropolitan Street R. Co.*, 15 Misc. 158.

The jury is not limited to any arbitrary amount except to \$5,000 in Colorado (where death is caused by common carrier; minimum sum \$3,000), Connecticut, Illinois (under miner's act direct damages unlimited), Maine (not less than \$500 nor more than \$5,000 except in action against municipality for defect in highway), Massachusetts (fine for not less than \$500 nor more than \$5,000; in action by administrator or executor not exceeding \$5,000 or less than \$500, except in an action against municipality for injury on highway, then \$1,000; and for the death of the employé not instantly killed \$5,000, or where employé is instantly killed in action by widow, etc., not less than \$500 nor more than \$5,000), Minnesota, Missouri (except in case of loss of life by willful violation of miner's act), Nebraska, New Mexico (when done by common carrier or its agents), Oregon, Wisconsin, Wyoming; \$7,000 in New Hampshire; \$10,000 in Ohio, Oklahoma, Utah (except where action is brought by a parent for minor child, a guardian for a ward, or heirs and personal representative for a person not a minor) Indiana, Kansas, Virginia, Dist. of Columbia, W. Virginia; \$20,000 in Montana (in an action for the exclusive benefit of widow and next of kin).

Exemplary damages are allowed for willful act or gross negligence in Arizona, Kentucky and Texas. Damages may also be given in Missouri for aggravating circumstances, and also in New Mexico.

Under L. 1870, ch. 78, rate of interest is governed by law in force when verdict is rendered. *Salter v. U. & D. R. R. Co.*, 86 N. Y. 401.

Section 1905. NEXT OF KIN DEFINED.—“The term ‘next of kin,’ as used in the foregoing sections, has the meaning specified in section 1870 of the act.” L. 1871, ch. 219.

Section 1870. NEXT OF KIN DEFINED.—“The term ‘next of kin,’ as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts, and expenses, other than a surviving husband or wife.” *Murdock v. Ward*, 67 N. Y. 387; rev'g 8 Hun, 9.

*Ketalas v. Ketalas*, 72 N. Y. 312.

#### (a). BY WHOM AND IN WHOSE BEHALF ACTION MAY BE BROUGHT.

The proper party to sue as party plaintiff is the PERSONAL REPRESENTATIVE; so in New York, Arkansas (if no representative, heirs), *Davis v. St. Louis &c. R. Co.*, 57 Ark. 117; Connecticut, Dist. of Columbia, Delaware (but widow in proper person, if there be one), Indiana.

Personal representative may maintain where the relation of parent and child does not exist, for the benefit of next of kin. *Mayhew v. Burns*, 103 Ind. 328.

Where a minor was instantly killed, leaving his mother surviving, the guardian had paid no expenditures incurred from the injury, and could not recover under Indiana Rev. Stat. 1881, sec. 266. *Louisville &c. Co. v. Goodykuntz*, 119 Ind. 111.

Parent may sue as administrator for death of son, under Indiana Rev. Stat. 1881, sec. 284, instead of suing as parent under sec. 266. *Barry v. Louisville &c. R. Co.*, 128 Ind. 484.

So in Iowa: The test being whether deceased lived after the injury—not, how long he lived,—a right of action accrues to his representative if he survives the injury but for a moment. *Kellow v. Central Iowa R. Co.*, 68 Iowa, 470.

So in Michigan, Minnesota, Montana (or heirs in some cases), Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, South Carolina. *Edgar v. Costello*, 14 S. Co. 20.

*Contra*, *Morgan v. Thompson*, 82 Ky. 383; *Spring v. Glenn*, 12 Bush. (Ky.) 172.

So in Vermont, Virginia, West Virginia, Wisconsin (*Gores v. Graff*, 77 Wis. 174), Wyoming, Idaho (or by heirs, and if decedent be a minor, then proper party is father, or in case of his desertion, mother for minor child and guardian for ward). So in Kansas (unless deceased was non-resident or no representatives had been appointed, and then widow, if none, next of kin). *Hulbert v. Topeka R. Co.*, 44 Fed. Rep. 310. So in Kentucky, but for willful negligence also widow, heir (widow and children have prior right to sue and possess whatever may be recovered in an action for death, under Kentucky Gen. Stat. ch. 57, sec. 3. *Henderson v. Kentucky R. Co.*, 86 Ky. 289), and for malicious and unjustified use of firearms, and in duels, widow and minor children, or either. So in Maine, from defect in highway, but by indictment for death by common carrier; so in Tennessee, but if representative declines, widow and children may use his name (or widow in her name; if none, children). So in Utah (and also heirs and also father, or in cases of death or desertion mother for minor child, guardian for ward). So in Alabama (a father, or, in case of his death, desertion, imprisonment or insanity, mother or personal representative may maintain the action for the death of a minor child), but in other cases the action is by the representatives. *Lovell v. De Bardelaben &c. Co.*, 90 Ala., 13; *Stewart v. Louisville &c. R. Co.*, 83 id. 493.

The rule in certain other states is as follows:

California: Heirs or personal representatives, father, or if none, or in case of desertion, mother for minor child, guardian for ward; in Arizona all the parties, or one or more for the benefit of all, may sue, and in case of failure to do so in six months after death the personal representative; in Colorado a husband or wife, or, in the case of his or her failure to sue within a year after death, or in the case there be none, then the heirs, but in the case of a minor or unmarried person, the father or mother, or the survivor of them. In Florida the widow or husband, if surviving, otherwise minor children; if there be none, person dependent on decedent for support; if there be none, the executor or administrator. Georgia: Widow for death of husband, or, if none, children for death of father. Husband for death of wife, and children jointly, if there be any; mother, or if there be none, father for death of child upon whom he or she is dependent for support, or in case he contributed thereto, in case the child leave no wife, husband or child. Illinois: Personal representatives, or in case of death from will-

ful violation of minor's act, widow, lineal heirs, adopted children, or any person dependent on deceased for support. *Holton v. Daly*, 106 Ill. 131.

See *C. & E. &c. R. Co. v. O'Connor*, 119 Ill. 586; *Corliss v. Worcester &c. R. Co.*, 63 N. H. 404; *Clark v. Manchester*, 62 id. 577; *Needham v. R. Co.*, 38 Vt. 294, *Indianapolis &c. R. Co. v. Keely*, 23 Ind. 133.

Louisiana: Minor children or widow, or either, or, if there be none, surviving father and mother, or either. Maryland: State for use of beneficiaries.

Massachusetts: By indictment, if by negligence of corporation operating a railway, or by the unfitness or gross negligence of its servants, passenger or person not a passenger or in the employ of the corporation be killed, or if a person be killed by a collision with the cars of a corporation at a crossing through neglect to give statutory signals. Under the same circumstances representative may bring action, and also for death of employé of a railroad company, if employé might have maintained the action had he not been an employé, or if passenger be killed by the negligence of common carrier or the unfitness or gross negligence of its servants, or in an action against a municipality for defect in highway causing death; and where an employé is killed and death is not instantaneous, by the negligence of employer under employer's liability act. But where the employé is killed instantly action should be brought by widow, under such act, and if no widow, by next of kin dependent on decedent. Where death is caused by the negligence of a fellow servant, no action can be maintained by the administrator. Mass. Stat. 1887, ch. 270, applies only to action by widow or next of kin. *Dacy v. Old Colony R. Co.*, 153 Mass. 112.

Mississippi: Widow (*Natchez Cotton Mill Co. v. Mullins*, 67 Miss. 672), or husband, if none, by child; by parent for death of child. (Where a statute gives one right of action to a representative for the wrong to the deceased, and another to the next of kin for injury sustained by them, one person uniting both capacities can recover on both grounds in one suit. *Illinois Central R. Co. v. Crudup*, 63 Miss. 291.)

Missouri and New Mexico: Husband or wife, or, if none, or if there be failure to sue within six months after death, minor child; or, if decedent was a minor and unmarried, father and mother, or survivor. In case of death or willful violation of minor's act, widow, lineal heirs or adopted children, or any person dependent on decedent for support.

Rhode Island: Personal representative, appointed within or without the state, for the benefit of widow and next of kin, but where there is a widow only, she may, at her option, sue any person having a direct pecuniary interest in the life. Under Rhode Island Pub. Stat. ch. 204, sec. 20, an action must be brought, not by the father of the son killed, but by the latter's administrator. *Goodwin v. Nickerson*, 17 R. I. 478.

Texas: All beneficiaries are entitled, or one or more for all; or, if there be failure to sue within three months, personal representative, unless requested otherwise by beneficiaries. Tennessee: Personal representative, but if he decline, widow and children who may use his name; also widow, or, if none, children. Although a widow has a preference under Mel. & V. Tenn. act, secs. 3130, 3132, she may waive it and administrator sue. *Webb v. East Tenn. R. Co.*, 88 Tenn. 119.

A non-resident mother has cause of action. *Augusta &c. R. Co. v. Glover*, (Ga.) 18 S. E. Rep. 406; *Chesapeake &c. R. Co. v. Higgins*, 85 Tenn. 620; *Luke v. Calhoun Co.*, 52 Ala. 115.

who, thereafter maintained it with the husband's consent, was not such an emancipation as to prevent the latter recovering for its death by negligence. *Elwood &c. R. Co. v. Ross*, 26 Ind. App. 258.

Under the Arkansas statute in force in Indian Territory, recovery by widow and next of kin may be had though death be instantaneous. *Missouri &c. R. Co. v. Elliot*, 102 Fed. Rep. 96.

Where right of action is vested in personal representative, widow cannot sue. *Major v. Burlington &c. R. Co.*, 115 Iowa, 309.

To permit a parent to recover as next of kin under Kan. Civ. Code, secs. 442, 442a, he must show that no personal representative has been appointed. *Atchison &c. R. Co. v. Judah*, 10 Kan. App. 577; s. c., 62 Pac. Rep. 711; *Atchison Water Co. v. Price*, 9 Kan. App. 884; s. c., 59 Pac. Rep. 677.

Before statutes were enacted pursuant to Ky. Const. sec. 241, that section authorized recovery by the personal representatives for the benefit of the estate. *Thomas v. Royster*, 98 Ky. 206.

So that they might recover though deceased left neither a widow or a child. *Lexington &c. R. Co. v. Huffman*, (Ky.) 32 S. W. Rep. 611.

An infant was killed by careless use of a firearm by a co-employé. The father was not allowed to recover under a statute, giving recovery for such injury to widow or minor child, nor under a statute giving right of action for death, which requires that personal representatives bring the suit, nor for loss of services of son during minority, since right to such services ceased with death of son. *Harris v. Kentucky &c. Co.*, (Ky.) 45 S. W. Rep. 94; s. c., 43 id. 462.

Recovery cannot be had from master for negligence of fellow-servant, either under Ky. Const. sec. 241 or Ky. St. sec. 6. *Link v. Louisville &c. R. Co.*, (Ky.) 54 S. W. Rep. 184.

An adult child is an "heir" within the meaning of a statute, giving recovery to a widow, heir, or personal representative. *Pennsylvania R. Co. v. Malia*, (Ky.) 49 S. W. Rep. 809.

Action for death given to "minor heirs," held not to survive their majority or death. *Hubervald v. Orleans R. Co.*, 50 La. Ann. 477.

Action for death by wrongful act (Me. Acts 1891, ch. 124), is confined to immediate death and does not extend to death resulting from injury. *Sawyer v. Perry*, 88 Me. 42.

Where action is given to personal representatives, father cannot sue. *Bligh v. Biddeford &c. R. Co.*, 94 Me. 499.

The statutes giving a right of action to a person's representative for injury causing his death, did not contemplate the case of an infant prematurely born by reason of an accident to the mother, and surviving but a few moments thereafter. *Dietrich v. Northampton*, 138 Mass. 14.

The dependence, in fact and not in law, is required to entitle one to maintain an action under Massachusetts employer's liability act, by instantaneous death of employé by employer's negligence. *Daly v. N. J., &c. Co.*, 155 Mass. 1.

No recovery under Mass. L. 1887 c. 270 for death not instantaneous, but accompanied by conscious suffering. *Martin v. Boston &c. R. Co.*, 175 Mass. 502.

"Widow or next of kin," construed to include a mother who is a non-resident alien. *Mulhall v. Fallon*, 176 Mass. 266.

Plaintiff cannot recover in statutory action for death, where deceased lived several hours after receiving his injuries, but an action for the injuries survives to personal representatives. *Jones v. McMillan*, (Mich.) 88 N. W. Rep. 206.

"Next of kin," construed not to include husband. *Watson v. St. Paul & C. R. Co.*, 70 Minn. 514.

Personal representative vested with cause of action held to have right to settle without the consent of the next of kin. *Foot v. Great Northern R. Co.*, 81 Minn. 493; s. c., 52 L. R. A. 354.

Mother may recover at common law if she be the only surviving parent, for the loss of his services from the time of the injury until his death, and for expenses incidental to his sickness. *Natchez & C. R. Co. v. Cook*, 63 Miss. 38.

The word "parent" construed as meaning father; hence, a mother cannot bring an action for the death of her child. *Amos v. Mobile & C. R. Co.*, 63 Miss. 509.

Where action for death by wrongful act is given to next of kin and death is instantaneous, personal representative cannot sue. *McVey v. Illinois C. R. Co.*, 73 Miss. 487.

Right of action given to "brother" or "sister," held not to apply to an illegitimate child. *Illinois C. R. Co. v. Johnson*, 77 Miss. 727; s. c. 51 L. R. A. 837.

Nor can mother sue for death of an illegitimate son. *Alabama & C. R. Co. v. Williams*, 78 Miss. 209; s. c., 51 L. R. A. 836.

A provision of an employer's liability act giving right of recovery to personal representatives for death by negligence of fellow servant held not to emit the statutory right of next of kin, where death is caused by negligence of master. *Bussey v. Gulf & C. R. Co.*, 79 Miss. 597.

Mother may recover for death of child by a former husband, but stepfather cannot. *Hennessey v. Bavarian Brew. Co.*, 145 Mo. 104; s. c., 41 L. R. A. 388.

Statutory action allowed where death was instantaneous. *Metz v. Chicago & N. W. R. Co.*, 85 Fed. Rep. 180.

Right of action for death by negligence given by the statute of Montana to heirs is joint and does not permit mother to sue alone. *Whelan v. Rio Grand & C. R. Co.*, 111 Fed. Rep. 326.

The right of action for death by negligence given to personal representative on behalf of widow and next of kin, is not an asset of deceased's estate and need not be inventoried. It belongs to the beneficiaries. *Friend v. Burleigh*, 53 Neb. 674.

Where death was the result of injuries sustained, representatives may recover in statutory action only where deceased might have recovered had he lived. *Chicago & C. R. Co. v. Zernecke*, 59 Neb. 689.

Contributory negligence of beneficiary, no defense to the statutory action for death. *Consolidated & C. R. Co. v. Hone*, 59 N. J. L. 275.

Right to damages due statutory beneficiary survives him and is an asset to be disposed of by will or statute of distributions. Where the statutory action is granted to personal representatives of deceased, death of beneficiary does not abate it and his administrator should not be made a party to the record. *Cooper v. Shore Electric Co.*, 63 N. J. L. 558.

Under a statute vesting the right of action in the personal representative a complaint by widow in her own right is demurrable. *Howell v. Commissioners*, 121 N. C. 362.

The action is defeated by contributory negligence of deceased. *Cameros v. Great Northern R. Co.*, 8 N. D. 618.

Or of beneficiary. *Wolf v. Lake Erie & C. R. Co.*, 55 Oh. St. 517; s. c., 38 L. R. A. 812.

Administrator's letters need not show that he was appointed to bring suit. *Solar Refining Co. v. Elliott*, 15 Oh. C. C. 581.

A statute giving right of action to "personal representatives" construed to include executors. *Wittman v. Cincinnati &c. R. Co.*, 10 Oh. S. & C. P. Dec. 503.

Where deceased was an illegitimate child, no recovery was allowed the mother. *Harkins v. Philadelphia &c. R. Co.*, 15 Phila. 286; *Dickenson v. Northeastern R. Co.*, 2 Hurl. & Colt. (Exch.) 734.

A woman, married to deceased after the injury, causing death, held entitled to the statutory damages as widow. *Gross v. Electric Traction Co.*, 180 Pa. St. 99; aff'g s. c., 5 Pa. Dist. 294.

Under a statute giving the action first of widow and, if none, then to children, a complaint by children showing a widow living, held demurrable. *Snyder v. Philadelphia &c. R. Co.*, 9 Pa. Dist. 3.

Deceased's mother, allowed to discontinue a suit for his death begun by the father. *Doran v. Avoca Coal Co.*, 9 Kulp. 479.

It is not necessary that the wife, husband, parent or children should have any legal claim for support upon the person killed, under South Carolina Gen. Stat., sec. 2184. *Petrie v. Columbia R. Co.*, 29 S. C. 303.

Statute, giving action for death by negligence to "widow, heir, or personal representative," construed to give no personal remedy where deceased left neither widow or child. *Lintz v. Holy Terror Min. Co.*, 13 S. D. 489.

A non-resident widow has a cause of action for injuries, causing the death of her husband, in the state of Tennessee, even though he was a non-resident. *Chesapeake &c. R. Co. v. Higgins*, 85 Tenn. 620.

Under a statute providing that the personal representative might sue for benefit of widow and next of kin, and, if he refused, widow and children might bring it in his name, father and mother can not sue and action for their benefit must be brought by the personal representative. *Holston v. Coal and Iron Co.*, 95 Tenn. 525; *Railroad v. Johnson*, 97 id. 667, s. c., 34 L. R. A. 442 (so of husband).

So long as marital relation exists a wife may recover for the negligent killing of her husband, although she had been living apart from him. *Dallas &c. R. Co. v. Spicker*, 61 Tex. 427.

A married daughter and son in nowise supported by parent cannot recover for his death. *St. Louis &c. R. Co. v. Johnston*, 78 Tex. 536.

A posthumous child has a cause of action for death of father, under Texas Rev. Stat. sec. 2903. *Nelson v. Galveston R. Co.*, 78 Tex. 621. He is a surviving child. *Texas R. Co. v. Robertson*, 82 id. 657; *Tiffany Death by Wrongful Act*, sec. 85.

Statutory action allowed where death is instantaneous. *Sterenbergh v. Mailhos*, 99 Fed. Rep. 43.

Where statute allows an action to be brought by all the parties interested, or by one for the benefit of all, one has authority to sue for benefit of all without their knowledge or consent. *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229.

Contributory negligence held a defense to a statutory action for death. *Robinson v. Detroit &c. R. Co.*, 73 Fed. Rep. 883.

An amendment of a statute, giving damages for death to family, which allows suit to be brought by the "widow, or if there be no widow, by the children," construed to regulate and not change beneficiaries. *Felton v. Spiro*, 78 Fed. Rep. 576.

Recovery for death may be had under Ky. Stat. sec. 6, though the result of negligence of superior fellow servant. *Cincinnati &c. R. Co. v. Cook*, (Ky.) 67 S. W. Rep. 383.

In the Kentucky constitution, giving action for death by negligence the word negligence is construed to mean actionable negligence in its ordinary legal acceptance. *Singleton v. Felton*, 101 Fed. Rep. 506.

The fraudulent sale of a horse by one who knows that it has glanders to a person ignorant thereof will render the former liable for the death of the latter, where such disease was contracted as a natural and probable consequence of the condition of the horse. *State, Hartlove v. Fox* (Md.) 26 L. R. A. 267.\*

Death of husband due to neglect and maltreatment in hospital of a voluntary unincorporated association of which he was a member held to give no right of action against the association. *Martin v. Northern &c. Asso.*, 68 Minn. 521.

One who induces or encourages another to commit a wrongful act resulting in the death of a third person is liable under Missouri Rev. Stat. 1879, sec. 2122. *Gray v. McDonald*, 104 Mo. 303.

Where a steamboat company, after having landed a person at an unsafe place, turned off the steamer lights so that he fell into the river and was drowned, under Missouri Rev. Stat. 1879, sec. 2121, a cause of action is given for death by injury from negligence of master, employé, etc., while running or managing a steamboat. *Biddenberg v. Charles &c. Co.*, 108 Mo. 394.

One who induced another already helplessly intoxicated to drink liquor to such a degree as to cause his death will be liable to next of kin. *McCue v. Klein*, 60 Tex. 168; *Fink v. Garman*, 40 Pa. St. 95.

A statute, giving recovery against carrier for the death of "any person whether a passenger or not," held not to apply to death of an employé caused by negligence of a fellow servant. *Miller v. Coffin*, 19 R. I. 164.

No recovery for death can be had where deceased was shot in a fit of temporary insanity induced by his own use of unnecessary violence. *Jenkins v. Hankins*, 98 Tenn. 545.

A master is liable for the death of a minor son serving as fireman without father's consent. *Gulf &c. R. Co. v. Rediker*, 75 Tex. 310.

A corporation is "a person" liable to a statutory action for death by negligence. *Rigdon v. Temple Waterworks*, 11 Tex. Civ. App. 542; *Lynch v. South-western Teleg. &c. Co.*, (Tex. Civ. App.) 32 S. W. Rep. 776; *Fleming v. Loan Agency*, 87 Tex. 238.

Otherwise as to a municipal corporation. *Searight v. Austin*, (Tex. Civ. App.) 42 S. W. Rep. 857.

Statutory liability for death by negligence construed not to extend to negligence of a servant. *Lipscomb v. Houston &c. R. Co.*, (Tex.) 64 S. W. Rep. 923; s. c., 55 L. R. A. 869; modifying s. c., 62 S. W. Rep. 954; *Cole v. Parker*, 66 id. 135.

Liability for death by negligence does not extend to the receiver of a private corporation. *Parker v. Dupree*, (Tex. Civ. App.) 67 S. W. Rep. 185.

The master of a vessel not guilty of a willful or malicious act was not liable for the death of an employé, as his acts were those of his principal. *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

A statute making municipality liable for destruction of property by mobs, does

\* NOTE.—*Marsh v. Webber*, 13 Minn. 109, 114; *Jeffrey v. Bigelow*, 18 Wend. 518; *French v. Vining*, 102 Mass. 132. See "Manufacturers and Vendors."

administratrix held a bar to an action for the death. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339.

And no recovery for death can be had in such action. *Edwards v. Gimbel*, 202 Pa. St. 30.

The *bona fide* action of widow with the statutory right to bring the suit, in settling, binds all parties. *Smalling v. Kreech*, (Tenn.) 46 S. W. Rep. 1019; *Prater v. Marble Co.*, 105 id. 496.

The recovery of medical attendance, expenses and loss of service does not prevent recovery for damages for death. *Barley v. Chicago &c. R. Co.*, 4 Biss. 430.

## V. Jurisdiction.

The statute giving action for death from negligence does not apply when the injury is committed in a foreign country although by the negligence of a corporation chartered by the laws of this state. The cause of action under the statute is a new one and not the revival of one possessed by the deceased. *Whitford v. The Panama R. Co.*, 23 N. Y. 465, aff'g judg't for def't on demurrer.

An action for the death of a citizen of this state on the high seas, on board a vessel hailing from, and registered in a port, within the state and employed by the owners in their own business, through whose negligence the death results, *may be maintained in this state*. *McDonald v. Mallory*, 77 N. Y. 547, overruling demurrer to complaint.

An action is allowed in this state for the negligence of the defendant in another state, causing death, when it appears that such cause of action is given by law in the latter state. *Leonard v. California S. N. Co.*, 84 N. Y. 48, aff'g judg't for pl'ff, distinguishing *Richardson v. N. Y. C. R. Co.*, 98 Mass. 85; *Woodward v. M. S. & N. I. R. Co.*, 10 Ohio St. 101; *Needham v. G. T. R. Co.*, 38 Vt. 295; *Allen v. P. & C. R. Co.*, 45 Md. 41; *S. R. & D. R. Co. v. Lacy*, 43 Ga. 461; *Marcy v. Marcy*, 32 Conn. 308.

**From opinion.**—"It is held that under these provisions of the statute of Connecticut an action lies in that state in favor of the representatives of a deceased party to recover damages. *Murphy v. N. Y. & N. H. R. Co.*, 30 Conn. 184; s. c. 29 id. 496; *Soule v. N. Y. & N. H. R. Co.*, 24 id. 575. The construction thus placed by the courts of another state upon the statutes of that state should be followed, and is controlling in the tribunals of such state. *Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 id. 218.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory (Bouv. L. Dic. Personal Actions, Transitory Actions); and these actions may be brought anywhere, and are governed by the *lex fori*. (Bouvier: Story on Conflict of Laws, sec. 307, a. e.) The cause of action which the statutes of Connecticut created is transitory in its nature, and, unless excepted from the



general rule as to the place where such actions may be brought, can be enforced in the courts of this state or any other forum, provided the laws of that forum do not forbid its maintenance. In this state it is held that actions will lie for injuries to the person, committed outside of the territorial limits of the state. In *Smith v. Bull*, 17 Wend. 323, it was decided that an action for an assault and battery, committed in the state of Pennsylvania, could be maintained in any court of common pleas of this state. The rule, no doubt, is that all common law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other state, and that the injured party could have recovered there had the action been brought in such state. The remedy in such cases is given by the courts of one country or state upon the principle of comity which is due by one sovereign state or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this state, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this state but in a foreign country, unless it is proved that the laws of that country are of a similar character. *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. The Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547.

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The doctrine that an action will lie when the common law, or the statutes of different states or countries correspond, is sustained by numerous authorities. *Madrazo v. Willea*, 3 B. & Ald. 353; *Melan v. Duke de Fitz-James*, 1 Bos. & Pul. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 *Smith's Lead. Cas.* 963; *Shipp v. McCraw*, 3 *Murphy* (N. C.) 463; *Wall v. Hoskins*, 5 *Ired. Law* (N. C.) 177; *Stout v. Wood*, 1 *Blackf. (Ind.)* 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death happening in the state of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other state courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. N. Y. C. R. R. Co.*, 98 *Mass.* 85, the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different states were not of a similar nature, and the common law rule prevailed in Massachusetts. The case, therefore, is not analogous. In *Woodward v. Mich. So. & N. R. Co.*, 10 *Ohio St.* 121, it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representative of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under statute of Illinois or whether an administrator appointed under the laws of Illinois, might not maintain such action.

The question now presented is not fully considered, and, therefore, the decision has no force as a case in point. In *Needham v. G. T. Railway Co.*, 38 *Vt.* 295,

the death occurred in the state of New Hampshire, and there was no law existing, or alleged to exist, which gave the plaintiff a right of action. In *Allen v. Pitts. &c. R. R. Co.*, 45 Md. 41, there was no allegation that there was any statute in the state where the death was caused creating a cause of action, and it was held that, in the absence of any proof, there was no presumption in favor of a positive statute law of the state, but it must be presumed that the common law prevailed. The case, therefore, is not in point. In *Selma R. & D. R. R. Co. v. Lacy*, 43 Ga. 461, the same general state of facts existed, and the same rule was recognized."

An action under the statute for negligent killing, has no extra-territorial jurisdiction, so there may be no recovery for an injury in another state, without proving a similar statute of that state. *Debevoise v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 377, aff'g judg't of nonsuit.

Citing *Whitford v. Panama R. Co.*, 23 N. Y. 464; *McDonald v. Mallory*, 77 id. 546; *Leonard v. Columbus Steam Navigation Co.*, 84 id. 48.

Must show that cause of action arose within jurisdiction of the court. *Hegerich v. Keddie*, 99 N. Y. 258.

Although a non-resident may be appointed an administrator in this state, he does not, by the appointment, become in any sense a resident.

Such an administrator, therefore, cannot maintain an action under the Code of Civil Procedure, (sec. 1780) against a foreign corporation upon a cause of action for a tort which did not arise within this state.

In an action to recover damages for a death caused by defendant's negligence, the cause of action is for a tort.

As the question of jurisdiction in such an action relates to the subject-matter of the action, jurisdiction cannot be conferred upon the court by any consent or stipulation of the parties, and the objection may be taken at any stage of the action, and *it seems* the court may *ex mero moto*, when attention is called to the facts, refuse to proceed further and dismiss the action.

The distinction made between residents and non-residents by said provision of the Code is not repugnant to the provision of the Federal Constitution, (sec. 2, art. 4), declaring that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." *Robinson v. Oceanic S. N. Co.*, 112 N. Y. 315.

The complaint showed, that the plaintiff was a resident of New York, and the defendant a corporation thereof operating a line of railway, extending into the state of Pennsylvania, upon which extension the husband of the plaintiff was killed through the negligence of the defendant. The statute of the latter state gives the widow, for her own benefit and that of the children of the decedent, a cause of action similar in import to that given by the law in this state. Held, that the widow could recover as such in this state, but not beyond the amount limited by the

state of New York. *Wooden v. W. N., N. Y. & P. R. Co.*, 126 N. Y. 10, aff'g judg't overruling demurrer to complaint.

Administratrix, through appointment in New York, of person killed in New Jersey by a foreign corporation may recover judgment therefor here, as the New Jersey statute and that of this state both authorize recovery therefor. *Stallnecht v. P. R. R. Co.*, 13 Hun, 451, aff'g order overruling demurrer to complaint.

Section 1902 of the Code of Civil Procedure is not covered by the express terms of section 2702 thereof, but by the broad powers conferred by the latter section upon ancillary representatives; it is evident that the legislature intended to give them every right of action conferred upon executors or administrators except those specially excepted. *Lang v. Houston &c. R. Co.*, 75 Hun, 151; s. c. aff'd, 144 N. Y. 717.

Although the statutes of the various states, giving causes of action in case of death of a person caused by the wrongful act of negligence of another, have no extra-territorial force, the courts of the state of New York, as a matter of comity, where the statutes of the state in which the cause of action arises and that of the state of New York are similar, and where they have jurisdiction of the defendant, will furnish the machinery to prosecute the claim, but it is the statute of the state wherein the cause of action arose and not that of the state of New York which the courts of the latter state will enforce in such cases, and an action under such statute is maintainable only by the person who, by the terms of the statute of the state wherein the cause of action arose, is authorized to maintain the same. *Selma R. & D. R. Co. v. Lacey*, 49 Ga. 106; *Beldin v. Black Hills & St. Pierre R. Co.*, 52 Am. & Eng. R. R. Cases 624; *Illinois Central R. Co. v. Hunter*, 70 Miss. 471.

The question of the capacity of a plaintiff to sue can be raised only by answer or demurrer, and if not so raised it is deemed to have been waived, but the question whether a complaint states facts sufficient to constitute a cause of action can be raised at any time during the trial of the action and need not be presented either by answer or demurrer. *Stone v. The Groton Bridge &c. Co.*, 77 Hun, 99.

In an action in New York for death in Canada, the statutes of Canada determine the substantive rights of the parties and the statutes of New York, the details of procedure. The interest granted by New York Code Civ. Proc. sec. 1904 was not allowed when the statutes of Canada did not provide for it. *Kiefer v. Grand Trunk &c. R. Co.*, 12 App. Div. 28; *Boyle v. Southern R. Co.*, 36 Misc. 289.

Release executed by the administrator prior to his appointment is inoperative. *Snedeker v. Snedeker*, 47 App. Div. 471; s. c. aff'd, 164 N. Y. 58.

A non-resident alien permitted to bring the statutory action. *Szymanski v. Blumenthal*, (Del.) 52 Atl. Rep. 347.

See, also, *Kelleyville Coal Co. v. Petraytis*, 95 Ill. App. 635; s. c. aff'd, 195 Ill. 215.

Action cannot be maintained in Georgia without allegation that laws of Alabama and Georgia are the same respecting negligent killing. *Selma R. Co. v. Lacy*, 43 Ga. 461.

No evidence was given that law of Indiana authorized action, where injury was received, hence common law was presumptively in force. *Chicago &c. R. Co. v. Schroeder*, 18 Ill. App. 328.

Right of action exists only by law of place where injury happened. Hence, where killing occurred in Missouri, proof that action could be maintained in that state was necessary on a trial in state of Iowa. *Hyde v. Wabash &c. R. Co.*, 61 Iowa, 441.

Citing *State v. Pittsburg &c. R. Co.*, 45 Md. 41; *Hover v. Penn. R. Co.*, 25 Oh. St. 667.

Where a right of action accrues by virtue of a statute of any state, the action may be maintained in the courts of any other state where the statutes relating to the same subjects are of similar import, though they be not precisely the same. It would seem to be sufficient, if the action be not contrary to the public policy or law of the state of the tribunal. Hence, where an administrator had a right of action, under the statute of Illinois for death of his intestate by negligence of defendant, the action would be maintained in Iowa. *Morris v. Chicago &c. R. Co.*, 65 Iowa, 727.

See *Boyce v. Wabash R. Co.*, 63 Iowa, 70.

From opinion.—“We think that it has been generally held that where a right of action accrues by virtue of a statute of any state, the action may be maintained in any other state, if not contrary to the public policy or law of the place where the suit is brought. See *King v. Sarria*, 69 N. Y. 24; *Phillips v. Eyre*, L. R. 62 B. 1; *Wall v. Hoskins*, 5 Ired. Law 177; *Herrick v. Minneapolis &c. R. Co.*, 31 Minn. 11; *Boyce v. Wabash R. Co.*, 63 Iowa, 70. \* \* \* It is not to be denied that there are cases not in accord with the rule of those above cited. See *Woodward v. Michigan S. & N. I. R. Co.*, 10 Oh. St. 121; *Richardson v. New York Cent. R. Co.*, 98 Mass. 80, and *McCarthy v. Chicago P. I. & P. R. Co.*, 18 Kan. 46.”

Courts of Kansas refused to enforce a statute of New Mexico, penal in its nature and giving recovery for death by negligence, as to persons who could not recover, if the injury had been received in Kansas. *Dale v. Atchison &c. R. Co.*, 57 Kan. 601.

Likewise of the Missouri statute. *Matheson v. Kansas City &c. R. Co.*, 61 Kan. 667.

The fact that a corporation was organized in both states of Massa-

achusetts and Connecticut cannot affect the liability for an accident occurring in the latter state, as there is no statute in Connecticut whereby the action survives or is created. *Davis v. N. Y. R. Co.*, 143 Mass. 301.

Action for death occurring in South Dakota permitted in Minnesota. *Nicholas v. Burlington &c. R. Co.*, 78 Minn. 43.

An administrator may enforce, in Mississippi, a cause of action arising and held in the state of Tennessee, for the wrongful killing in the latter state, although it could not have been maintained in Tennessee had it occurred in Mississippi. *Illinois R. Co. v. Crudup*, 63 Miss. 291.

The Kansas statute, enforced in Missouri, under a statute permitting parties to sue on causes of action accruing to and enforceable by them in any state or territory. *Riley v. Grand Island Receivers*, 72 Mo. App. 280.

Action held unenforceable where brought, if unenforceable where accident occurred. *Ott v. Lake Shore &c. R. Co.*, 18 Oh. C. C. 395.

The courts of Ohio enforce the laws of another state only when that state would enforce its law in similar cases. *Wabash &c. R. Co. v. Fox*, 20 Oh. C. C. 440.

A non-resident alien cannot bring the statutory action in Pennsylvania. *Deni v. Pennsylvania R. Co.*, 181 Pa. St. 525; aff'g s. c., 6 Pa. Dist. 15.

An action may be maintained in Pennsylvania, upon process served in that state, to recover damages in an action *ex delicto*, for negligence causing death, occurring in New Jersey, when statutes of the two states are similar. While a foreign statute has no extra territorial force, rights under it, not contrary to the policy of Pennsylvania, will, by comity, be enforced. *Knight v. West Jersey R. Co.*, 108 Pa. St. 250.

An administratrix appointed in New York can maintain an action in that state for injury received in New Jersey causing death, the right to which arises under the New Jersey statute. *Dennick v. R. Co.*, 103 U. S. 11.

**From opinion.**—"The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the circuit court of the United States for the northern district were competent to try such a case when the parties were properly before it. *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Bl. 983, 1055; *McKenna v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law of the state where the transaction occurred, is it to be said that it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute

was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other state of the Union? The contrary has been held in many cases. See *ex parte Van Riper*, 20 Wend. (N. Y.) 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Baxt. (Tenn.) 341; *Great Western Railway Co. v. Miller*, 19 Mich. 305. \* \* \*

We are aware that *Woodward v. Michigan Southern & Northern Indiana Railroad Co.*, (10 Oh. St. 121), asserts a different doctrine, and that it has been followed by *Richardson v. New York Central Railroad Co.*, 98 Mass. 85, and *McCarthy v. Chicago, Rock Island & Pacific Railroad Co.*, 18 Kans. 46. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the court of appeals of New York, in the case of *Leonard, Administrator v. The Columbia Steam Navigation Co.* not yet reported, but of which we have been furnished with a certified copy."

A right given by the statutes of one state such as a right to sue and recover for the death of a person caused by negligence, will be recognized and enforced in the courts of another state, whose laws give a like right under the same facts. *Texas & Pacific Railway Co. v. Cox*, 145 U. S. Sup Ct. 593.

In *Willis v. Missouri R. Co.*, 61 Tex. 432, it was held by the Supreme Court of Texas that suit could not be brought in that state for injuries resulting in death inflicted in the Indian territory, where no law existed creating such a right of action. The opinion goes somewhat further than this in expression, but in that regard has not been subsequently adopted.

In *Texas & P. R. Co. v. Richards*, 68 Tex. 375, it was said that while there was some conflict of decision, it seemed to be generally held that a right given by the statutes of one state would be recognized and enforced in the courts of another state, whose laws gave a like right under the same facts. In *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, the Supreme Court declined to sustain a suit in Texas by a widow for damages for the negligent killing of her husband in Arkansas, for the reason that the statutes of Arkansas were so different from those of Texas in that regard that jurisdiction ought not to be taken, but the court indicated that it would be a duty to do so in transitory actions where the laws of both jurisdictions were similar. The question, however, is one of general law; and we regard it as settled in *Dennick v. Central R. Co. of New Jersey*, 103 U. S. 11.

Where a statutory cause of action for death by negligence arises in one state it may be enforced in any other, where the statute or policy of the law is substantially the same, though the beneficiaries may differ. *Stewart v. Baltimore &c. R. Co.*, 168 U. S. 445.

Right of action founded on death arises where the injury occurred, and not where the administrator was appointed. *Lung Chung &c. v. Northern Pac. R. Co.*, 19 Fed. Rep. 254.

The right to recovery is governed by statutes of the state where the negligence and death occurred, though the deceased and those entitled to recover are citizens of another state, and, when not inconsistent with

its laws, may be enforced in another state. *Davidow v. Pennsylvania R. Co.*, 85 Fed. Rep. 943.

Non-resident aliens held not entitled under an act allowing next of kin to sue. *Brannigan v. Union Gold Min. Co.*, 93 Fed. Rep. 164.

An Indiana administrator allowed to sue in Ohio for damage from death by negligence. *Cincinnati &c. R. Co. v. Thiebaud*, 114 Fed. Rep. 918.

Civil action given to next of kin by laws of Mexico, though there classed as a negligent crime, enforced in Texas. *Mexican &c. R. Co. v. Slater*, 115 Fed. Rep. 593.

Where the statutes of one state vested the right of action in heirs and that of another, in personal representative, a complaint in the former, for death in the latter, by an heir, held demurrable. *Thorpe v. Union P. R. Co.*, 24 Utah, 475.

If the action is not maintainable where accident occurred, it cannot be enforced where suit is brought. *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109.

Action accrued in province of Quebec for failure of defendant to comply with law of that province, as to the construction of lawful crossings on a highway. The action, although transitory, is entirely dependent on the foreign law, and that such law must be fully set out to enable the court to know whether the cause of action exists, and the legal effect cannot be plead. *McLeod v. Conn. &c. R. Co.*, 58 Vt. 727.

Citing *Kennedy v. Morgan*, 57 Vt. 48; *Fay v. Kent*, 55 id. 557.

See, also, *S. P., Bruce's Adm'r v. Cincinnati R. Co.*, 83 Ky. 174; *Ill. Cent. R. Co. v. Crudup*, 63 Miss. 291.

A statute giving cause of action for a "death caused in this state," construed to include death outside of state from accident in the state. *Rudiger v. Chicago &c. R. Co.*, 94 Wis. 191.

#### ADMINISTRATOR—APPOINTMENT.

Suit may be brought by a temporary administrator. *Louisville &c. R. Co. v. Chaffin*, 84 Ga. 519; *Houston &c. R. Co. v. Cook*, 60 Tex. 403.

Also by a foreign executor or administrator in a jurisdiction where statutory power is given him to do so. *Union Pac. R. Co. v. Shacklet*, 119 Ill. 232; *Jeffersonville R. Co. v. Hendricks*, 26 Ind. 228; 41 id. 48.

But not otherwise. *Tiffany's Death by Wrongful Act*, sec. 110.

A claim for damages for death are not such assets as will authorize a probate court to appoint an administrator, where such appointment depends upon the existence of assets of the deceased. So, held under Kansas statute in the case of the death of a non-resident (*Jeffersonville R. Co. v. Swayne's Adm'r*, 26 Ind. 477; *Perry v. St. Joseph R. Co.*, 29

Kas. 420; *Union Pac. R. Co. v. Dunden*, 37 id. 1; *Ill. R. Co. v. Cragin*, 71 Ill. 177, where the administrator was appointed in Iowa upon the estates of a resident of Illinois, who has no property in the former state, and the action was brought in Illinois). In Iowa, Minnesota and Nebraska it is held that, as the cause of action is given to the personal representative, the power to appoint is implied. *Tiffany's Death by Wrongful Act*, sec. 111.

The question of the power to appoint an administrator may be inquired into (*Union Pac. R. Co. v. Dunden*, 37 Kas. 1), but such appointment is presumptively authorized, if made. *Jacob's Adm'r v. Louisville &c. R. Co.*, 10 Bush. 263. Such appointment may be directly attacked by the alleged wrong doer, when based upon a claim against him. *Tiffany's Death by Wrongful Act*, sec. 112.

When administrator would have right of action in state of Iowa for collection of a claim, the circuit court had jurisdiction to appoint him an administrator for collection of claim, no matter where decedent resided at his death. *Morris v. Chicago &c. R. Co.*, 65 Iowa, 727. See, *Boyce v. Wabash R. Co.*, 63 id. 70.

A surrogate, in issuing letters of administration, has authority, and it is within his discretion, to limit the powers conferred upon the administrator.

Where, therefore, such letters contain this clause, "these letters are issued with limited authority to prosecute only, and not with power to collect or compromise," held, that the surrogate had power to issue the limitation.

It seems, that if a limitation was in excess of the powers of the surrogate, it did not invalidate the letters but was at most only an irregularity.

It seems also (Miller, J., Danforth and Finch, JJ., concurring). that the objection is one that may not be raised collaterally, in a suit brought by the administrator. *Martin v. Dry Dock &c. R. Co.*, 92 N. Y. 70.

Foreign administrator allowed to sue in Federal Court, though beneficiaries resided where accident happened. *Popp v. Cincinnati &c. R. Co.*, 96 Fed. Rep. 465.

#### (a). JURISDICTION—INJURIES ON HIGH SEAS, PORTS, BAYS. &c.

Long Island Sound is the subject of territorial dominion; being an inland arm of the sea, with no outlet to the ocean, except by a channel within cannon range on either side.

If the sound was not embraced in the royal grant to the Duke of York, the king retained it as the property of the crown, until it was



divested by the revolution; and his dominion over its waters then devolved on the states of New York and Connecticut.

So far as these waters are wholly within this state, the territorial authority of New York, subject to the public right of navigation, extends from shore to shore; and so far as the two states are co-terminous, it extends to the middle of the sound, if not to a line running directly from Fisher's Island to Lyon's Point.

The cession to the federal authorities of admiralty and maritime jurisdiction, over our inland seas and bays, was not an alienation of their waters, or of general jurisdiction over them; and in respect to these, the states retain unimpaired the residuary powers of legislation and their rights of territorial dominion.

The counties and towns which are bounded generally on the sound, comprehend within their limits, for the purposes of ordinary civil and criminal jurisdiction, the waters between their respective shores and the exterior water line of the state. *Mahler v. The Norwich & N. Y. Transportation Co.*, 35 N. Y. 452.

The supreme court of this state had jurisdiction of an action against the owners of a steamboat, navigating the waters of Lake Champlain, for causing the death of plaintiff's intestate by negligence, while a passenger on said boat within this state.

This jurisdiction is not taken away by the act of Congress of 1851, limiting the liability of shipowners, &c. 9 U. S. Stat. at Large, 635. Where the injury is confined to one party, the limited liability prescribed by said act (sec. 3) can be equally as well enforced in a common law action as though no such limit had been imposed. *Dougan v. Champlain Transportation Co.*, 56 N. Y. 1.

The jurisdiction of actions to enforce common law remedies for breaches of maritime contracts or for maritime torts saved to the state courts by the judiciary act of 1789 (1 U. S. Stat. at Large, 76, sec. 9), is not limited, restricted or qualified by the act of Congress of 1851, "to limit the liability of shipowners," etc. (9 U. S. Stat. at Large, sec. 635), unless appropriate proceedings are taken under said statute by a party interested, to avail himself of the benefit thereof.

In such an action the provisions of said act of 1851 can only be interposed to limit the plaintiff's recovery to the modified liability prescribed therein. Secs. 3, 4.

Plaintiff employed one "C.," who was the owner of a scow, to transport thereon cattle and horses across the St. Lawrence river. "C." employed defendant's tug to tow the scow, with the knowledge and assent of plaintiff, he agreeing to pay a portion of the contract price; by the unskillful management of the tug the scow was drawn under water and

some of the cattle lost. Held, that plaintiff could maintain an action to recover his damages, and that the Supreme Court of this state had jurisdiction of such action. *Baird v. Daly*, 57 N. Y. 236.

Where death occurs on high seas, the action may be maintained in the courts of the state in a port of which the vessel is owned and registered. *McDonald v. Mallory*, 77 N. Y. 546, rev'g 44 N. Y. Supreme Court, 80; *Crapo v. King*, 16 Wall. 610, rev'g 45 N. Y. 86.

Where death occurs on navigable waters within state of Rhode Island, the courts of Rhode Island had jurisdiction. *Am. S. Co. v. Chase*, 16 Wall. 522; 9 R. I. 419.

See *Sherlock v. Alling*, 93 U. S. 99; *Mahler v. Norwich Trans. Co.*, 35 N. Y. 352; *Dougan v. Champlain Trans. Co.*, 56 id. 1; *Opsahl v. Judd*, 30 Minn. 126.

As to jurisdiction of Federal Courts, suits in admiralty, &c. see Tifany's Death by Wrongful Act, sec. 203.

In an action for the death of one by the act of another, committed abroad, it is incumbent on the plaintiff to prove that such death was an actionable wrong by the law of the place where the act was committed. Ports, bays and harbors to the distance, at least, of a marine league from the shore are within the territorial jurisdiction and subject to the municipal law of the sovereign of the adjacent land. Accordingly, held, that, in an action for the death of one by the act on board of a vessel lying in the port of a foreign country, at a point not more than two miles from the shore, a failure by the plaintiff to show that, by the law of that country, such death was an actionable wrong, is fatal to a recovery.

Where a servant went overboard a ship and was drowned, freedom from contributory negligence must be proved. *Geoghegan v. The Atlas Steamship Co.*, 3 Misc. 224, rev'g judg't for pl'ff. (Common Pleas of N. Y.)

**From opinion.**—"The action is by an administratrix for damages from the death of her intestate, who by the alleged negligence of the defendant, fell overboard from its steamer, a British vessel, in the bay of Savanilla, United States of Columbia.

That the actionable quality of an alleged wrong depends upon and is determined by the municipal law of the place of the transaction; that in a suit here proceeding upon an alleged wrong committed abroad, the court, in the absence of evidence to the contrary, will presume the common law to be the law of the locality; that if by the principles of the common law, such alleged wrong would not be the subject of action for private redress, the plaintiff, in order to recover, must prove it to be so by the law of the place of the transaction; that by the common law the death of a human being is not the subject of a civil action, and that, by consequence, whoever seeks reparation in our courts for the death of another abroad, must establish by affirmative evidence that such death is an actionable wrong by the law of the place of the occurrence, are now elementary

principles in the jurisprudence of the state of New York. (*Whitford v. Panama R. Co.*, 23 N. Y. 465; *McDonald v. Mallory*, 77 id. 546; *Leonard v. Columbia S. N. Co.*, 84 id. 48; *Wooden v. Western New York & P. R. R. Co.*, 126 id. 10.)

Incontestably the decision of the appeal, in one of its aspects, is suspended upon the application of these principles to the case in controversy. Counsel for the respondent so conceded on the trial, and accordingly, maintaining that the *locus* of the transaction was a British vessel on the high seas, and invoking the recognized rule that the law of the flag is the law of a vessel so situate (*McDonald v. Mallory*, 77 N. Y. 546), he introduced in evidence Lord Campbell's act, by which the death of a human being by the wrongful act of another is made the subject of a civil action. The appellant challenged the contention, and assuming the position that as it appeared by uncontroverted proof that the act in litigation was committed within the territorial jurisdiction of the United States of Colombia, and as no evidence was adduced that by the law of that country the alleged wrong is actionable, he moved to dismiss the complaint.

We are of the opinion that the ground upon which the appellant stood is impregnable; and that the learned trial judge erred in denying the motion.

When the plaintiff rested it was in evidence by the log book, that at the time of the accident, the vessel was in the harbor of Savanilla, where the port authorities were received, where passengers and mails were discharged, and where the cargoes were delivered and taken in. A witness for the plaintiff testified: "I couldn't tell how far the shore was from the ship, when this accident happened; I couldn't calculate the distance. We could see the shore from the ship, but I couldn't tell the distance. I should think it wouldn't be three miles." On part of the defendant the evidence as to the locality of the vessel was, that "she was in the bay of Savanilla, a mile and three-quarters or two miles from the shore."

Upon this uncontested state of fact, the question was one of law for decision by the court, whether at the time of the accident the vessel was on the high sea, as claimed by the plaintiff, or within the territory of the United States of Colombia, as asserted by the appellant.

That the vessel was not on the high sea, but was within the dominion and subject to the law of the United States of Colombia, is, upon the authority of the publicists, an obvious and undeniable proposition. "The maritime territory of every state extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands belonging to the same state. The general usage of nations superadds to this extent territorial jurisdiction, a distance of a marine league, or as far as a cannon shot will reach from the shore, all along the coast of the state. Within these limits its rights of property and territorial jurisdiction are absolute, and exclude those of every other nation." Lawrence's *Wheaton*, part II, chap. iv, sec. 6, p. 320. "The exclusive dominion of a state unquestionably extends to those portions of the sea adjoining its territory embraced by harbors, gulfs, bays and estuaries, and into the open sea to the distance of a marine league." 1 Kent's *Comm.* 29, 30, marginal pages.

"The ports and roadsteads are unquestionably a part of the territory and subject to the exclusive dominion of the state to which they belong, to the same extent as the land itself. They are governed in all respects by the municipal law." *Pon. Inter. Law*, sec. 145.

And the same doctrine is promulgated by the tribunal in this country of highest authority on the subject. "Between nations the minimum limit of the

territorial jurisdiction of a nation over tidewaters is a marine league from its coast." *Manchester v. Massachusetts*, 139 U. S. 240, 258. "It is part of the law of civilized nations that when the merchant vessel of one country enters the port of another for the purpose of trade it subjects itself to the law of the place to which it goes unless by treaty or otherwise the two countries have come to some different understanding or agreement." *Wildenhaus' Case*, 120 U. S. 1, 11.

"Upon a critical examination of the cases cited by the respondent, we find nothing to the contrary of the proposition that the rights of the parties to this litigation are to be determined by the law of the United States of Colombia.

The act upon which the suit proceeds having been committed abroad, the burden was on the plaintiff to prove it an actionable wrong; and as she produced no evidence in support of the proposition, the complaint should have been dismissed.

Assuming, however, that at the time of the accident, the vessel was on the high sea, and so subject to the law of England, which authorizes an action for the death of a human being; still, upon a familiar principle, the law of the forum regulates the burden of proof and the quantum of evidence requisite to a recovery."

Statute in New Jersey as to actions for death by negligence extends to death within three miles of the shore. *Lennan v. Hamburg &c. Ss. Co.*, 73 App. Div. 357.

## **DOMESTIC ANIMALS.**

- I. INJURIES FROM.**
  - (a) What is sufficient notice or knowledge.
  - (b) Not lawful to knowingly keep a vicious animal.
  - (c) Injury by vicious dog to persons coming on owner's premises.
  - (d) Contributory negligence.
- II. INJURING TROUBLESOME AND VICIOUS ANIMALS.**
- III. WHO IS LIABLE FOR KNOWINGLY KEEPING OR HARBORING A VICIOUS ANIMAL.**
- IV. JOINT TRESPASSERS.**
- V. INJURY BY ANIMALS WHILE TRESPASSING.**
  - (a) Extent of liability.
  - (b) Dogs straying—common law rule did not extend to.
  - (c) Act of stranger causing the trespass.
  - (d) Duty of land-owner to fence.
  - (e) Division fences.
  - (f) Injuries committed on highway.
  - (g) Wild animals.
- VI. INJURY ON RAILWAYS.**
- VII. CATTLE UNLAWFULLY AT LARGE PRECLUDES RECOVERY.**
- VIII. CATTLE UNLAWFULLY AT LARGE DOES NOT PRECLUDE RECOVERY.**
- IX. COMPANY LIABLE FOR WANTON OR WILLFUL ACTS OR GROSS NEGLIGENCE.**
- X. COMPANY SHOULD USE REASONABLE CARE TO PREVENT INJURY TO CATTLE KNOWN TO BE ON RAILWAY.**
- XI. COMPANY SHOULD USE REASONABLE CARE TO DISCOVER CATTLE AND PREVENT INJURY TO THEM.**
  - (a) Suitable care requires outlook.
  - (b) Special watchman need not be kept.
  - (c) Train agent need not keep outlook.
  - (d) Bell should be rung or whistle sounded when cattle are seen.
  - (e) Train should be at once stopped.
  - (f) Company not liable for failure to stop.
  - (g) On account of darkness or fog.
  - (h) Safety of passengers is paramount.

the injury upon himself. If the injury happen while the animal is unlawfully on the land of another, the owner of the animal is absolutely and irrespective of any negligence on his part, liable for the natural consequences of the trespass. But if the animal is on the land of another by his failure to perform some duty to keep it therefrom, whether such duty arise from direct provision of law, or contract expressed, or grant presumed, the owner of the animal is not liable.

### I. Injuries From.

When a domesticated animal does injury to the property of another, the owner or keeper of the animal is not ordinarily liable therefor unless he failed to use ordinary care in keeping or handling such animal, or in case of injury from an attack by such animal *on man or beast*, unless he knew, was presumed to know, or in the exercise of ordinary prudence should have known of the propensity or probability of the animal making such attack, in which case, the animal ceases to be regarded as a domesticated animal, and the owner, having no right to keep it at all, does so at his peril.

(This rule does not include the case, where the injury was done while the animal was *unlawfully* on the land of another without fault of the owner of the land, in which case, as will be seen, the owner of the animal is liable for trespass, and the question of negligence is not involved.)

Dickinson v. McCoy, 39 N. Y. 403; Cox v. Murphy, 82 Ga. 623; Stumps v. Kelley, 22 Ill 140; Brent v. Kimball, 60 id. 211; Keightlinger v. Eagan, 65 id. 235; Wormley v. Gregg, 65 id. 251; Marian v. Vanaldt, 88 id. 132; Graham v. Payne, 122 Ind. 406; Maine v. Weiland, 81½ Pa. St. 243; Coggsell v. Baldwin, 15 Vt. 404; Cooley on Torts, 342; Beck v. Dyson, 4 Camp. 198; Jones v. Perry, 2 Eng. 482; Pickering v. Orange, 1 Scan. 338; Graham v. Payne, 122 Ind. 406; Joseph Schlitz Brew Co. v. Blacklay, 18 Oh. C. C. 359; Trinity &c. R. Co. v. O'Brien, 18 Tex. Civ. App. 690; Crowley v. Groonell, 73 Vt. 45; s. c., 55 L. R. A. 876; Chickering v. Lord, 67 N. H. 555; O'Connell v. Jarvis, 13 App. Div. 3; Clowdis v. Fresno Flume &c. Co., 118 Cal. 315; Barclay v. Hartman, 2 Marv. (Del.) 351; Hallyburton v. Burke County Fair Asso., 119 N. C. 526; s. c., 38 L. R. A. 156.

Defendant was liable for wrongfully turning horses into a vacant field where there were other horses, regardless of whether he knew that they were vicious. *Martin v. Farrell*, 66 App. Div. 177.

Owner must have sufficient notice to put a prudent man on his guard. *Fake v. Addicks*, 45 Minn. 37; 22 Amer. R. 716.

To establish liability for viciousness of a domestic animal, owner must have had notice of its viciousness, or have been wanting in exercise of reasonable care. *Startler v. McArthur*, 33 Mo. App. 218; *Bell v. Leslie*, 24 id. 661.

Owner of a mule killing a colt is only liable if he knew of mule's propensity to injure young colts. *Meegan v. McKay*, 1 Okla. 59.

Mere fact that young, unbroken horse injured person assured that he was gentle, who was aiding in fastening him to a wagon, does not show that he was vicious, although owner represented him to be gentle, and owner is not liable unless he knew or had reason to know it was false. *Funny v. Curtis*, 78 Cal. 498.

(a). WHAT IS SUFFICIENT NOTICE OR KNOWLEDGE.

NATURAL PROPENSITIES.

Evidence that a horse kicked when teased, tickled or struck with sticks, was not sufficient to establish its vicious disposition. *Lawlor v. French*, 2 App. Div. 140.

Especially where it shows no such disposition, except when so annoyed or struck. *McHugh v. New York*, 31 App. Div. 299.

Notice to foreman in charge of a dog during its owner's absence, held notice to owner. *Niland v. Geer*, 46 App. Div. 194.

Evidence that a dog attacks a person when set upon him by its custodian is not sufficient to establish its viciousness; nor is evidence of a fight between it and another dog. *Strubing v. Mahar*, 46 App. Div. 409.

Such propensities as are natural to the animal the owner is presumed to know. Hence, if the animal be given an opportunity to exercise the propensity, through the negligence of the owner, he would be liable. *Wharton on Negligence*, sec. 907.

*Hammond v. Melton* 42 Ill. App. 188.

Defendant was not charged with notice of viciousness, where his horse had never before or since kicked anyone. *O'Connell v. Mooney*, 32 Misc. 641.

Balking and kicking on the road, while drawing a load, is no notice of horses' liability to kick in the stall. *Bennett v. Mallard*, 33 Misc. 112.

Owner of horse known to be vicious and likely to injure one going in his stall, was liable to a groom not warned of the danger, although he never injured anyone before. *McGarry v. N. Y. & H. R. Co.*, 28 J. & S. (60 Super. C.) 367.

Owner's knowledge held immaterial, where servant knew it and in view thereof, was negligent in his management of the animal. *Clowdis v. Fresno Flume &c. Co.*, 118 Cal. 315.

Knowledge of ferocious temper is enough. *Warner v. Chamberlain*, 7 Houst. 18.

Allegation of dog's habit to bite is unnecessary, where there is an allegation of owner's knowledge of its fierce disposition. *Guenther v. Fohey*, 26 Ind. App. 93.

In an action under a statute, providing that "the owner of a dog shall

be liable to the party injured for all damages done by his dog, except when the party is doing an unlawful act," it was held that while the statute was evidently intended to do away with the necessity of proving *scienter*, still a plaintiff might prove the things necessary to a right of action, at common law, and proof of *scienter* was permitted. *Sanders v. O'Callaghan*, 111 Iowa, 574.

In absence of knowledge of the vicious nature of a dog, owner was not liable, where, upon being inadvertently stepped on, it ran from under the wagon and bit one of a number of boys who were throwing dirt at the wagon. *Cuney v. Campbell*, 76 Minn. 59.

A bull that had always been docile was not shown to be vicious, by evidence that he had once attacked a man who provoked him by abuse. *Erickson v. Bronson*, 81 Minn. 258.

A boy, the servant of a tenant on a farm, and entitled to use the *locus in quo*, brought his gray horse from the pasture through the barnyard where a bull was confined, and from which he drove the cows into the lane, leaving the gate into the barnyard open so that the bull followed into the lane and injured the boy and the horse. The bull was known to the boy and to its owner to have a peculiar aversion to gray horses.

The boy having the right to the common use of the lane, could recover, although he was careless in leaving the gate open. *Earhart v. Youngblood*, 27 Pa. St. 331.

Actual biting on a previous occasion is not essential; where the dog has shown a disposition to do so, it is sufficient to carry the case to the jury. *McConnell v. Lloyd*, 9 Pa. Super. Ct. 25.

Jury was not justified in inferring a habit of running away from evidence that a horse had walked off when unhitched and unattended. *Buckley v. Earle & Co.*, 22 R. I. 358.

Where owner knew a ram would butt, he was bound to prevent injury from this vice. *Oakes v. Spaulding*, 40 Vt. 347.

*Jackson v. Smithson*, 15 M. & W. 563.

Proof of *scienter* as to rams between August 1st and December 1st, dispensed with. This absolutely required ram to be restrained. *Town of Lamphier*, 37 Vt. 52.

Knowledge that dog had a disposition likely to cause it to commit injury similar to that in question is sufficient. *Robinson v. Marino*, 3 Wash. 434.

Where a bull driven along the street, ran at a man with a red handkerchief, and the defendant thereafter ascribed the attack to the handkerchief, there was some evidence to go to the jury on the question of the defendant's knowledge of the dangerous character of the bull. *Hudson v. Roberts*, 6 Exch. 699; 20 L. J. id. 299.



## PREVIOUS COMMISSION OF THE OFFENSE.

The fact that a pair of horses, ordinarily gentle, previously ran away through fright, reasonably justified, does not charge owner with notice that they were vicious or dangerous, so as to make him liable where they subsequently ran away from the same cause. *Benoit v. Troy &c. R. Co.*, 154 N. Y. 223; rev'g s. c., 9 App. Div. 622.

Evidence that dog had bitten another about two weeks before, and that the owner had been advised of it, was sufficient to justify submission to the jury of the question of the owner's knowledge of its vicious disposition. *Bauer v. Lyons*, 23 App. Div. 204.

Citing *Buckley v. Leonard*, 4 Den. 500; *Caldwell v. Snook*, 35 Hun, 73; *Brice v. Bauer*, 108 N. Y. 428.

Defendant was chargeable with knowledge of the viciousness of a dog, which had bitten two others while with her child, during the previous year. *Duval v. Barnaby*, 75 App. Div. 154.

Owner of dog known to have the habit of jumping at heads of horses is liable for injuries from such act, while taking him along a public street. *Putnam v. Wigg*, 3 N. Y. S. R. 304; 14 N. Y. Supp. 90.

Notice to or knowledge by owner that the animal had previously committed a like injury, is sufficient. *Arnold v. Norton*, 25 Conn. 92.

*Kittridge v. Elliott*, 16 N. H. 77; *Buckley v. Leonard*, 4 Denio, 500; *Fake v. Addicks*, 45 Minn. 37.

Enough to show that it is within the owner's knowledge that dog might bite, not necessary to show that he had bitten. *Flangsbury v. Basin*, 3 Ill. App. 531.

*Rider v. White*, 65 N. Y. 54; *Wood v. Vaughan*, 28 N. B. 472.

It is not necessary to show that a vicious dog had previously bitten somebody, if owner should have known of its disposition to bite or attack. *Kalb v. Klages*, 27 Ill. App. 531.

Defendant cannot set up a lack of knowledge of the viciousness of a dog, where it had made various attacks on another. *Chicago &c. R. Co. v. Kuckkuck*, 98 Ill. App. 252.

Fact that a bull taken along the street had never attacked anyone before was not conclusive, but to be considered. *Barnum v. Terpenning*, 75 Mich. 557.

Where owner had knowledge of dog's disposition to attack horses on the road, evidence that such actions were contrary to his disposition were inadmissible. *Willett v. Goetz*, 125 Mich. 581.

That owner has seen dog run to the fence and bark is not sufficient notice of its vicious habit of jumping against the fence so as to frighten horses and cause them to run away. *Bradley v. Myers*, Pa. C. P., 10 Lanc. L. Rev. 137.

Although the owner knows that dog is in the habit of chasing persons or animals on the road, he is not liable for frightening horses, when he has no knowledge that injury ever resulted from such habits, and when he used ordinary care to prevent injuries. *Shaw v. Craft*, 37 Fed. Rep. 317.

Knowledge that a dog on previous occasion ran at a person growling and showing its teeth is sufficient notice of its viciousness. *Wood v. Vaughan*, 28 N. B. 472 (1892).

#### FEROCIOUS DOGS.

Keeping ferocious dogs without confinement is gross negligence rendering the owner liable for attacking and biting. *Jacoby v. Ocherhausen*, 59 Hun, 619.

A dog without slightest warning sprang upon and bit a woman. This sufficiently showed it to be vicious and dangerous and imposed on the master the duty of keeping him in subjection. *Webber v. Hoag*, 28 N. Y. S. R. 630.

Notice of dog's ferocity to owner's wife is sufficient. *Barclay v. Hartman*, 2 Marv. (Del.) 351.

That the dog was on exhibition in a stall in charge of an exhibitor, did not relieve the owner, under a statute imposing liability for injury by dogs except where the party injured is on owner's premises after dark or engaged in a wrongful act. *Bush v. Wathen*, 104 Ky. 548.

If a dog be of a ferocious nature it is equivalent to notice to the owner.

Master turning loose a dangerous and ferocious dog is liable for the harm done by it. *McGuire v. Ringrose*, 41 La. Ann. 1029.

One who puts an animal known to be vicious, in charge of an employé to be conducted along the public street, cannot avoid responsibility by investing the employé with the character of an independent contractor. *O'Neill v. Blase*, (Mo. App.) 68 S. W. Rep. 764.

#### PRESUMPTION AS TO DOGS.

Except when a rule is changed by statute the presumption is that a dog has not a propensity to worry or bite. Wharton on Neg. sec. 913.

Citing *Read v. Edwards*, 17 C. B. N. S. 245; *Thomas v. Morgan*, 2 C. M. & R. 496; *Marsh v. Jones*, 21 Vt. 378; *Brown v. Carpenter*, 26 id. 638; *Woolf v. Chalker*, 31 Conn. 121; *Vrooman v. Lawyer*, 13 Johns. 339; *Wheeler v. Brant*, 23 Barb. 324; *Fairchild v. Bentley*, 30 id. 147; *Buckley v. Leonard*, 4 Denio 500; *Sherfey v. Bartley*, 4 Sneed 58; *Durden v. Barnett*, 7 Ala. 169; *McCaskill v. Elliott*, 5 Strob. 196; *Jackson v. Smithson*, 15 M. & N. 563; *Hudson v. Roberts*, 6 Exch. 697.

Notice that dog will worry sheep is not notice that he will attack a man; nor, that a horse is unruly, that he may kick or bite. (*Spray v. Ammerman*, 66 Ill.

309; *Keightlinger v. Egan*, 65 id. 235; *Cockersham v. Nixon*, 11 Ind. 269; *Hartley v. Halliwell*, 2 Stark. 212.) But notice that bull gores other domestic animals is warning that he will attack man. (*Earhart v. Youngblood*, 27 Penn. St. 331; *Cockersham v. Nixon*, 11 Ind. 269.)

See, *Twigg v. Ryland*, 62 Md. 386; *Smith v. Donohue*, 49 N. J. L. 548; *Buck v. Moore*, 12 Bush. 337.

There is no presumption of ferocity with domestic animals as there is with wild animals. *West Chicago Street R. Co. v. Walsh*, 78 Ill. App. 595.

Where a dog has always been kind and gentle and never given reason for a suspicion that he would bite, the owner is not liable. *Martinez v. Bernhard*, 106 La. 368; s. c., 55 L. R. A. 671.

#### WATCH DOGS—DOGS KEPT CONFINED.

The fact that a dog is kept for the purpose of guarding property imputes knowledge to the owner of a propensity to attack and bite mankind, and hence it is negligence on the part of the owner to allow him at large.

The plaintiff, a child of about seven years old, lived with her parents in a house rented of the defendant, in the rear of his house. The latter procured the dog about a month before the injury to guard his property in the barn; he was usually kept chained and muzzled, but escaped, and as plaintiff was passing around defendant's house to the rear, along the side of the house, the dog sprang upon her and bit her. The evidence showed that the dog was vicious. Owner knew dog had bitten person before. A recovery was sustained. *Hahnke v. Friederich*, 140 N. Y. 224, aff'g judg't for pl'ff.

*Lynch v. McNally*, 73 N. Y. 347; *Rider v. White*, 65 id. 54; *Jacoby v. Ocherhausen*, 59 Hun, 619; s. c. aff'd, 129 N. Y. 649.

#### SCIENTER.

Need not be proved under statutes of Connecticut, as to dog's evil disposition, Michigan, New Hampshire, New York, Pennsylvania, Ohio or Wisconsin, in case of injury to sheep. *Cooley on Torts*, 341, note.

The statute making the owner of a dog which shall *kill* or *wound* sheep liable, without notice that he was mischievous, has no application where the sheep were only *chased and worried*. In that case there must be proof of the *scienter* to render the defendant liable. *Auchmuty v. Ham*, 1 Denio, 495.

Fact that the owner kept a dog confined was strong evidence that he was unsafe when at large. *Buckley v. Leonard*, 4 Denio, 500.

The defendant's vicious and ferocious dog, once having bitten the defendant's servant, escaped at night and went to the plaintiff's premises

and bit him. Defendant was chargeable with knowledge of the vicious character of the dog, and, it seems this would be so, if it had not appeared that the dog had bitten another person before it bit the plaintiff, as the very purpose for which he was kept required a dog of a fierce nature; and that, therefore, defendant was chargeable with negligently keeping him. *Brice v. Bauer*, 108 N. Y. 428.

But see *Jennings v. D. G. Burton Co.*, 73 Hun, 545.

Defendant W. rented premises of defendant C. for use as a stable and kept a dog thereon which he chained in the day time. It was for W.'s own purposes and C. had no knowledge that the dog was even harbored on the premises. W. was chargeable with knowledge of its viciousness but C. was not. *Lagutta v. Chisolm*, 65 App. Div. 326.

See, also, *Marsh v. Hand*, 120 N. Y. 315.

Knowledge of vicious propensities may be inferred from the owner usually keeping him confined. *Warner v. Chamberlain*, 7 Houst. 18.

Knowledge that a dog, used as a watch dog, is tied during the day time is notice that he is dangerous. *Speckman v. Krieg*, 79 Mo. App. 376.

See, also, *Chicago &c. R. Co. v. Kuckkuck*, 98 Ill. App. 252.

Dogs kept in a barn are presumed not to be vicious; and knowledge of vicious or dangerous habits must be shown. *Shaw v. Craft*, 37 Fed. Rep. 317.

It appeared that dog had *always been kept chained*; that he would bark and jump at persons near him and try to get loose, and once, when loose, ran and seized a woman's dress as she escaped through a gate; that he sprang upon plaintiff as she went to defendant's house and bit and bruised her savagely, and defendant had expressed fears that the dog would get loose and bite a neighbor's child.

There was enough for jury on the ferocious disposition of the dog, and the owner's knowledge. *Robinson v. Marino*, 3 Wash. 434.

**From opinion.**—"The keeper of such a dog must see to it that he is kept securely, or be responsible for all injury done. Cooley on Torts (2d ed.) 404; Starr, pp. 343-4; 2 Shearm. and Redf. on Neg. (4th ed.) sec. 630; Flansburg v. Raisin, 3 Ill. App. 531; Godean v. Blood, 52 Vt. 251 \* \* \* *Wilkinson v. Parrott*, 32 Col. 102."

#### REPUTATION.

The general reputation of a dog and the conduct of the public towards it, is inadmissible on an issue of its viciousness. *Norris v. Warner*, 59 Ill. App. 300.

Dog's reputation for viciousness is admissible on the question of *scienter*. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

See, also, *Cuney v. Campbell*, 76 Minn. 59.

by any one when found running at large. *Putnam v. Payne*, 13 J. R. 312; *Brown v. Carpenter*, 26 Vt. 638. And when known to the owner, corresponding obligations are imposed upon him. Lord Hale says: 'He (the owner) must, at his peril, keep him up safe from doing hurt, for though he use his diligence to keep him up, if he escape and do harm the owner is liable in damages.' In *Kelly v. Tilton* (2 Abb. Ct. App. Cas. 495) Wright, J., said: 'If a person will keep a vicious animal, with knowledge of its propensities, he is bound to keep it secure at his peril.' In *Wheeler v. Brant* (23 Barb. 324) Judge Balcom said: 'Defendant's dog was a nuisance, and so are all vicious dogs, and their owners must either kill them or confine them as soon as they know their dangerous habits, or answer in damages for their injuries.' In *Card v. Case* (57 Eng. C. L. R. 622), Coltman, J., said: 'That the circumstances of the defendant's keeping the animal negligently is not essential; but the *gravamen* is the keeping of the ferocious animal, knowing its propensities.' The cases are uniform in this doctrine, although expressed in a variety of language by different judges. *Smith v. Pelah*, 2 Strange 1264; *Jones v. Perry*, 2 Esp. 482; *Greason v. Keteltas*, 17 N. Y. 496; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 Car. & P. 138; *Rider v. White*, 65 N. Y. 54."

A vicious dog being a nuisance *per se*, an allegation that the owner knew it throws upon him the burden of showing that he kept it securely; and failure to allege that he did not do so does not make the complaint demurrable. *Woodbridge v. Marks*, 5 App. Div. 604; aff'g s. c., 14 Misc. 388.

Failure to keep a horse tied up, knowing it to be vicious, rendered its owner liable for frightening a mare on the highway. *Kitchens v. Elliot*, 114 Ala. 290.

Defendant knew his dog was vicious. It had bitten others. He was liable for its biting plaintiff after breaking its chain. *Kippen v. Ollason*, (Cal.) 69 Pac. Rep. 293.

'The keeping of a vicious dog is wrongful and at peril of owner, and *prima facie* owner is liable to any person injured without averment or proof of negligence in securing or taking care of it. *Woolf v. Chalker*, 31 Conn. 121.

Georgia Code, sec. 2964, declares "a person who owns or keeps a vicious or dangerous animal of any kind, and by the careless management of the same, or by allowing the same to go at liberty, another without fault on his part is injured thereby, such owner or keeper shall be liable in damages for such injury." *Conway v. Grant*, 88 Ga. 40.

During an attempt of a woman driving a mare to drive off a stallion attacking her, she was struck by stallion and hurt. The court reversed the judgment for defendant and stated the law as in opinion. *Hammond v. Melton*, 42 Ill. App. 187.

**From opinion.**—"The horse being a domestic animal necessary for the use and pleasure of man, the keeping of a stallion is not a wrong in itself, but is proper, and no wrong can come from it unless there is in addition some wrongful

conduct. The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and if such propensities are of a nature to cause injury, he must anticipate and guard against them. He necessarily knows that the act will be committed if opportunity offers, so the keeper of a stallion is bound to take notice of the well-known propensities of stallions in general, and to use such degree of care as the nature of the animal may reasonably require to avoid injury from such propensities. But he is under no obligation to guard against injuries which he has no reason to expect from the animal, either on account of the propensities of stallions in general or some disposition of the individual animal which he has notice of. If, however, the animal is disposed to attack mankind, and the keeper has notice of the dangerous propensity, the public safety demands that if he keep the animal at all, he shall keep him secure. *There is no such necessity for keeping exceptionally vicious individuals of a species of animals naturally peaceable, as justifies their being kept upon any other terms.* After notice, the keeper of such animal is responsible for all injuries occasioned by such attacks, and the fact that he endeavors to so keep the animal as to prevent the mischief will not protect him if he fails. *The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with the knowledge of the vicious propensity.*" (Citing *Stumps v. Kelley*, 22 Ill. 140; *Flansburg v. Basin*, 3 Ill. App. 531; *Wood on Nuisances*, sec. 759.) \* \* \* *In one sense the basis of the action would be negligence, but it is that sort of negligence which consists in knowingly keeping a dangerous animal and not keeping him secure.* In such case it is not necessary to prove want of care in methods of stabling. *Cooley on Torts*, p. 343; 1 *Addison on Torts*, secs. 261, 285; 1 *Hilliard on Torts*, 569."

The mere keeping of a dog knowing it to be vicious is *prima facie* actionable negligence, if injury occur, regardless of any question of negligence in securing it. *Ahlstrand v. Bishop*, 88 Ill. App. 424.

The complaint alleged that defendant wrongfully kept the dog, and suffered him to go at large; that he attacked and bit the plaintiff; knowledge on the part of the defendant, that the dog was accustomed to commit such injury. This was sufficient. *Partlow v. Haggarty*, 35 Ind. 178.

*S. P., Williams v. Moray*, 74 Ind. 25.

When plaintiff alleges the mischievous or vicious propensity of the animal, the injury resulting therefrom and the *scienter*, he makes a good case upon paper, and one which the defendant must meet by a denial, or an answer which confesses and avoids the alleged cause of action. The gist of the action is keeping with knowledge of the mischievous propensities. *Graham v. Payne*, 122 Ind. 406.

*Oakes v. Spaulding*, 40 Vt. 347; *Brown v. Carpenter*, 26 id. 638; *Card v. Case*, 57 Eng. Com. Law, 622; *Popplewell v. Pierce*, 10 Cush. 509; *Mann v. Weiland*, 81½ Pa. St. 243; *Cogswell v. Baldwin*, 15 Vt. 404.

Permitting a dog of known vice to run at large, gives recovery to one bitten by it. *Hahn v. Kordula*, 5 Kan. App. 142.

Placing a cow in a public stock pen knowing or negligently ignorant

of her viciousness, rendered owner liable for injury to a prospective purchaser while examining her. *Brooks v. Brooks*, (Ky.) 53 S. W. Rep. 645.

The owner of a dog, having knowledge of his ferocious proclivities, is liable in damages to any one injured by the animal. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. *Goode v. Martin*, 57 Md. 606.

*Buckley v. Leonard*, 4 Denio, (N. Y.) 500; *Auchmuty v. Ham*, 1 id. 491; *Loomis v. Terry*, 17 Wend. 49; *Smith v. Pelah*, 2 Strange, 126; see *Spring Co. v. Edgar*, 99 U. S. 654; *Gladmon v. Johnson*, 36 J. L. (C. P.) 153; *Stiles v. Cardiff &c. Nav. Co.*, 33 L. J. (Q. B.) 319; *Baldwin v. Casella*, L. R. 7 Exch. 325; *Appleby v. Percy*, L. R. 9 Com. F. 647; *Kinmoreth v. McDougall*, 46 N. Y. S. R. 211, (1892); *Durden v. Barcutt*, 7 Ala. 169; *Karr v. Parks*, 44 Cal. 46; *Keightlinger v. Avary*, 65 Ill. 235; 75 id. 141; *Dockerty v. Hutson*, 125 Ind. 122; *Sylvester v. Moag*, 155 Pa. 225; *Marsh v. Jones*, 21 Vt. 378; *Strouse v. Leipf*, (Ala.) 23 L. R. A. 622; *Fakes v. Addicks*, 45 Minn. 37.

In such case the whole keeping is misfeasance. *Nickerson v. Wheeler*, 118 Mass. 295.

Owner of horses, knowing them to be vicious, was liable, where they ran away and injured plaintiff. *Hall v. Huber*, 61 Mo. App. 384.

A vicious dog, being a nuisance, an owner keeping it after knowledge thereof, does so at his peril. *Speckman v. Krieg*, 79 Mo. App. 376; *Zimet v. Hollenback*, 9 Kulp, (Pa.) 564.

Gist of an action where a dog is kept, knowing of its vice, is not the mere keeping of it, but the keeping of it "in a negligent manner." *Haynes v. Smith*, 62 Oh. St. 161.

Keeping a dog knowing its vice, is sufficient to give recovery, regardless of any question of negligence in securing it. *Triolo v. Foster*, (Tex. Civ. App.) 57 S. W. Rep. 698.

That the owner of a vicious dog endeavored to restrain him, and that it broke loose or was untied by another person, will not relieve such owner from liability for injuries committed by the dog at large. *Robinson v. Marino*, 3 Wash. 434.

#### (c). INJURY BY VICIOUS DOG TO PERSONS COMING ON OWNER'S PREMISES.

A person who keeps a dog upon his premises, known to him to be so vicious and ferocious as to endanger the safety of strangers, is liable for injuries inflicted by the dog upon one, who is innocently upon the premises, without notice of the character of the dog. *Rider v. White*, 65 N. Y. 54.

*The Tonawanda Railroad Co. v. Munger*, 5 Denio, 255.

From opinion.—"*Sarek v. Blackburn*, (4 C. & P. 297,) was an action brought

to recover damages for an injury by the bite of a vicious dog kept by the defendant. The dog was chained in a yard in the rear of the defendant's house, near one of the passages leading to it, and through which the plaintiff was walking when the dog fell upon him. Chief Justice Tindal in his charge to the jury said, 'The question will turn upon whether there was a justifiable right to be on the spot.' 'If a man puts a dog in a garden walled all around, and a wrongdoer goes into the garden, and is bitten, he cannot complain in a court of justices of that which was brought upon him by his own act.' And in an action for an injury done by a vicious bull, Chief Justice Best was not less explicit. 'If the plaintiff,' said he, '*had gone where he had no right to go*, that might have been an answer to the action; but the fact was not so. The plaintiff had a right to be where he was—he was in the pursuit of his ordinary business.' (*Blackman v. Simmons*, 4 C. & P. 138.) See, also, *Brock v. Copeland*, (1 Esp. 203), *Howland v. Vincent*, (10 Metcalf, 371), and *Jordin v. Crump*, (8 M. & W. 782).

Where that which is done by a party on his own land is illegal and punishable as such; or, although not illegal, *if it be an act which probably may endanger human life, as the setting of spring guns, he may be responsible even to a voluntary trespasser for injuries thus sustained.* (*Bird v. Holbrook*, 4 Bing. 628; *Jordin v. Crump*, *supra*.) But even in such a case, *where the plaintiff had notice* that deadly engines were placed in a wood, into which he, notwithstanding, entered and was severely wounded, it was held he could not maintain any action, having voluntarily brought the injury upon himself. (*Ilott v. Wilkes*, 3 B. & Ald. 304.)

One who complains of another's negligence should, himself, be without fault. (*Brownell v. Flagler*, 5 Hill, 282; *Cook v. The Champ. Trans. Co.*, 1 Denio, 99.) Where the plaintiff, at the time of the alleged injury, was trespassing on the defendant, or otherwise wrong in the particular act complained of, such delinquency alone, with very limited exceptions, is a decisive answer to any claim for damages founded on the defendant's negligence.

Negligence is a violation of the obligation which enjoins care and caution in what we do. But this duty is relative, and where it has no existence between particular parties, there can be no such thing as negligence in the legal sense of the term. A man is under no obligation to be cautious and circumspect towards a wrong-doer. A horse straying in a field falls into a pit left open and unguarded: the owner of the animal cannot complain, for as to all trespassers the owner of the field had a right to leave the pit as he pleased, and they cannot impute negligence to him. But injuries inflicted by design are not thus to be excused. A wrong-doer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. *Negligence, however, even when gross, is but an omission of duty. It is not designed and intentional mischief, although it may be cogent evidence of such an act.* (Story on Bl. secs. 19, 22; *Gardner v. Heartt*, 3 Denio, 236.) *Of the latter, a trespasser may complain, although he cannot be allowed to do so in regard to the former."*

In Wharton on Negligence, sec. 914, it is said:

"Keeping a ferocious dog for defense does not impute liability unless the dog be kept negligently. In this respect the rule is to be distinguished from that laid down as to spring guns. A spring gun is an unnecessary and cruel engine: a watch dog, who will assail invaders, is sanctioned by usage and law, and may be maintained, chained or inclosed, for household protection. (*Woolf v. Chalker*, 31



Conn. 121; McIntyre v. Plaisted, 57 N. H. 606.) Hence, when the defendant, for the protection of his yard, kept a fierce dog, which was tied up all day and let loose into the yard after dark, and the defendant's foreman negligently went into the yard after dark, knowing that the dog was let loose at night, and was thrown down and bitten by the dog, it was held that he was not entitled to recover damages." Brock v. Copeland, 1 Esp. 302.

A man, however, has no right to put a ferocious dog in such a situation in the way of access to his house, that a person innocently coming there may be injured by it. Citing Munn v. Reed, 4 Allen, 431; Laverone v. Mangianti, 41 Cal. 438.

It is not the necessary or natural and usual consequence of a person's trespassing upon a man's premises that he should be attacked by a savage dog. Bigelow on Torts, pp. 249, 250.

Owner of a ferocious watch dog, chained so as to permit a range of fifty feet to guard outbuilding, held not liable to one approaching such building by an unusual route and at an unusual time in search of a man supposed by him to be in such building. Woodbridge v. Marks, 17 App. Div. 139.

A man may keep a dog for the necessary defense of his house, his garden or his fields, and may cautiously use him for that purpose in the *night time*; but if he permits a mischievous dog to be at large on his premises, and a person is bitten by him in the *day time*, the owner is liable in damages, though the person injured be at the time *trespassing* on the ground of the owner, by hunting in his *woods* without license.

*It seems* that a person is not permitted, for the protection in his absence, of property against a *mere trespasser*, to use means endangering the life or safety of a human being, whatever he may do where the entry upon his premises is to commit a felony or breach of the peace; and where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding; full notice of the mischief to be encountered must be given; and the principles of humanity must not be violated, or the owner will be subjected to damages for any injury which ensues. Loomis v. Terry, 17 Wend. 497.

One who knowingly keeps upon his premises a vicious dog, so that he can injure an innocent trespasser, is liable for damages. Melsheimer v. Sullivan, 1 Col. App. 22.

Owner of a vicious dog, knowing it is accustomed to bite, is liable to person entering a back yard in a city on lawful business. Conway v. Grant, 88 Ga. 40.

**From opinion.**—"Though the gate was open and the plaintiff was on lawful business, it may be that he had *no strict legal right* to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises to bite him or others that might so intrude. Such a dangerous

means of defense against mere trespassers the law will not countenance." And to the general authorities on this subject, see, *Brock v. Copeland*, 1 Esp. 203; *Sarch v. Blackburn*, 4 Car. & P. 296; *Curtis v. Mills*, 5 id. 489; *Loomis v. Terry*, 17 Wend. 496; 31 Am. Dec. 306; *Pierret v. Moller*, 3 E. D. Smith, 574; *Kelley v. Tilton*, 3 Keyes, (42 N. Y.) 263; *Sherfey v. Bartley*, 4 Sneed. 58; 67 Am. Dec. 597; *Woolf v. Chalker*, 31 Conn. 121; 81 Am. Dec. 175; *Lavarone v. Mangianti*, 41 Cal. 138; 10 Am. Rep. 269; *Notes to Knowles v. Mulder*, (Mich.) 16 Am. St. Rep. 627; *Cooley on Torts*, sec. 345; *Bishop on Noncontr. Law*, sec. 1235, *et seq.*; 1 *Thomp. on Neg.* p. 220, sec. 34; *Muller v. McKesson*, 71 N. Y. 195; 29 Am. Rep. 123; *Rider v. White*, 65 N. Y. 54; 22 Am. Rep. 600.

Keeping a ferocious dog does not create liability. *Keightlinger v. Eagan*, 65 Ill. 235.

When a mischievous or vicious animal is given the freedom of a pasture field, and afforded thereby an opportunity to injure a person having occasion to pass in the field, the confinement is not such as the law requires. *Graham v. Payne*, 122 Ind. 403.

That plaintiff was bitten by another's dog while upon defendant's premises, did not render the latter liable, where he did permit him to be there with a knowledge of its viciousness. *Trumble v. Happy*, 114 Iowa, 624.

In a statutory action, under a statute imposing on the owner of a dog, liability for all injury done by it unless the injured party was doing an unlawful act, mere negligence not amounting to an unlawful act, is no defense. Going to a barn at 8 P. M. to get some things from a buggy left in charge of a liveryman is not such an unlawful act. One who harbors a dog is an owner under such an act. *Schultz v. Griffith*, 103 Iowa, 150.

In action under the statute, the burden is on the defendant to set up that the injury occurred after dark or that plaintiff was on the premises unlawfully, as a defense. *Wolff v. Lamann*, (Ky.) 56 S. W. Rep. 408.

Under such a statute, a visitor to servants going in the back way, was held not a trespasser. *Riley v. Harris*, 177 Mass. 163.

Knowledge that the dog was vicious made it a nuisance, and gave recovery to one lawfully on the place, regardless of any question of negligence in its keeping. *Speckman v. Kreig*, 79 Mo. App. 376.

Owner of dog, knowing of its viciousness, is liable when he permits it to be at large upon highway, although he may keep a dog for necessary defense of his home, garden or fields. *Roehers v. Remhoff*, 55 N. J. L. 475.

One who keeps a ferocious dog in a city must so secure it, that persons going lawfully on premises or along highway will not be injured. Defendant knew dog's character. The action was for trespass, and although the defendant's conduct showed negligence the case did not go off on that. *Sylvester v. Moag*, 155 Pa. St. 225.

## (d). CONTRIBUTORY NEGLIGENCE.

If a person with full knowledge of the evil propensities of an animal wantonly excite him, or voluntarily and unnecessarily put himself in the way of such an animal, he should be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case it cannot be said, in a legal sense, that the keeping of the animal, which is the *gravamen* of the offense, produced the injury. *Muller v. McKesson*, 73 N. Y. 195, affirming 10 Hun, 44, and judg't for pl'ff.

*Cogswell v. Baldwin*, 15 Vt. 404; *Koney v. Ward*, 36 How. Pr. 255; *Wheeler v. Brant*, 23 Barb. 324; *Blackman v. Simmons*, 3 Car. & P. 138; *Brock v. Cope-land*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628; *Fake v. Addicks*, 45 Maine 37.

**From opinion.**—"There are expressions in some of the cases indicating that the liability of the owner is not affected by the negligence of the person injured. In *Smith v. Pelah* (2 Strange 1264) the owner was held liable, although the injury happened by reason of the person injured treading on the dog's toes, the Chief Justice saying: 'For it was owing to his not hanging the dog on the first notice.' It is not stated that the person injured knew of the dog's propensities, or that it was done intentionally. In *Woolf v. Chalker* (31 Conn. 130), it is said that the owner is liable 'irrespective of any questions of negligence of the plaintiff,' and citing *May v. Burdett* and *Card v. Case* (*supra*).

In *May v. Burdett*, the Chief Justice, after approving of the ruling in *Smith v. Pelah* (2 Strange, *supra*), and a passage from *Hale's Pleas of the Crown* (p. 430), said: 'It may be that if the injury was solely occasioned by the willfulness of the plaintiff after warning, that may be a ground of defense, but it is unnecessary to give any opinion as to this.'"

When an employé of a person, keeping a dangerous dog continues to work for his employer, with knowledge of the character of the dog and the place where he is kept, he takes the risk of being bitten, and his employer is not liable for the damages he may sustain by reason of his being bitten by such dog. *Farley v. Picard*, 78 Hun, 560.

A person who irritates an animal and is bitten or kicked in return, is deemed in law to have consented to the injury. *Conway v. Grant*, 88 Ga. 40.

Under a statute imposing liability for injury by dog upon owner unless party injured was engaged in a wrongful act, negligence is no defense, unless it amounts to an unlawful act. *Schultz v. Griffith*, 103 Iowa, 150; s. c., 40 L. R. A. 117.

Which is not shown by proof that plaintiff on several previous occasions, had thrown stones at the dog. *Van Bergen v. Eulberg*, 111 Iowa, 139.

Where one is upon premises by permission, it is not contributory negligence to fail to inquire whether there is a vicious dog there. *Sanders v. O'Callaghan*, 111 Iowa, 574.

A prospective purchaser is not negligent in going into a stock pen to examine a cow. *Brooks v. Brooks*, (Ky.) 53 S. W. Rep. 645.

The exception under a statute imposing on owner of dog liability for all damage done by it as to persons injured while on the premises after dark or while engaged in some unlawful act, does not exclude the defense of contributory negligence. *Bush v. Wathen*, 104 Ky. 548; *Wooldridge v. White*, 105 id. 247.

In action under the statute, on an issue as to whether a child of 11 was engaged in a "wrongful act" in teasing a dog while eating, the child's age is an element of consideration. *Wolff v. Lamann*, (Ky.) 56 S. W. Rep. 408.

If the person bitten by a ferocious dog encouraged the same about his premises, such conduct may be submitted to the jury on the question of contributory negligence. *Twigg v. Ryland*, 62 Md. 380.

In an action under a statute imposing on owner of a dog, liability for damage done by it while outside of owner's inclosure, defendant was held liable for his dog's assault on a child in the house of latter's parents, though dog was taken from his inclosure contrary to instructions by servants. Negligence of child's parents in admitting dog to house was not imputed to child. *Fye v. Chapin*, 121 Mich. 675.

For other cases construing same statute, see *Swift v. Applebone*, 23 Mich. 252; *Elliot v. Herz*, 29 id. 202; *Monroe v. Rose*, 38 id. 347; *Trompen v. Verhage*, 54 id. 304; *Burnham v. Strother*, 66 id. 519.

Boy who sticks his hand in a crack in an enclosure, in which a dog is properly secured cannot recover. *Badali v. Smith*, (Tex. Civ. App.) 37 S. W. Rep. 642.

## II. Injuring Troublesome and Vicious Animals.

Where one person's cattle come upon another's premises, the latter has the right to drive them therefrom into the highway, and in an action for alleged injuries to such cattle, it is for the owner to show that such person abused or ill-treated them.

It is not a wrongful act for a person driving cattle of another from his premises to chase them twice around his farm, unless unnecessarily done, nor to use a pitchfork to separate the cattle, unless he uses it in a wrongful way.

A farmer may use a dog, if not ugly, to aid him in driving trespassing cattle from his premises. *Carney v. Brome*, 77 Hun. 583.

Vicious dog duly licensed, collared and confined for protection, may not be killed. *Brill v. Flagler*, 23 Wend. 354.

Dog found worrying sheep, or followed immediately up after worry-

ing, under Cal. Civ. Code, sec. 341, sub-sec. 2, may be killed. *Johnson v. McConnell*, 80 Cal. 545.

May not shoot trespassing hens. *Johnson v. Patterson*, 14 Conn. 1; *Clark v. Keliher*, 107 Mass. 406; *Matthews v. Fiertel*, 2 E. D. Smith, 90.

Right to kill a dog under Conn. Gen. St. sec. 3751 is not limited to injury to person, but to destruction of young and tender plants, where he was asleep, and the value of the dog is immaterial. *Simmonds v. Holmes*, 61 Conn. 1.

Although the owner may maintain an action of trespass *vi et armis* for malicious killing, he cannot maintain case for unintentional and negligent killing by railway train. Negligence of defendant was not shown. *Jemison v. So. Western R. Co.*, 75 Ga. 444.

See, also, *Wilson v. The Wil. & Man. R. Co.*, 10 Rich. L. R. (S. C.) 52.

Hunters liable for killing by mistake. *Ransom v. Kitner*, 31 Ill. App. 241.

Shooting dogs worrying a hen which was carried outside the fence by another dog, was justifiable. *Anderson v. Smith*, 7 Ill. App. 354.

Owner of crops may not kill domestic animals while found trespassing thereon. *Reis v. Stratton*, 23 Ill. App. 314.

*Snap v. The People*, 19 Ill. 80; *Tynor v. Cary*, 5 Ind. 216; *Dodson v. Mock*, 4 Dev. & Bat. 146; *Ford v. Taggart*, 4 Tex. 492.

Person may shoot a trespassing dog injuring his property, viz. bacon, late at night. *Dunning v. Bird*, 24 Ill. App. 270.

Person in defending wheat field against a trespassing dog shot the same. Question of justification was for jury and they found for defendant. *Life v. Blackwelder*, 25 Ill. App. 119.

See, also, *Aldrich v. Wright*, 53 N. H. 398.

Dogs may not be killed with impunity nor for a trivial offense. *Brent v. Kimball*, 60 Ill. 211.

*Spray v. Ammerman*, 66 Ill. 309; *King v. Klein*, 6 Pa. St. 318.

One willfully and maliciously killing a dog, not vicious or dangerous, and not doing damage, is liable to owner, although dog was accustomed to bark at passers-by. *Jacquay v. Hartzill*, 1 Ind. App. 500.

Fact that person had been annoyed by a trespassing dog, and that the dog in question had been trespassing, does not justify killing him. *Sosat v. State*, 2 Ind. App. 586.

See, also, *Tift v. Tift*, 4 Den. 175; *Davis v. Campfield*, 23 Vt. 236.

Owner of domestic animals may kill a dog harassing, maiming or worrying sheep, even if at the time the dog is not committing the act, provided his conduct is such as to excite a reasonable apprehension that he is about to do so. *Marshall v. Blackshire*, 44 Iowa. 475.

To justify a killing of a dog, as permitted by statute, when "found

worrying, wounding or killing any domestic animal outside the inclosure or immediate care of his owner," the worrying and killing must substantially concur; that the dog was known to have done so or is believed to be about to do so merely, is not sufficient. *Chapman v. Decrow*, 93 Me. 378.

It is within the police power of a state, to provide for the summary destruction of dogs found running at large. *Hagerstown v. Witmer*, 86 Md. 293; s. c., 39 L. R. A. 649.

Vicious dog duly licensed, collared and confined for protection may not be killed. *Uhlein v. Cromack*, 107 Mass. 273.

A statute, as to the killing of dogs worrying cattle or sheep, does not apply to or interfere with one's right to kill a dog which is about to kill his poultry. *Nesbett v. Wilbur*, 177 Mass. 200.

Shooting into a congregation of dogs, that for eight nights had assembled on a person's premises and fought so as to keep family awake and seriously annoy them, and after they had become an intolerable nuisance, and after ineffective complaint to the police and twice driving them away in the night, raised a question for the jury whether shooting was justified. Trial court only submitted question of damages; error. *Hubbard v. Preston*, 90 Mich. 221.

If a valuable dog on several different occasions bark around one's house at night, chase cats treeward, track up a freshly painted porch, visit the hen house and break a single egg, it may not be killed without previous protestation to the owner, when known. One morning defendant saw dog in front of his house and shot him; he found he had left tracks on his freshly painted stoop. *Bowers v. Horen*, 93 Mich. 400.

So a dog that has never trespassed before, but that runs from the highway to a lily pond, may not be killed without warning to those in charge. *Tenhopen v. Walker*, 96 Mich. 236.

Owner of sheep may shoot upon sight, while on his premises unattended, a sheep-killing dog, which shortly previous was chasing his lambs. *Throne v. Mead*, 122 Mich. 273.

If a person, to kill dogs engaged in killing his sheep, place poisoned meat on his farm, having reason to suppose his neighbors' dog might come thereon, and they do so and are killed, he will be liable therefor, unless such dogs in fact did kill his sheep. *Gillum v. Sisson*, 53 Mo. App. 516.

The act of killing another's dog, is not a criminal offense either statutory or at common law. *State v. Mease*, 69 Mo. App. 581.

Defendant was justified in killing a dog which he found stealing milk at night. *Fisher v. Badger*, (Mo. App.) 69 S. W. Rep. 26.

In a county in which the Missouri stock law has not been adopted, owner of land may drive off trespassing animals; but if he attempts to detain them he is liable for resulting injury. *Harris v. Brummel*, 74 Mo. App. 433.

While dogs may be killed to protect one's own property, they are to be respected as property, and cannot be killed simply because they are found trespassing. *Fenton v. Bisel*, 80 Mo. App. 135; *Woolsey v. Haas*, 65 Mo. App. 198.

Notice to keep the dog off the premises was not enough; it was for the jury to say whether it was necessary under the circumstances to kill the dog to protect the property. *Hodges v. Causey*, 77 Miss. 353.

Dog has a money value, and if it be unlawfully killed compensation may be recovered. *Nehr v. State*, 35 Neb. 638.

See, also, *Smith v. St. Paul & C. R. Co.*, 79 Minn. 254.

But dog that persistently and threateningly assails people passing on the street is a nuisance and may be killed by the person assailed. *Nehr v. State*, 35 Neb. 638.

*Brown v. Carpenter*, 26 Vt. 638; *Putnam v. Payne*, 13 Johns. 312; *Hinckley v. Emerson*, 4 Cow. 351; *Loomis v. Terry*, 17 Wend. 496; *Maxwell v. Palmersten*, 21 id. 406; *Brill v. Flagler*, 23 id. 354; *Dunlap v. Snyder*, 17 Barb. 561; *Parken v. Wise*, 27 Ala. 480; *King v. Kline*, 6 Pa. St. 318; *Woolf v. Chalker*, 31 Conn. 121.

Where an ox escaped into defendant's field by reason of his own failure to fix a fence, he was liable for driving it out upon the highway, where it got upon the railroad track and was killed. *Morse v. Glover*, 68 N. H. 119.

Reasonable and ordinary methods only are warranted in driving off trespassing cattle. Wanton injury to them is not justified. *Addington v. Canfield*, (Okl.) 66 Pac. Rep. 355.

Pa. Act, April 14, 1851, sec. 7, as to the permission to kill dogs found worrying sheep, was not repealed by Pa. Act, May 15, 1889, and May 25, 1893. *Commonwealth v. Gabby*, 5 Pa. Dist. 159.

Though a dog is of bad habits and has just bitten his child, one is not justified in going upon its owner's premises thereafter and shooting it. *Decker v. Holgate*, 5 Lack. L. News, 56.

Dogs assaulting a person may be killed by him, even after interval necessary to get his gun. *Spaight v. McGovern*, 16 R. I. 658. (Under R. I. Pub. St., chap. 93, sec. 8.)

That plaintiff's dog had frequently trespassed on defendant's premises, was suspected of killing defendant's rabbits and plaintiff was notified that unless it was stopped the dog would be shot, was not sufficient

justification for killing the dog unintentionally while shooting to scare it. *Harris v. Eaton*, 20 R. I. 81.

Dog is personal property and recovery may be had for negligent injury. *Richardson v. Railroad Co.*, 55 S. C. 334; *Sally v. Id.*, 54 id. 481.

Maliciously shooting a dog was the proximate cause of injury to one whom the dog ran against. *Isham v. Dow's Estate*, 70 Vt. 588; s. c., 45 L. R. A. 87.

### III. Who Is Liable for Knowingly Keeping or Harboring a Vicious Animal.

Where executors agreed with "C." that the latter should occupy and work a farm on shares for a year, keep fences in repair, take care of stock, leave thereon as much and as good stock as he found, keep nothing thereon in which the first party did not have an interest, and "C." while so occupying the farm, procured a vicious ram in exchange for one already on the farm and kept it without the knowledge of the first party, and the same escaped and injured the plaintiff, "C." and not the executors was liable. *Marsh v. Hand*, 120 N. Y. 315, aff'g 40 Hun, 339, distinguishing *Champion v. Bostwick*, 48 Wend. 475; *Stroher v. Elting*, 97 N. Y. 102.

One who resides as head of the family on his wife's premises was liable for ugly dog kept thereon. *Kessler v. Lockwood*, 62 Hun, 619.

Married woman liable for bite of her husband's dog, harbored on her premises, with knowledge of its vicious propensities. *Quilty v. Battie*, 48 N. Y. S. R. 413.

The statutory provision rendering a person in possession of a dog, or who shall suffer a dog to remain about his house for twenty days, &c., liable as owner for his mischievous acts, does not make an employer liable for mischief done by the dog of his hired laborer, where the dog was in the habit of following his master daily to his work on the farm of the employer and of returning each night to and staying with his master at his own house, which was distant from that of the employer. *Auchmuty v. Ham*, 1 Denio 495.

See *Jennings v. D. G. Burton Co.*, 73 Hun, 546.

An employer does not harbor a dog, because he knows that his hired man has one in his family, which occupies a separate residence on the farm.

"G." in occupation of a farm, employed in working it "W." who was allowed to occupy a farm-house on the premises as a part of the compensation for his labor, the products of which were received by "G." "W." brought a dog upon



the premises, which in the course of his employment, "W." occasionally used to churn butter which was made for "G." The dog was vicious and bit one Simpson, who brought an action against "G." to recover damages for the injury thus inflicted.

Held, in the absence of knowledge upon the part of "G." of the bad disposition of the dog, that he was not liable. *Simpson v. Griggs*, 58 Hun, 393.

Defendants were husband and wife, living together upon premises owned by the wife, both contributing to the household expenses. The husband bought a dog and brought it upon the premises. The jury found, upon sufficient evidence, that the dog was vicious, and known by the wife to be so; and that she harbored it upon the premises with knowledge of its vicious propensities. The dog, not being confined, went upon neighboring premises and there bit the plaintiff.

Harboring this dog was the personal act of the wife; allowing it to escape, knowing that its vicious propensities might cause injury to others, was her personal tort, and she was liable for the resulting injury.

Being the personal tort of the wife her husband was properly joined as defendant. *Quilty v. Battie*, 61 Hun, 164; aff'd, 135 N. Y. 201.

Citing *Fitzgerald v. Quann*, 109 N. Y. 441; *Genenz v. De Forest*, 49 Hun, 364; *Keenan v. Gutta Percha Mfg. Co.*, 46 id. 544.

Lessor of a farm on shares was under contract to provide therefor certain cattle including a bull, and was liable for a vicious one, when he had notice that it was so and refused to consent to measures to prevent injury from it. *Lettis v. Horning*, 67 Hun, 627.

Where a man occupies certain premises and supports his family, and with them several dogs, which are kept on the place, the dogs, so far as the public are concerned, are presumed to belong to him.

The defendant kept certain dogs, which were of a vicious character, as he well knew; they were suffered to go at large without being properly guarded, and the plaintiff was injured by them; the defendant was a householder, occupying with his family premises owned by his wife; he supported his family, supplied his table and was the head of his own household; the dogs were fed from the table and had the freedom of the premises. The defendant testified that he did not own the dogs and did not own the premises where he lived.

The question of the title was of little importance, and the defendant, as he kept and harbored the dogs, was liable under a proper state of facts for the injuries which they inflicted. *Bundschuh v. Mayer*, 81 Hun, 111.

One who lived with his mother on premises rented by her, over which he had no control, was not liable as owner or harbinger of a dog kept by her coachman. *Lynt v. Moore*, 5 App. Div. 487.

President and manager of theatre company is the harbinger or keeper of a vicious horse, where he has the ordering and the disposing of it.

*Lawlor v. French*, 14 Misc. 497; s. c. rev'd on other grounds, 2 App. Div. 140.

When husband keeps dog on wife's premises, it is chargeable to him and not her. *Strouse v. Leipf*, (Ala.) 23 L. R. A. 622.

Harboring a vicious dog, knowing its propensity, creates liability. *Hornbein v. Blanchard*, (Col. App.) 35 Pac. Rep. 187.

They to whom the use and care and control of cattle are confided, although not the absolute owners, are deemed the owners under Connecticut Statutes (tit. 33, sec. 21). All damages done by cattle, horses, sheep or swine, when the fence is sufficient, shall be paid by the owners of them." So that father and a son having use and possession of cattle generally, as joint occupants of a farm, in an action of trespass, *quare clausum fregit* were jointly liable. *Smith v. Jaques*, 6 Conn. 530.

He who has care and custody of sheep, for the purpose of depasturing them, is liable for damage done by them, to same extent as owner. *Barnum v. Vandusen*, 16 Conn. 200.

One who harbors a dog as owner, is chargeable as owner in a statutory action. *Shultz v. Griffith*, 103 Iowa, 150; s. c., 40 L. R. A. 117.

Owner of animal is liable for injuries committed by his animal. *McGuire v. Ringrose*, 41 La. Ann. 1029.

A vendor who allows his dog, which has returned, to remain, without the vendee's consent, is chargeable as his keeper. *Mitchell v. Chase*, 87 Me. 172.

Whether owner of land was keeper of dog was passed on by jury in *Barrett v. Malden &c. R. Co.*, 3 Allen, 101; *Cummings v. Riley*, 52 N. H. 368.

The word "owner," as used in Massachusetts' General Statutes, chap. 25, sec. 25, is intended to include the person in whom is the general property in the animal, and also those in possession of them under special title or by virtue of any lien, and such general owner must be held responsible even if, at the time of the injury, they were in possession of a bailee for the purpose of being driven. *Hartford v. Brady*, 114 Mass. 466.

Citing *Sheridan v. Bean*, 8 Metc. 284.

Dog was owned and licensed in the name of superintendent of poor farm of city, and kept and fed at farm and allowed to run thereon. This with knowledge and without objection of overseers of poor; did not show, as a matter of law, that the city was keeper of dog within General Statutes, chap. 88, sec. 59. *Collinghill v. City of Haverhill*, 128 Mass. 218.

Distinguishing *Barrett v. Malden &c. R. Co.*, 3 Allen, 101.

Wife was not a keeper of dogs so as to render her liable to persons bitten, when they were owned and kept on her premises by her husband.

although she carried on a separate business on such premises. Charge of the court was that wife was not liable if jury found dog was husband's, and he kept it against her consent. *McLoughlin v. Kemp*, 152 Mass. 7.

So, where a hired man kept a dog on master's premises, and by his acquiescence, latter was not liable *per se* for its bite. *Whittemore v. Thomas*, 153 Mass. 347.

See, *contra*, *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

Merely suffering a dog to remain on the premises temporarily, does not establish the status of a keeper. *O'Donnell v. Pollock*, 170 Mass. 441.

Owner of premises, who allows a boarder to keep a dog thereon, is not as matter of law, chargeable as keeper in a statutory action. *Boylan v. Everett*, 172 Mass. 453.

Nor is one who allows a dog, which had wandered with a servant of its master to his premises, to remain there temporarily. *Fye v. Chapin*, 121 Mich. 675.

But such liability has been imposed upon the owner of land, worked on shares, by her son, who owned the dog, and whose only home was with his mother. *Jenkinson v. Coggins*, 123 Mich. 7.

When animal is hired out *for some time*, hirer and not owner is liable for injuries from its vicious habits. *Bell v. Leslie*, 24 Mo. App. 661.

Owner, having general possession, care and control of beasts, is answerable for trespass. *Noyes v. Colby*, 30 N. H. 143.

Where defendant negligently kept a vicious dog, it was not essential to his liability that he own or control either the premises or the dog. *Hayes v. Smith*, 62 Oh. St. 161.

Little son of steward brought, and on moving away steward left, a dog at the county almshouse; directors failed to banish it and acting steward adopted it for the county; county was not liable. *Sproat v. Greene County Poor Directors*, 145 Pa. St. 598.

Where a boy of fourteen owned a dog and lived with his mother, who was defendant's housekeeper, defendant's liability was for jury on question of viciousness of dog of which he had knowledge, and whether he had kept or harbored it. *Snyder v. Patterson*, 161 Pa. St. 98.

Owner's servant, without his knowledge or consent, placed a vicious horse in charge of third person, where he injured a colt, and owner was liable. *Campbell v. Trimble*, 75 Tex. 270.

#### AGISTORS.

One having a qualified ownership, as an agistor of cattle, is liable for their trespass; and absolute owner is not liable, *unless in case*. (*Wales v. Ford*, 3 Holst. 267.) *Rossell v. Cottom*, 31 Pa. St. 525.

Owner or agistor of agisted cattle is liable for trespass, *although but one satisfaction can be obtained*. Common law not changed by R. S. C. 113, sec. 4. The statute is, "When any person is injured on his land by sheep, &c., he may recover his damages in an action of trespass against the owner of the beasts or by distraining, &c." *Sheridan v. Bean*, 8 Metc. 284.

When "A." and "B." own adjoining closes, the partition fence between which is not divided, each is bound to keep his cattle on his own land at his peril. But if "C." with "A.'s" assent, keep his oxen in "A.'s" pasture, and has the custody of them there, and they stray into "B.'s" close, "C." and not "A." is to be considered, as to the oxen, as the occupant of "A.'s" close, and is liable for damage. But it is otherwise if "A." has custody of "C.'s" oxen while they are in his close. *Twoksbury v. Bucklin*, 7 N. H. 518.

Citing 4 D. & E. 318; *Chatham v. Hampson*, 2 L. Raymond, 804; *The Queen v. Bucknall*, 3 D. & E. 766.

Action of trespass will not lie against owner while cattle are in hands of agistor or bailee; if action would lie at all it would *be in case*, as if he had selected reckless and irresponsible agistor or bailee, or had reason to know that cattle would commit trespass. *Ward v. Brown*, 64 Ill. 307.

*Ozburn v. Adams*, 70 Ill. 291; *Baird v. Shipman*, 132 id. 20.

#### IV. Joint Trespassers.

When dogs belonging to several owners are found in company killing sheep, each owner is liable for the injury done by his own dog, and for no more. *Auchmuty v. Ham*, 1 Denio, 495.

When cows belonging to several owners, are found trespassing, each owner is liable only for the damage done by his own cow, and in absence of all proof as to the amount done by each cow, it will be inferred that the cattle did equal damage. *Partenheimer v. Vanorder*, 20 Barb. 479.

Two persons, owning dogs severally, are not jointly liable for acts of mischief done by such dogs jointly. Owner must be sued in separate actions.

Connecticut statute makes owner of dog liable in trespass for all damages by wounding or destroying sheep, although owner did not know that dogs were accustomed to do such mischief. *Russell v. Tomlinson et al.*, 2 Conn. 206.

From opinion.—"It would be repugnant to the plainest principles of justice to say that the dogs of different persons, by joining in doing mischief, could

make their owners jointly liable. This would be giving them a power of agency, which no animal was ever supposed to possess."

Where the cattle of two several parties go upon the field of another, and injure his crops, a joint action of trespass cannot be maintained against them. Each owner is separably liable for the injuries done by his own stock. *Westgate v. Carr*, 43 Ill. 450.

*Yeakell v. Alexander*, 48 Ill. 263.

Plaintiff may elect to sue all or only a part of the several owners of trespassing animals. *Brady v. Ball*, 14 Ind. 317.

Citing *Chit. Pl. 86 Perk. Pr. 144.*

Where growing crops were destroyed by the repeated trespassing of cattle of different owners, and it was impossible to distinguish between the trespass of one lot of cattle and that of the other, the court apportioned the damage according to the number of cattle and allowed a recovery against one owner in accordance with such apportionment; no error. *Powers v. Kindt*, 13 Kan. 61.

Where injury was done by two dogs, together, belonging to several owners, each owner was liable only for the damage done by his own dog, not for the whole damage done by the two dogs. Separate action necessary. *Buddington v. Shearer*, 20 Pick. 477.

Citing *Van Steinburgh v. Tobias*, 17 Wend. 562; *Auchmuty v. Ham*, 1 Denio, 495.

From opinion.—"In such cases there is no concurrence of intent or action among the several owners of the animals in producing the same injury. A person's responsibility for the act of his dog arises from the fact of ownership. \* \* \*"

Tenants in possession may be sued jointly in an action for trespass committed by animals kept by them in common upon the premises, although the several animals are owned by them severally. *Jack v. Hudnall*, 25 Oh. St. 255.

All who join in harboring a vicious dog, are liable as joint tort feorsors for its acts. *Hayes v. Smith*, 15 Oh. C. C. 300.

Pennsylvania act, 1851, permits suit to be brought against all the owners of several dogs, which at one and the same time kill and wound sheep. No *scienter* need be proved. Each owner is liable for whole damage; proof of joint ownership need not be proved when they do the act together. *Ker v. O'Connor*, 63 Pa. St. 341.

The statute allows the several owners of dogs concerned in a joint mischief to be joined, but does not require it. Without this statute, the different owners and keepers of dogs could not be properly joined, but each must answer for the wrongs of his own dog. *Rowe v. Bird*, 48 Vt. 578.

*Adams v. Hall*, 2 Vt. 9.

A charge that each of the several owners of dogs engaged in an attack on sheep, was liable for the whole damage, was proper in a statutory action. *Nelson v. Nugent*, 106 Wis. 477.

### V. Injury by Animals While Trespassing.

By the common law, every owner or possessor of cattle was bound absolutely to keep them from the land of another.\*

This rule has been adopted in several states. But it is often modified by certain duties of the injured person respecting fences. Thus, either by agreement, statute or prescription it may be the duty of a person to erect a fence along the boundaries of his land or a portion thereof. If he fail in this duty and cattle thereby enter, he can have no redress. But, although he be obliged to fence, it may be that he is only bound to fence against the beasts of his adjoining owner, in which case, if he fail to build or properly maintain such fence, it would be no excuse for the trespass of a person not an adjoining owner, whose cattle might thereby enter.

In many states the common law never prevailed. This was often the case, because in a new country the large extent of uncultivated lands able to be employed only for pasturage rendered the fencing or other restraint of cattle impracticable. Hence, it was the right of every owner of cattle to let them roam, and the duty of every land owner to keep the cattle of others from his land, if he so wished. As the cultivation of the land increased there was greater occasion for protection against straying cattle, and fence and estray laws, or the common law rule in some form was adopted, or contracts made to fence, or prescriptive rights arose respecting the same. Hence, when a fence was built as prescribed, the land that it was intended to protect was as privileged from the trespass of cattle, as if as to such land the common law prevailed, and if cattle entered without fault of the land owner, so far as such fence was concerned, the owner of the cattle was absolutely liable. But in such case, also, when the duty of the land owner was to maintain some portion or the whole of a *division* fence, his failure to do so

\* NOTE.—Such law entirely eliminates all question of negligence (save in the instances hereinafter stated), where the injury is done by trespassing animals, and places the owner in a position where he has a right to keep animals, but if he does not keep them securely, so far as injuries on his neighbors' land are concerned, he will be absolutely liable, as if for the maintenance of a nuisance. This is an anomaly in the law and contrary to the essential principles governing the lawful ownership and enjoyment of property. A right conferred in the innocent exercise thereof becomes a wrong. If, without the slightest negligence of the owner, gun-powder and a cow on "A."s land simultaneously go off and do damage on the land of "B." a neighbor, "A." is absolutely liable for the injury done by the cow, but not that done by the powder without evidence of negligence. It is, therefore, in legal theory, safer to keep nitro-glycerine, operate steam engines, burn lands, confine water, and use all fearful and destructive agencies on land, than to harbor thereon a domesticated cow.

was a defense available only to the adjoining owner. And so, if it were the duty of the cattle owner to fence, so far as such duty extended, the obligation of the common law was applied; and if a statute existed against straying cattle, so far as it extended, it put the responsibility for trespassing on the owner of the beasts.

The question is this, whose duty is it to keep beasts from unlawful entry on land? The common law is itself a fence *for the land owner*, but when, for any reason, it becomes the land owner's duty to fence, the common law rule is modified, because his fence, so far as required, and not the law, becomes the barrier to the cattle.

So, where the common law does not prevail, either the cattle may roam at will, or statute, contract or prescription determines that the land owner, or cattle owner, or both, shall do some act to keep cattle from trespassing, and so far as either party fails, so far he becomes liable, or is precluded from recovering, if injury arise by his fault.

So there may be various conditions of the law, thus,

(1) When there is no duty to fence and no law against cattle straying; then it would be a simple question whether the common law prevails, or otherwise;

(2) Law forbidding cattle to be at large. This would be an adoption of the common law;

(3) By law, contract or prescription, duty of owner of cattle to fence them in; the failure to do this makes him liable absolutely, as if to that extent the common law prevailed;

(4) Law, contract, or duty by prescription, that land owner should fence against cattle. The fence properly built and maintained makes his land as inviolable as did the common law, and failure to fence, so far as such failure contributed to his injury, would take away his right to recover.

Thus, statutes as to fencing and estrays are but *pro tanto* adoptions or restrictions of the common law, as they result in measurably adopting or supplanting that law for the purpose of keeping beasts from trespassing. If a breach of duty by the injured person assists the injury, the damage resulting therefrom is not recoverable; if the breach of duty be by the owner of the cattle, it establishes his liability.

However, any generalization must be imperfect by reason of the peculiar language of statutes and the diverse holdings of courts. Especially is this so where the question of injury to animals by railways is involved.

The following holdings may be useful:

ALABAMA.—Uninclosed lands are common pasturage. *Wilbite v. Speakman*, 79 Ala. 400.

ARKANSAS.—Little Rock &c. R. Co. v. Finley, 37 Ark. 562.

CALIFORNIA.—Common law never was adopted, but by statute 1850, page 130, owner of land could not recover for cattle breaking into his close, unless the land were enclosed by statutory fences. *Comerford v. Dupuy*, 17 Cal. 308.

Statute 1861, p. 523, amended statute 1867, 1868, p. 426, made it unlawful to herd or permit the herding of sheep on the land or possessory claims of another, but this did not apply to cattle straying thereon without the agency, knowledge or consent of their owners. *Logan v. Gedney*, 38 Cal. 579.

changed the same in certain counties, relative to partition fences. *Richardson v. Milburn*, 11 Md. 340.

Baltimore &c. R. Co. v. Lanborn, 12 Md. 257.

MASSACHUSETTS.—Common law prevails. *Rust v. Low*, 6 Mass. 90.

"A's" cattle, through "B's" negligence to keep division fences in repair, escaped into "B's" field, and thence, through "C's" neglect to keep in repair fences between "C." and "B.," escaped into "C's" land and did damage. "A." was liable at suit of "C." *Lyons v. Merrick*, 105 Mass. 71.

MICHIGAN.—Common law prevails, except that no recovery can be had for damage done by beasts, unless land be fenced, except in case where, by the laws of the township, beasts are prohibited from running at large. *Williams v. Michigan &c. R. Co.*, 2 Mich. 260.

Wood v. La Rue, 9 Mich. 158.

MINNESOTA.—In the absence of action by town, under sub. div. 6, sec. 15, c. 10, Gen. Stat., common law prevails. *Locke v. First Div. &c. R. Co.*, 15 Minn. 283.

Citing, *State v. Pulle*, 12 Minn. 170.

Unless otherwise provided by the town, cattle cannot run at large in summer, although owner of land not legally fenced, cannot recover for injuries done by cattle over two years old, and not breachy. *Fritz v. First Div. R. Co.*, 22 Minn. 404.

MISSISSIPPI.—See *Vicksburgh &c. R. Co. v. Patton*, 31 Miss. 156; *New Orleans &c. R. Co. v. Field*, 46 Miss. 573.

MISSOURI.—See *McPheeters v. Hannibal &c. R. Co.*, 45 Mo. 22.

NEVADA.—See *Chase v. Chase*, 15 Nev. 259.

NEW HAMPSHIRE.—Common law prevails. *Noyce v. Colly*, 30 N. H. 143.

NEW JERSEY.—Common law prevails although statute (Elm. Dig. 192; R. L. 387), declares that fences shall be deemed lawful for the purpose of creating liability in damages in some cases, and of exemption from liability in others; but this extends "only to owners of adjoining closes, between whom, a division of the partition fence has been made, and the part to be maintained by each has been ascertained, either by voluntary agreement between them or an assignment by the township committee." If there be no such division, the common law prevails. This does not apply to cattle running at large and trespassing. *Chambers v. Matthews*, 18 N. J. L. 368; *Vandegrift v. Rediker*, 22 id. 185.

NEW YORK.—The owner of cattle is bound at his peril to confine them on his own land; if they escape and commit a trespass on the land of another, unless through defect in fence which the latter ought to repair, the owner is liable. *Van Leuven v. Lyke*, 1 N. Y. 515; *Spinner v. N. Y. C. R. Co.*, 67 id. 156; *Marsh v. Hand*, 120 id. 319, 320; *Bush v. Brainerd*, 1 Cow. 78, note; *Wells v. Howell*, 19 Johns. 384; *Phillips v. Covell*, 79 Hun, 210.

A neglect to build or repair division or partition fence renders the party liable in damages for injuries arising therefrom. *Bush v. Brainerd*, 1 Cow. 78; *Deyo v. Stewart*, 4 Denio, 101.

For fence laws see Town Law, sec. 100.

OHIO.—Common law never prevailed. 3 Oh. St. 172; 4 id. 474. By statute the owner of cattle is liable for all damages done by them while unlawfully at large, unless done to a railroad; but the act of 1865, forbidding cattle to be at large, does not make the owner of the cattle guilty of a breach of the act, if he uses reasonable care to prevent it. *Marietta R. Co. v. Stephenson*, 24 Oh. St. 48.

OREGON.—See *Campbell v. Bridwell*, 5 Ore. 311.



that is with regard to tame beasts, for the grass they eat and trample upon, though not for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick, or bulls to gore.' And all of the general authorities seem to agree that the owner of a domestic animal is not liable because of a negligent failure to keep it confined on his own premises, *except for the consequences which may be anticipated because of its well-known disposition and habits, unless it is possessed of a vicious disposition of which he had notice.* In *Losee v. Buchanan*, 51 N. Y. 476 (but see *Thompson Law of Negligence*, p. 52), it is said: 'As to the former (speaking of domestic animals), the owner is not responsible for such injuries as *they are not accustomed to do*, by the exercise of vicious propensities which they do not usually have, unless it can be shown that he has knowledge of the vicious habit and propensity. As to all animals, the owner can usually retain and keep them under control, and if he will keep them he must do so. If he does not, he is responsible for any damage which their well-known disposition leads them to commit. I believe the liability to be based upon *the fault which the law attributes to him*, and no further actual negligence need be proved than the fact that they are at large unrestrained.'

We believe the foregoing to be a correct statement of the law in such cases. *Earl v. Van Alstine*, 8 Barb. 630; *Van Leuven v. Lyke*, 1 N. Y. 515; *Vrooman v. Lawyer*, 13 Johns. 339; *Thompson Law of Neg.* sec. 15, p. 201; *Thompson Law of Neg.* sec. 26, p. 209; *Durham v. Musselman*, 2 Blackf. 96; *Thompson Law of Neg.* sec. 10, p. 389; *Sinram v. Pittsburg & C. R. W. Co.*, 28 Ind. 244; *Smith v. Causey*, 22 Ala. 568; *Wormley v. Gregg*, 65 Ill. 251; *Dearth v. Baker*, 22 Wis. 73.

In *S. & R. Law of Neg.*, sec 629, it is said: 'But the owner of creatures which as a species are harmless and domesticated, and are kept for convenience or use, such as dogs, cattle, horses, and even bees, is not liable for injuries willfully committed by them, unless he is proved to have had notice of the inclination of the particular animals complained of to commit such injuries. If, having had such notice, he neglects to keep them confined where no one can suffer from them while using ordinary care, he is liable for all injuries committed by them. And the owner of even a wild beast is not liable for injuries caused by it in a manner which no acquaintance with its nature could have led him to expect, except upon similar evidence of notice.'

The opposing doctrine is thus stated:

"The gist of trespass is the unlawful entry, and the direct object of an action therefor is the recovery of damages for the injury to the close, but where incidental injuries to the plaintiff's cattle, or the like, are committed by trespassing animals, these may be alleged by way of aggravation, and damages recovered therefor; as where a trespassing animal gores, or kicks or bites the plaintiff's horse or cow. *Angus v. Radin*, 8 Am. Dec. 626; *Dolph v. Ferris*, 42 id. 246; *Saxton v. Bacon*, 31 Vt. 540; *Lyons v. Merrick*, 105 Mass. 71; *Dunkle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722; *Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10. Nor need it be alleged or proved that the owner of such animal had any previous notice of its vicious disposition, or that it had previously shown such disposition. *Angus v. Radin*, 8 Am. Dec. 626; *Dunkle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722. Although an owner of animals *mansuetæ naturæ* is not liable for such injuries committed by them while not tres-

passing, unless they have been previously vicious to his knowledge. *Angus v. Radin, supra*; *Van Leuven v. Lyke*, 1 N. Y. 515. But when they are trespassing it is at the peril of the owner, and he must answer for all the consequent injuries. The case of dogs attacking sheep or cattle on another's land, already mentioned, stands upon a different footing, for there the original entry was not a trespass. But if a dog accompanies his trespassing owner and does such an injury, he must answer for it without regard to previous notice of the dog's vicious disposition, because it is a proximate result of his own trespass. *Beckwith v. Shordike*, 4 Burr. 2092. In case of vicious injuries to the plaintiff's cattle by a trespassing animal, if *scienter* of the mischievous propensity is not alleged, the fact of the trespass must be averred as the ground of action, or there can be no recovery, even though it appears in proof that the animal was trespassing. *Van Leuven v. Lyke*, 1 N. Y. 515; s. c., *post*.

The communication of disease by the defendant's trespassing animals to the animals of the plaintiff may also be averred and proved in aggravation of the trespass, though the defendant had no notice of the disease. *Anderson v. Buckton*, 1 Stra. 192; *Bamum v. Vanduzen*, 16 Conn. 200. But in an action for negligence in infecting the plaintiff's sheep by contact with the defendant's diseased sheep, where it does not appear how the sheep came on the plaintiff's land, *scienter* is necessary. *Cook v. Waring*, 32 L. J. Ex. 262. Damages are recoverable also in an action for the trespass of the defendant's 'scrub' bull for getting the plaintiff's thoroughbred cow with calf. *Crawford v. Williams*, 48 Iowa, 247. So in case of a trespassing stallion getting a mare with foal. *Hagan v. Casey*, 36 Wis. 553. And damages for such injury may be recovered in a subsequent action, notwithstanding a prior recovery for the trespass, if the facts as to the mare's condition were not known at the time. *Id.* So damages are recoverable for an injury by a trespassing calf to the plaintiff's trees, though the injury is not such as cattle are, by nature, wont to commit. *Keenan v. Cavanaugh*, 44 Vt. 368. The defendant is not liable for injuries committed by other cattle not under his control, entering through the breach made by his cattle."

To warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *Hollenbeck v. Johnson*, 79 Hun, 499.

In a complaint charging a trespass by defendant's horses on plaintiff's land and alleging by way of aggravations the kicking and breaking the collar bone of the plaintiff's horse, it is not necessary to aver that the defendant's horses were accustomed to kick, or that the defendant had notice of the vicious propensity. *Dunkle v. Kocker*, 11 Barb. 387.

This is so even if the injury arise from some unusual vicious propensity of the trespassing animal. The *gravamen* of the action is the trespass, which carries with it all incidental injury.

The owner of an animal is liable for personal injuries done by it to another upon whose land it is trespassing, whether it is a vicious animal or known to its owner to be vicious, or otherwise. *Malone v. Knowlton*, 39 N. Y. S. R. 901.

*Van Leuven v. Lyke*, 1 N. Y. 515; see *Hollenbeck v. Johnson*, 79 Hun. 499; *Vicksburg & Co. v. Patten*, 31 Miss. 156; *Walker v. Herron*, 22 Tex. 55.

Where defendant's animals are unlawfully as trespassers in the close of another, their owner is liable for all damages or injuries they commit *whether he had any previous notice of their tendency to commit the harm or injury complained of or not*. Nor need it be alleged that owner had previous notice.

*Angus v. Radin*, 8 Am. Dec. 626; *Dolph v. Ferris*, 42 id. 246; *Tonawanda R. Co. v. Munger*, 49 id. 25; *Dunkle v. Kocker*, 11 Barb. 387; *Lee v. Riley*, 18 Com. B. (N. S.) 722; *Lyons v. Merrick*, 105 Mass. 71; *Saxton v. Bacon*, 31 Vt. 540.

Statutory liability, for all damages for animals "running at large," does not extend to injury by a jack, where it escaped without defendant's knowledge or negligence. *Briscoe v. Alfrey*, 61 Ark. 196; s. c., 30 L. R. A. 607.

Recovery was allowed, where the consequence of the trespass was communication of disease to cattle. *Barnum v. Vandusen*, 16 Conn. 200.

*Anderson v. Buckton*, 1 Stra. 192.

Though owner of cattle, lawfully at large, may not be liable for their trespassing on uninclosed land, he is nevertheless liable, if he deliberately drives them thereon. *Monroe v. Cannon*, 24 Mont. 316.

Statutory permission to detain animals unlawfully at large, for damage done, held not to exclude common law action for damages. *Bowles v. Abrahams*, 65 Mo. App. 10.

Nebraska Herd Law construed to limit the common law liability for trespassing animals. *Lorance v. Hillyer*, 57 Neb. 266.

The common law rule that allows cattle to be at large only at risk of owner, regardless of negligence, was restored by the repeal of Pa. Act 1889, of the act of 1700, requiring the landowner to assume the burden of keeping cattle out of his premises. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Getting cow with calf, *Crawford v. Williams*, 48 Iowa, 247; or mare with foal, *Hagan v. Casey*, 30 Wis. 553.

So when calf injured trees. *Keenan v. Cavanaugh*, 44 Vt. 268.

"H." and "B." were adjoining owners. In consequence of "B.'s" neglect to maintain his portion of the fence, "A.'s" horse escaped upon "B.'s" land and was gored by "B.'s" bull. It was for the jury and not the court to say whether the injury was the natural consequence of "B.'s" neglect. *Saxton v. Bacon*, 31 Vt. 540.

Citing *Powell v. Salisbury*, 2 Younge & Jervis, 391.

**From opinion.**—"We do not regard it as indispensable to the maintenance of this action that the vicious habits of the animal should have been known to the defendant."

Where the dividing line of property is along the middle of a road so that no fence can be erected, an owner is bound to prevent his cattle straying. *Carpenter v. Cook*, 71 Vt. 110.

*Tonawanda R. Co. v. Munger*, 5 Denio, 255; *Westgate v. Carr*, 43 Ill. 450; 49 Am. Dec. 241; *Frazier v. Nortinus*, 34 Ia. 82; *Comerford v. Dupuy*, 17 Cal. 308; *Morris v. Fraker*, 5 Col. 425; *Studwell v. Rich*, 14 Conn. 292; *Wright v. Wright*, 21 Conn. 344; *Larkin v. Taylor*, 5 Kan. 260; *Lyons v. Merrick*, 105 Mass. 71; *Williams v. Michigan &c. R. Co.*, 2 Mich. 260; *Fritz v. First Div. &c. R. Co.*, 22 Minn. 404; *Gregg v. Gregg*, 55 Pa. St. 227.

But, see, *Keenan v. Cavanaugh*, 44 Vt. 268, and *Chambers v. Matthews*, 18 N. J. L. 368, where it was held that the owner of land is not obliged to fence against cattle running at large on highway.

Owner was not relieved from the acts of his turkeys, trespassing upon another's land, because there was an opening in the latter's fence. *Mcpherson v. James*, 69 Ill. App. 337.

Plaintiff cannot recover for damage done by cattle to uncultivated land, unless they be driven thereon. *Meyers v. Menter*, (Neb.) 88 N. W. Rep. 662.

Where fruit trees are planted though in a city lot, it is cultivated land, within the Nebraska Herd Law, as to trespassing animals. *Lorance v. Hillyer*, 57 Neb. 266.

The purpose of the Free Range Law is to protect owners of cattle which stray on the lands of others, but it does not permit one to wilfully drive cattle thereon. *Addington v. Canfield*, (Okl.) 66 Pac. Rep. 355.

Failure to maintain the statutory fence does not prevent recovery under the statute for damages to inclosures or crops by notoriously mischievous cattle. *Smith v. Jones*, 95 Tenn. 339.

The common law not being in force, failure to fence one's property so as to prevent all sizes and kinds of cattle, of ordinary disposition trespassing, prevents recovery therefor. *Clarendon Land &c. Co. v. McClelland*, 89 Tex. 483; s. c., 31 L. R. A. 669.

Owner of animals forbidden to run at large, was conclusively presumed negligent, where they entered plaintiff's land through a fence sufficient to turn animals permitted to be at large. *Frazer v. Bedford*, (Tex. Civ. App.) 66 S. W. Rep. 573.

The acts requiring fencing are not unconstitutional as interfering with the enjoyment of private property, but are mere regulations in such use and enjoyment. *Poindexter v. May*, 98 Va. 143; s. c., 47 L. R. A. 588.

#### (c). DIVISION FENCES.

When a division fence is required between adjoining properties, and the cattle escape onto the land of one through defective fence which such person neglected to maintain, the owner of the cattle is not liable; but this does not excuse trespass by cattle of third persons, nor undomesticated animals. *Deyo v. Stewart*, 4 Denio 101.

*Stafford v. Ingersoll*, 3 Hill. 38; *Phillips v. Corell*, 79 Hun, 210; *Bush v. Brain-*

ard, 1 Cowen, 78 note a, p. 82; *Seeley v. Peters*, 5 Gilm. 130; *Chambers v. Matthews*, 18 N. J. L. 368; *Wilber v. Closson*, 35 Me. 26; *Lawrence v. Combs*, 37 N. H. 331; *Cate v. Cate*, 50 N. H. 114; *Gilman v. Noyes*, 51 N. H. 629; *Williams v. Michigan &c. R. Co.*, 2 Mich. 260; *Keenan v. Cavanaugh*, 44 Vt. 268; *Tower v. Providence &c. R. Co.*, 2 R. I. 404; *Rust v. Low*, 6 Mass. Rep. 98; *Lyons v. Nurrick*, 105 id. 71; *Cooley on Torts*, 339; N. Y. 1 R. S. 346, sec. 44, *Banks' 7th ed.*, vol. 1, p. 831.

By N. Y. statute, 1 R. S. 353, art. 4, it may be made the duty of owners of adjoining lands to build and maintain certain parts of division fences. The like obligation may also be imposed by contract or prescription, which presupposes an original contract; and when the duty exists and has been violated, the law will give no redress to the party in fault for damages sustained by him in consequences of a defect in the part of the fence he was bound to make or repair. *Tonaawanda R. Co. v. Munger*, 5 Denio, 255.

Citing 1 Chit. Pl. 544; *Poole v. Longueville*, 2 Saund. 285, note 4; *Bush v. Brainard*, 1 Cow. 79, note; 13 Am. Dec. 513; *Shepherd v. Hees*, 12 Johns. 433.

Where fence is undivided, each owner must keep cattle on his own land where common law prevails as to division fences. *Tewksbury v. Bucklin*, 7 N. H. 518.

*Avery v. Maxwell*, 4 N. H. 36; *Thayer v. Arnold*, 4 Met. 589; *Little v. Lathrop*, 5 Greenl. 356; *Lawrence v. Combs*, 37 N. H. 335.

So when once erected it is removed by both parties, each party must keep his cattle at his peril. *Van Slyck v. Snell*, 6 Lans. 299.

Owner of close need not fence against any cattle save those rightfully upon adjoining land.

*Lawrence v. Combs*, 37 N. H. 366; *Salkwell v. Milwarde*, 26 Hen. 6, 23; 10 Ed. 4, 7; *Fitzh v. Curiacland*, 1, 2; *Rust v. Low*, 6 Mass. 99; 3 Kent. 438; *Avery v. Maxwell*, 4 N. H. 37; *Halliday v. Marsh*, 3 Wend. 147; *Wells v. Howell*, 19 Johns. 385; *Stackpole v. Haley*, 16 Mass. 38; *Lord v. Wormwood*, 29 Me. 282; *Hurd v. R. Co.*, 25 Vt. 122; *Dovaston v. Payne*, 2 H. Blackstone, 527; *Cornwall v. Sullivan R.*, 28 N. H. (8 Foster) 167.

Common law liability has been restricted by statute, as between the proprietors of adjoining closes, who, under certain circumstances, are each bound to maintain a just proportion of their division fence; and the party in default has no remedy for a trespass committed by the cattle of the other party.

Where one's cattle are lawfully placed on "A.'s" land, and escape thence to the land of another, their owner is entitled to the same exemption from liability that "A." might claim in case the cattle had been his, but nothing more.

Accordingly, where "B.'s" cattle were rightfully pasturing on land owned and occupied by "A." and they escaped thence to the adjoining land of "C." through a defect in the division fence which "A." was bound to repair. Held, that "C." might maintain trespass against "B."

And, *semble*, as the cattle were on "A.'s" land with his consent, he might be treated as owner of them for all the purposes of a remedy, either at the common law or under the statute. *Stafford v. Ingersol*, 3 Hill, 38.

A statutory provision prohibiting use of barbed wire in division fences is violated, where it is placed within the corners of a rail fence entirely on his, defendant's own land. *Buckley v. Clark*, 21 Misc. 138.

Owner of cattle held not liable, where they were pastured on the land of another, and trespassed through insufficient line fence. *Eck v. Hocker*, 75 Ill. App. 641.

The jury must determine whether a line fence is sufficient to restrain cattle's disposition to rove, under Pa. Act 1842. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Where land owner failed to maintain a proper fence he cannot charge a cattle owner with trespass, simply because he knew of it. *Clarendon Land &c. Co. v. McClelland*, 89 Tex. 483; s. c., 31 La. R. A. 669.

Adjoining owner cannot recover for trespass of cattle through a division fence, insufficient through his neglect. *Heironimus v. Duncan*, 11 Tex. Civ. App. 610.

#### (f). INJURIES COMMITTED ON HIGHWAY.

When animals are lawfully driven or taken along the highway in a proper manner, and without negligence escape upon the premises of another and do damage before they can be removed by the exercise of due expedition, the owner is not liable. But they must be lawfully on highway. Cooley on Torts, 341.

Plaintiff was knocked down and injured in a street in the city of B— by a cow belonging to the defendant "W." In an action to recover damages it appeared that the owner had contracted to sell and deliver the cow, and, in pursuance of the contract, employed "F," a person long accustomed to that kind of business, to take her to the purchasers. "F." was leading the cow by a rope around her horns, when two dogs violently seized upon and frightened her; she kicked, knocked "F" down, pulled away from him and ran, and, while thus beyond his control, inflicted the injury complained of. Held, that, while it was not lawful for any cow to run at large in any street or public place in this state (Laws of 1872, chap. 776), the apparent violation of the law was explained; and in the absence of any evidence of knowledge on the part of said defendants that the cow was unruly, or had previously done similar acts, they were not, under the circumstances, liable.

*Moynahan v. Wheeler*, 117 N. Y. 285.

*Bush v. Brainard*, 1 Cow. 78, note a, pp. 87, 91; *Halladay v. Marsh*, 20 Am. Dec. 678; *Cool v. Crummet*, 13 Me. 250.

Where the defendant negligently permitted his horse to go, loose and unattended, upon the sidewalk of a populous street in a city, and in passing he kicked the plaintiff and injured him, defendant was liable.

To make the owner responsible, it is unnecessary to allege the viciousness of the horse, in committing the injury, except in cases where, but for the vice of the animal, the owner would be free from fault.

It is such negligence for the owner of a horse to turn him loose, to go from the stable into the street of a city, unattended, as will make him

the knowledge of the person *then* driving him, yet if the manner of driving him was negligent, a recovery was allowable, unless plaintiff was negligent. *Barnum v. Terpenning*, 75 Mich. 557.

See *Tillett v. Ward*, Q. B. Div. 22 Am. L. Reg. 245.

Herd of cattle turned, unattended, loose in the highway, contrary to statute, while hooking and pushing overturned a vehicle; owner liable; owner assumed all risks. *Shipley v. Colclough*, 81 Mich. 624.

Plaintiff was entitled to double damages under a statute, giving recovery for injury caused by a dog while traveling on a highway, where it attacked a horse and caused it to kick the driver. *Jenkinson v. Cogins*, 123 Mich. 7.

Animals lawfully on highway are not running at large so as to bind owner for injuries incident to cattle running at large. *Calvin v. Sutherland*, 32 Mo. App. 77.

Entry of cattle on private grounds, while passing along the highway, does not impose liability, where they are removed in a reasonable time. *Erdman v. Gottshall*, 9 Pa. Super. Ct. 295.

Failure to show that defendant knew of the alleged viciousness of the steer, driven along a city street, did not necessarily defeat recovery; and, on a conflict of evidence, defendant's carelessness in controlling it, was properly submitted to the jury. *Puechner v. Braun*, 10 Pa. Super. Ct. 595.

Liability of owner of a bull inflicting personal injury after it escaped, while being driven through the street, does not depend upon vicious propensities previously existing, and knowledge or notice thereof. *Baird v. Vaughn*, (Tenn.) 15 S. W. 734.

Knowledge of a dog's disposition to bite, is not essential to liability under a statute making a dog owner liable for all damage done by it while on a highway. *Kelly v. Anderson*, 19 R. I. 544.

Mere fact that domestic animal is unattended in highway, is not negligence. *Holden v. Shattuck*, 34 Vt. 336.

As to reasonable time to remove cattle trespassing, while being driven on highway, see *Goodwin v. Cheveley*, 28 L. J. Ex. 298.

S. C., 4 Hurlst. & N. 631.

#### (g). WILD ANIMALS.

Wild animals, by the authority of the decisions, would seem to stand upon the same plane with dogs proven dangerous, so that *feræ naturæ* are kept at the absolute risk of the owner. It has been thought by some modern authors\* whose judgment is authoritative, that while an injury

\* Note — See, Cooley on Torts, 348-9; Bishop on Non-Contr. Law, sec. 1320; and also Wharton on Neg., sec. 918.

by a wild animal escaped from restraint might establish a *prima facie* case of negligence, that the keeper could show that such escape was without fault on his part. The care required may be the highest practicable, like that required of common carriers of passengers, but does care enter into the question?

Owner of an elephant keeps it at his own risk, although ignorant of its dangerous character. *Filburn v. People's Palace &c. Co.*, (C. A.) L. R., 25 Q. B. D. 258.

## VI. Injuries on Railways.

(Unless so stated the question of compulsory fencing by company is not involved.)

By the common law, cattle on a railway track are trespassers, as the company is not, and the owner of the cattle is bound by fencing or otherwise, to keep them from entering thereon. Hence, if they be injured thereon the company, save as hereafter stated, is not liable, as the owner, by his own wrongdoing, has contributed to the injury. The question of the land-owner's negligence is not involved. *Tonawanda R. Co. v. Munger*, 4 N. Y. 349; aff'g 5 Denio, 255; note, p. 261; *Corwin v. N. Y. & E. R. Co.*, 13 N. Y. 42.

**From opinion.** (*Corwin v. R. Co.*, *supra.*)—"By the common law, the owner was bound to take care that his cattle did not leave his own lands and trespass upon those of his neighbor (*Pomfret v. Ricroft*, 1 Wm. Saund. 321); if they did, he was himself liable for damages in an action of trespass. It has long been settled that there can be no recovery in an action on the case for negligence where the negligence or misconduct of the plaintiff contributed to the injury; hence it was repeatedly decided, prior to the general Railroad Act of 1848, that one whose cattle were trespassing upon the railroad at the time they received the injury, could not recover damages of the railroad company." *Spinner v. N. Y. Cent. R. Co.*, 67 N. Y. 153.

*Pittsburg &c. R. Co. v. Stuart*, 71 Ind. 504; *Louisville &c. R. Co. v. Ballard*, 2 Metc. (Ky.) 177; *Knight v. New Orleans &c. R. Co.*, 15 La. Ann. 105; *Baltimore &c. R. Co. v. Lanborn*, 12 Md. 257; *Perkins v. Railway Co.*, 29 id. 307; *Darling v. Boston &c. R. Co.*, 121 Mass. 118; *Williams v. Michigan &c. R. Co.*, 2 Mich. 259; *Woolson v. Northern P. R. Co.*, 19 N. H. 267, *Vandergrift v. Redike*, 22 N. J. L. 185; *Price v. N. J. &c. R. Co.*, 2 Vroom. 229; 3 id. 19; *North. Penn. R. Co. v. Rehman*, 49 Pa. St. 101; *Jackson v. Rutland &c. R. Co.*, 25 Vt. 150; *Galpin v. Chicago &c. R. Co.*, 19 Wis. 637.

## VII. Cattle Unlawfully at Large Precludes Recovery.

The same rule applies to cattle unlawfully at large and injured while trespassing on a railway.

*Hance v. Cayuga R. Co.*, 26 N. Y. 428; *Simmons v. Poughkeepsie &c. R. Co.*, 2



App. Div. 117; Alabama &c. R. Co. v. McAlpin, 71 Ala. 545; Denver &c. R. Co. v. Stewart, 1 Col. App. 227; McDonald v. Great Northern R. Co., (Id.) 46 Pac. Rep. 766; Delta Electric Co. v. Whitcamp, 58 Ill. App. 141; R. Co. v. Hunter, 38 Ind. 557; Jeffersonville &c. R. Co. v. Adams, 43 id. 402; Jeffersonville &c. R. Co. v. Foster, 63 id. 342; Vanhorn v. Burlington &c. R. Co., 63 Iowa, 67; Kansas City R. Co. v. McHenry, 24 Kan. 359; Missouri &c. R. Co. v. McGrath, 7 Kan. App. 710; Weingartner v. Louisville &c. R. Co., (Ky.) 42 S. W. Rep. 839; Eames v. Salem R. Co., 98 Mass. 560; Maynard v. Boston &c. R. Co., 115 id. 458; Schneekloth v. Chicago &c. R. Co., 108 Mich. 1; Mosher v. St. Paul &c. R. Co., 42 Minn. 480; Johnson v. Minneapolis &c. R. Co., 43 id. 207; Averill v. Santa Fe Receivers, 72 Mo. App. 243; Case v. Central R. Co., 59 N. J. L. 471; Doggett v. Richmond &c. R. Co., 81 N. C. 459; Wolsen v. R. Co., 19 id. 267; Pittsburg &c. R. Co. v. Methven, 21 Oh. St. 586; N. Y. &c. R. Co. v. Skinner, 19 Pa. St. 298; R. Co. v. Tower, 2 R. I. 404; Sinkling v. Illinois C. R. Co., 10 S. D. 560; Houston &c. R. Co. v. Nichols, (Tex. Civ. App.) 39 S. W. Rep. 954; Missouri &c. R. Co. v. Russell, 43 id. 576; Texas &c. R. Co. v. Smith, 41 id. 83; Bunnell v. Rio Grande &c. R. Co., 13 Utah, 314.

This doctrine does not apply in action by a passenger. *Sullivan v. Phila. &c. R. Co.*, 30 Pa. St. 234. In absence of action by town under statute, the common law rule prevails, and cattle stray on railway track by the owner's own fault. *Locke v. First Div. R. Co.*, 15 Minn. 283; *Fritz v. Same*, 22 id. 404.

### VIII. Cattle Unlawfully at Large Does Not Preclude Recovery.

But it is also held that the *mere fact that cattle are unlawfully running at large* will not preclude recovery; especially where the company's negligence was the proximate cause of the injury.

This doctrine is more pronounced where the common law does not prevail, or stock are not unlawfully at large. Many of these decisions turn upon the point that the plaintiff's negligence was not proximate, and that the company did not use due care after discovering the stock.

*R. Co. v. Williams*, 65 Ala. 74; Alabama &c. R. Co. v. Powers, 71 id. 487; *R. Co. v. Finlay*, 37 Ark. 569; *Richmond v. Sacramento &c. R. Co.*, 18 Cal. 357; approving *Williams v. Michigan Cent. R. Co.*, 2 Mich. 259; *R. Co. v. Macer*, 40 Cal. 522; *Savannah &c. R. Co. v. Geigner*, 21 Fla. 669; *Cleveland &c. R. Co. v. Ahrens*, 42 Ill. App. 434. Citing *I. & St. L. R. Co. v. Peyton*, 76 Ill. 340; *Toledo &c. R. Co. v. Wickey*, 44 id. 76; *R. Co. v. Irish*, 72 id. 404; *Alger v. R. Co.*, 10 Ia. 268; *Searles v. Milwaukee R. Co.*, 35 id. 491; *Balcom v. R. Co.*, 21 id. 102; *Kuhn v. C. R. &c. R. Co.*, 42 id. 420; *Miller v. Chicago &c. R. Co.*, 59 id. 707; *Mo. Pac. R. Co. v. Wilson*, 28 Kan. 455; (where cattle were lawfully on highway) *R. Co. v. Lebus*, 14 Bush. 518; *R. Co. v. Gorman*, 26 Mo. 44; *Iba v. Hannibal &c. R. Co.*, 45 id. 469; *Turner v. Kansas &c. R. Co.*, 78 id. 578; *Raiford v. Mississippi R. Co.*, 43 Miss. 233; *R. Co. v. Patton*, 31 id. 188; *Bether v. Raleigh &c. R. Co.*, 106 N. C. 279; *Kerwhacker v. R. Co.*, 3 Oh. St. 172; *R. Co. v. Smith*, 22 id. 227; *Moses v. Southern R. Co.*, 18 Ore. 385; *Keeney v. Oregon &c. R. Co.*, 19 id. 291; *Front v. R. Co.*, 23 Gratt. 623; *Murray v. S. Car. &c. R. Co.*, 10 Rich. 227; *Sauls v. Alderman &c. Co.*, 55 S. C. 395; *Blaine v. R. Co.*, 9 W. Va. 253; *Isbell v. R. Co.*, 27 Conn. 393.

But mere right to run at large does not give right to trespass on railway. *Williams v. Michigan &c. R. Co.*, 2 Mich. 259. And owner of cattle takes the risk. *Memphis &c. R. Co. v. Smith*, 9 Heisk. 860; *Kerwhacker v. Cleveland &c. R. Co.*, 3 Oh. St. 172; *Pritchard v. R. Co.*, 7 Wis. 232.

Where horses were unlawfully at large, yet if involuntarily as to the owner, and he used care to recapture them, the doctrine of comparative negligence enabled him to recover. *Chicago &c. R. Co. v. Harris*, 54 Ill. 528.

It is only when the animal is at large by owner's sufferance that the company is relieved from liability for injury thereto. *Pearson v. Milwaukee &c. R. Co.*, 45 Iowa, 497, following *Buckley v. R. Co.*, 27 Conn. 479; *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

So held where horses escaped through a hedge fence and got on the track, but the owner did not know; he was not *per se* negligent. *Moriarty v. Central R. Co.*, 64 Iowa, 696.

Mules went out of the stable door, left open so that they could get to water, and went on railroad track; as the owner did not intend them to be at large he was not negligent so as to defeat an action for their injury. *Doran v. R. Co.*, 73 Iowa, 115.

In a stock law district, the railroad's right as to trespassing cattle, is the same as adjoining owners. *Canton &c. R. Co. v. French*, 75 Miss. 939.

Under Ohio Act of 1865, although cattle be unlawfully at large, yet if it be without the fault of the owner and they enter on the railroad through the land of another, the owner is not negligent. *Marietta R. Co. v. Stephenson*, 24 Oh. St. 48.

But see *Evans v. Sherman &c. R. Co.*, 14 Tex. Civ. App. 437; *Houston &c. R. Co. v. Hollingsworth*, 68 id. 724; *Texas &c. R. Co. v. Seay*, 69 id. 177.

## IX. Company Liable for Wanton or Wilful Acts or Gross Negligence.

But whether the cattle be trespassers, or lawfully at large, or not trespassers, the company is liable, if injury be done to them through the wanton or willful act of the company, or its agents or servants, while in the discharge of a service committed to them to do, or if it be done through negligence, so gross, as to be equivalent to wantonness or willfulness.

*Richmond v. Sacramento R. Co.*, 18 Cal. 351; *Headon v. Rust*, 39 Ill. 192; *Pierce v. Wright*, 73 Ill. App. 512; *Pierce v. Rabberman*, 77 id. 619; *Van Stone v. Burlington R. Co.*, 63 Iowa, 67; *Raiford v. Mississippi &c. R. Co.*, 43 Miss. 233; *Smith v. St. Paul City R. Co.*, 79 Minn. 254; *Jewett v. Kansas City &c. R. Co.*, 50 Mo. App. 547; *Hill v. Missouri &c. R. Co.*, 66 Mo. App. 184; *Clem v. Wabash &c. R. Co.*, 72 id. 433; *Moses v. Southern Pac. R. Co.*, 18 Or. 385; *East Tenn. &c. R. Co. v. Selcer*, 7 Lea, (Tenn.) 557; *Houston &c. R. Co. v. Nichols*, (Tex. Civ. App.) 39 S. W. Rep. 954; *Texas &c. R. Co. v. Smith*, 41 id. 83; *Missouri &c. R. Co. v. Russell*, 43 id. 576; *Missouri &c. R. Co. v. Meithvein*, 33 id. 1093; *Pritchard v. LaCrosse &c. R. Co.*, 7 Wis. 232; *Stucke v. M. &c. R. Co.*, 9 id. 202; *Chicago &c. R. Co. v. Goss*, 17 id. 428; *Bennett, v. C. & N. R. Co.*, 19 id. 145; *Fisher v. Farmers' &c. R. Co.*, 21 id. 73.

## X. Company Should Use Reasonable Care to Prevent Injury to Cattle Known to Be on the Railway.

It is also a usual rule that the company, *when cattle are known to be on the track*, or may reasonably be expected to be found there, should use reasonable and ordinary care to avoid injury to them, whether they be trespassers or otherwise.

Denver &c. R. Co. v. Nye, 9 Colo. App. 94; Georgia R. Co. v. Neely, 56 Ga. 540; Louisville &c. R. Co. v. Hall, 110 id. 49; Chicago &c. R. Co. v. Taylor, 8 Ill. App. 108; Chicago &c. R. Co. v. Hill, 24 id. 619; Lake Erie &c. R. Co. v. Norris, 60 id. 112; Chicago &c. R. Co. v. Smedley, 65 id. 644; Chicago &c. R. Co. v. Patterson, 72 id. 428; Searles v. Milwaukee &c. R. Co., 35 Iowa, 490; Baltimore &c. R. Co. v. Mulligan, 45 Md. 486; Johnson v. Minneapolis &c. R. Co., 43 Minn. 207; New Orleans &c. R. Co. v. Field, 46 Miss. 573; Robins v. St. Louis &c. R. Co., 21 Mo. App. 141; Gorman v. Pacific &c. R. Co., 26 Mo. 441; Turner v. St. Louis &c. R. Co., 76 Mo. App. 261; Walsh v. Virginia &c. R. Co., 8 Nev. 110; Cincinnati &c. R. Co. v. Smith, 22 Oh. St. 227; Lake Erie &c. R. Co. v. Weisel, 55 Oh. St. 155; Louisville &c. R. Co. v. Wainscott, 3 Bush. 149; Kentucky &c. R. Co. v. Lebus, 14 id. 518; Furness v. Union R. Co., 4 Pa. Dist. 784; Front v. Virginia &c. R. Co., 23 Gratt. (Va.) 619; Bemis v. Conn. &c. R. Co., 42 Vt. 375; Washington v. Baltimore &c. R. Co., 17 W. Va. 190.

## XI. Company Should Use Reasonable Care to Discover Cattle and Prevent Injury to Them.

In many states, including some where the common law rule prevails, it is held that a company should use ordinary and reasonable care to prevent injury to cattle. As has been seen, this is a general rule *after the cattle have been discovered or their presence should for any reason be expected*; but there is diversity of judicial opinion as to the care, that the company should use, *to discover* cattle that might have come on the track, and avoiding injury to them, and what degree of negligence must be proven to establish liability.

The following decisions will somewhat illustrate the tendency of the holdings:

ALABAMA.—Company is liable irrespective of its negligence. *Nashville &c. R. Co. v. Peacock*, 25 Ala. 229.

Company should use the care that a very careful person would take of his own affairs. *Ala. &c. R. Co. v. McAlpine*, 75 Ala. 113; *Mobile R. Co. v. Williams*, 53 id. 595.

ARKANSAS.—See *Little Rock &c. R. Co. v. Finlay*, 37 Ark. 562; *Memphis &c. R. Co. v. Kerr*, 52 id. 162.

CALIFORNIA.—If cattle could have been seen at some distance, by conductor, to be on the track, and if he could have managed to get them off unhurt, by employing the usual means, it would be negligent to go on; if suddenly, without notice,

they should run on the track and by ordinary and usual care the collision could not be avoided, the company would not be liable. Company was not obliged to fence. *Rich v. Sacramento R. Co.*, 18 Cal. 351.

COLORADO.—Company is liable absolutely for killing a domestic animal. *Atchison, T. & C. R. Co. v. Betts*, 10 Col. 431.

CONNECTICUT.—Fact that cattle were trespassing does not preclude recovery without actual negligence on the part of the owner proximately contributing to the injury; but if by proper care the company could have avoided the injury, it should have been done. *Isbell v. N. Y. & C. R. Co.*, 27 Conn. 393.

GEORGIA.—See *Georgia & C. R. Co. v. Neely*, 56 Ga. 540.

In Georgia, ordinary domestic animals and railroad trains are equally free, as respects each other, to pass on uninclosed lands. If they come in collision, with damage to either, the diligence of their respective owners will become material on the question of compensation. Corporations are not bound to fence their lines, nor farmers to confine their ordinary domestic animals. Code, sec. 3033, presumes the corporation was altogether in fault. To rebut this it must appear (Code, sec. 3033-4) that plaintiff consented to the injury, or that he caused it by his own negligence, or that the agents of the company exercised all ordinary care and reasonable diligence; when plaintiff's negligence contributed to the injury the damages may be apportioned according to the relative fault of the parties, (Code, sec. 3034). As to personal injuries, "If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover." (Code, sec. 2972.) *Savannah & C. R. Co. v. Gray*, 77 Ga. 282.

See, also, *Southern R. Co. v. Camp*. (Ga.) 42 S. E. Rep. 56; *Southern R. Co. v. Moore*, id. 82.

ILLINOIS.—When cattle are unlawfully at large in a village, the company should have its trains under control, and more care is required at a place where cattle are known to be lawfully at large. *Gulf & C. R. Co. v. Engle*, 84 Ill. 397.

Statute presumptively fixes liability when train is run in a city or town beyond rate of speed permitted by ordinance. *C. C. & C. R. Co. v. Ahrens*, 42 Ill. App. 437.

Company should use ordinary care after seeing animal, but was not obliged to send man ahead to drive it off. *Chicago & C. R. Co. v. Taylor*, 8 Ill. App. 108; *P. & C. R. Co. v. Camp*, 75 id. 577.

If by reasonable care and skill the injury could have been prevented, it should have been. Company was not bound to fence. *Rockford & C. R. Co. v. Leria*, 58 Ill. 49.

Whenever danger of a collision with an animal is imminent, by whosoever fault the stock be on the track, an engineer should use whatever proper means he has to avoid it. See *Cleveland & C. R. Co. v. Rice*, 40 Ill. App. 51. When animal is at large by sufferance of owner, and gets on track where company is not required to fence, company is not in general liable, unless its servants, after they discover the animal, might by the exercise of proper care and prudence, have prevented the injury. *Toledo & C. R. Co. v. Barlow*, 71 id. 640.

INDIANA.—As to trespassing cattle, company is only liable for willful or wanton acts or for gross negligence equivalent thereto. *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 370.

IOWA.—Company should use the care of a man of ordinary prudence. This was

stated in a case where the negligence was in not making proper effort to save stock after seeing it on track. *Searles v. Milwaukee &c. R. Co.*, 35 Iowa, 490.

(Citing *Alger v. R. Co.*, 10 Iowa, 268; *Baucum v. R. Co.*, 21 id. 102.

If cattle be killed where there is a right to fence and none has been erected, liability is absolute; if there be a fence gross negligence must be shown; if the killing is where there is no right to fence, the company is held to reasonable care, and is liable for ordinary neglect. *Davis v. Burlington &c. R. Co.*, 26 Ia. 549.

As to trespassing cattle, the company is only liable for willful or wanton acts, or for gross negligence equivalent thereto. Horses were at large contrary to law. *Van Horn v. Burlington &c. R. Co.*, 63 Iowa, 67.

Held, that in case of animals required to be kept inclosed, company was only liable for the negligence or willful injury. *Alger v. R. Co.*, 10 Iowa, 268.

KANSAS.—If trainmen could, by ordinary care, have seen, or seeing, have avoided striking an animal on the track, they were required to do so. Animal was lawfully at large. *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 455.

KENTUCKY.—*Kentucky R. Co. v. Lebus*, 14 Bush. 518; *Louisville &c. R. Co. v. Wainscott*, 3 id. 149.

As to trespassing cattle, company only liable for willful or wanton acts, or gross negligence equivalent thereto. *Louisville &c. R. Co. v. Ballard*, 2 Metc. 177.

Where the train could have been stopped within 75 yards, verdict for plaintiff was held proper, where it appeared that a horse ran for 460 feet before the train without the engineer's seeing it, though his view was unobstructed. *Louisville &c. R. Co. v. Jones*, (Ky.) 52 S. W. Rep. 938.

Presumption of negligence was overcome, by uncontradicted evidence that the horses could not have been discovered in time to have prevented injury by the exercise of ordinary care. *Felton v. Anderson*, (Ky.) 66 S. W. Rep. 182; *Illinois C. R. Co. v. Gholson*, id. 1022.

See, also, *Louisville &c. R. Co. v. Rice*, (Ky.) 60 S. W. Rep. 705.

LOUISIANA.—As to trespassing cattle, company only liable for willful or wanton acts, or gross negligence equivalent thereto. *Knight v. New Orleans &c. R. Co.*, 15 La. Ann. 105.

MARYLAND.—By statute 1838, chap. 244, and 1846, chap. 346, company is liable unless accident was due to unavoidable accident. *Keech v. Baltimore &c. R. Co.*, 17 Md. 32; *Baltimore &c. R. Co. v. Mulligan*, 45 id. 486.

Duty of company to use reasonable care to avoid an injury to stock found on its road. This places burden of exculpating itself on the company. *Baltimore &c. R. Co. v. Woodruff*, 4 Md. 242.

But the rule only applies when stock is on the track without any fault of the owner. *Baltimore &c. R. Co. v. Lamborn*, 12 Md. 257.

Company was bound to use reasonable care to avoid injury to stock found on its road, although there by owner's negligence. *Baltimore &c. R. Co. v. Mulligan*, 45 Md. 486.

MASSACHUSETTS.—As to trespassing cattle, company is only liable for willful or wanton acts, or gross negligence equivalent thereto. *Maynard v. R. Co.*, 115 Mass. 415.

But if found on track, company should exercise reasonable and proper care to avoid injury. *Darling v. R. Co.*, 121 Mass. 118; *Eames v. Salem &c. R. Co.*, 98 id. 560.

MICHIGAN.—Railroad company was not bound to fence, so not liable for injury

lone by them when unlawfully at large, unless done to a railroad company. *Maricitta R. Co. v. Stephenson*, 24 Oh. St. 48.

RHODE ISLAND.—As to trespassing cattle, company is only liable for willful or wanton acts, or gross negligence equivalent thereto. Not obliged to use ordinary care and skill in the common and ordinary use of its land for railroad purposes. *Power v. R. Co.*, 2 R. I. 404.

SOUTH CAROLINA.—Company should use ordinary care to prevent injury. *Walker v. Columbus &c. R. Co.*, 25 S. C. 141.

SOUTH DAKOTA.—Defendant was not liable, where its train's speed and equipment were proper, and it was unable, by the use of reasonable care, after discovering the animal, to prevent the injury. *Keilbach v. Chicago &c. R. Co.*, 11 S. D. 468.

TENNESSEE.—Defendant was not liable, where after seeing the dogs, it blew the whistle and did everything possible to avoid their injury. *Fink v. Evans*, 95 Tenn. 413.

Motorman, failing to use reasonable care after discovering a dog on the track, cannot rely on a dog's natural quickness to get out of the way. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317; s. c., 40 L. R. A. 518.

TEXAS.—International &c. R. Co. v. Dunham, 58 Tex. 23

Where the engineer, from the time he first saw the mules on the track, did all he could to avert injury, he was not chargeable with negligence. *Houston &c. R. Co. v. Hollingsworth*, (Tex. Civ. App.) 68 S. W. Rep. 724.

Where a private crossing was situated on a curve, concealed from view of an approaching train until within 40 feet, defendant was not liable for failure to signal on approaching, where everything possible was done to avert injury after discovering an animal thereon. *San Antonio &c. R. Co. v. Aycock*, (Tex. Civ. App.) 68 S. W. Rep. 1001.

VERMONT.—When engineer runs train with ordinary care and vigilance and watches the track in advance as much as he can consistently with his other duties, he discharges his obligation of care towards trespassing cattle. *Bemis v. Connecticut R. Co.*, 42 Vt. 375.

Company is liable for recklessness and want of ordinary care at the time and after discovering cattle on the track, and for wanton injury thereto. *Jackson v. Rutland R. Co.*, 25 Vt. 150.

VIRGINIA.—Front v. Virginia &c. R. Co., 23 Gratt. 619.

WEST VIRGINIA.—Company should use ordinary care to prevent injury. *Blaine v. Chesapeake &c. R. Co.*, 9 W. Va. 252; *Washington v. Baltimore &c. R. Co.*, 17 id. 190.

Verdict for plaintiff sustained where mule, which could have been seen 250 yards away on a moonlight night, walked 40 feet on the track before being struck, and nothing was done to avert an accident. *Blankenship v. Kenawha &c. R. Co.*, 43 W. Va. 135.

#### (a). SUITABLE CARE REQUIRES LOOKOUT.

Suitable care requires an outlook to discover cattle on the track. *Western R. Co. v. Sistrunk*, 85 Ala. 352.

*Mobile &c. R. Co. v. Kinsborough*, 96 Ala. 127; *Little Rock &c. R. Co. v. Finley*, 37 Ark. 562, (wrongfully on track); *Atlanta &c. R. Co. v. Hudson*, 62 Ga. 679; *Chicago &c. R. Co. v. Legg*, 32 Ill. App. 218; *Matthews v. St. Paul &c. R. Co.*, 18

Minn. 434; *New Orleans &c. R. Co. v. Bourgeois*, 66 Miss. 3; *Hill v. Missouri Pac. R. Co.*, 49 Mo. App. 520; *Gulf &c. R. Co. v. Johnson*, 54 Fed. Rep. 474.

Failure to keep a lookout did not permit recovery, where the engineer could not have seen the animal in time to prevent injury if he had. *Choate v. Southern R. Co.*, 119 Ala. 611.

See, also, *Louisville &c. R. Co. v. Brinckerhoff*, 119 Ala. 606.

Engineer must keep such lookout for live stock on the tracks as may be consistent with his other duties. *Central &c. R. Co. v. Dumas*, (Ala.) 30 South. Rep. 867.

Where an animal could have been seen in time to prevent injury at ordinary speed, the engineer was negligent, where, owing to excessive speed, it was impossible. *Central &c. R. Co. v. Stark*, (Ala.) 28 South. Rep. 411.

It is for the jury to say, whether railroad is liable, for killing a horse at a point where the track is straight for many yards. *Southern R. Co. v. Posten*, (Ala.) 31 South. Rep. 21.

A statute, imposing the duty of keeping a constant lookout on all "persons running trains," construed not to require fireman to keep lookout while engineer is doing so. *St. Louis &c. R. Co. v. Russell*, 62 Ark. 182; *Arkansas &c. R. Co. v. Saunders*, 69 id. 619.

Defendant meets the *prima facie* case of negligent killing, by showing that the horse came so suddenly on the track that it could not avoid injury. *St. Louis &c. R. Co. v. Cline*, 69 Ark. 659.

Injury to a hog, lying under cars on a side track, which were set in motion by backing an engine against them, raised no presumption of negligence. *Fink v. Nelson*, (Ark.) 48 S. W. Rep. 897.

Failure of a fireman to keep a lookout while otherwise necessarily engaged, or of the company to have some one exclusively engaged in that duty, held not a ground of liability. *Rogers v. Georgia R. Co.*, 100 Ga. 699.

Where plaintiff's right of recovery rested entirely on a presumption of negligence from the killing of cattle, and was met by uncontradicted evidence on behalf of defendant, judgment for former was reversed. *Southern R. Co. v. Adkins*, 114 Ga. 135.

Presumption of negligent killing of stock is overcome, by uncontradicted evidence, that injury could not be avoided by all ordinarily reasonable care and diligence. *Western &c. R. Co. v. Robinson*, 114 Ga. 159.

No duty to keep lookout for trespassing cattle. *Chicago &c. R. Co. v. Bunker*, 81 Ill. App. 616.

Railroads are bound to use ordinary care in keeping a lookout for stock on the track. *Missouri &c. R. Co. v. Farrington*, (Ind. Terr.) 43 S. W. Rep. 946.

Where the right of way is fenced in, the engineer has the right to assume that the track is clear and owes no duty but to use care *after discovery*. *Mears v. Chicago &c. R. Co.*, 103 Iowa, 203.

The same duties exist between a railroad and a farmer at a farm crossing, as between it and the public at a highway crossing; including the duty of the former to keep a lookout for cattle on the track. *Atchison &c. R. Co. v. Conlon*, 9 Kan. App. 116.

Where everything possible was done to avoid injury after the discovery of animals, company was held not liable. *Mobile &c. R. Co. v. Whayne*, (Ky.) 64 S. W. Rep. 723.

Railway company is liable for failure to use reasonable care to prevent injury. *Beatyville &c. R. Co. v. Maloney*, (Ky.) 49 S. W. Rep. 545.

Engineer should keep a lookout for stock so far as is consistent with his other duties. *Howard v. Louisville &c. R. Co.*, 67 Miss. 247.

*Bemis v. Conn. R. Co.*, 42 Vt. 375; *Carlton v. Wilmington &c. R. Co.*, 104 N. Car. 365; *Spicer v. Chesapeake &c. R. Co.*, 34 W. Va. 514.

Where the fireman and engineer were not able to keep a lookout at the time because of other duties which absorbed their attention, defendant was not chargeable. *Mobile &c. R. Co. v. Holliday*, 79 Miss. 294.

Failure of engineer to see animals on track in time to avoid injury, due to the glare of light from the fire box, which fireman was coaling, held not negligence. But where a cow was feeding with head towards and 10 feet away from the track, with a cut ahead and escape to the sides cut off by a fence and an embankment, the circumstances required caution. *Cantrell v. Kansas City &c. R. Co.*, (Miss.) 24 South. Rep. 871.

A special watchman must be kept on the engine (by statute). *Louisville &c. R. Co. v. Stone*, 7 Heisk. 468.

An instruction, that defendant was liable if it did not use ordinary care to discover an animal in time to stop, was improper as ordinary care did not necessarily involve stopping. *Houston &c. R. Co. v. Red Cross Stock Farm*, 22 Tex. Civ. App. 114.

#### (b). SPECIAL WATCHMAN NEED NOT BE KEPT.

Special watchman or patrols for the track need not be kept. *Memphis &c. R. Co. v. Kerr*, 52 Ark. 162.

*Witherill v. Milwaukee &c. R. Co.*, 24 Minn. 410.

#### (c). TRAIN AGENT NEED NOT KEEP A LOOKOUT.

Where proper fence has been built and maintained, the railway company was not obliged to keep an outlook for trespassing cattle. *Illinois Central R. Co. v. Noble*, 142 Ill. 578.



Train agents need not keep any outlook for the discovery of cattle on track. This would be subject to the qualification that there was no notice or knowledge that cattle were on the track. *Palmer v. Northern Pac. & R. Co.*, 37 Minn. 223.

*Stacey v. Winona & C. R. Co.*, 42 Minn. 158.

(d). BELL SHOULD BE RUNG OR WHISTLE SOUNDED WHEN CATTLE ARE SEEN.\*

Bell should be rung or whistle sounded when cattle are seen on or near the track. *Western & C. R. Co. v. Sistrunk*, 85 Ala. 352.

*Macon & C. R. Co. v. Lester*, 30 Ga. 911; *St. Louis & C. R. Co. v. Hurst*, 25 Ill. App. 181; *Chicago & C. R. Co. v. Killam*, 92 Ill. 245; *Lawson v. Chicago & E. Co.*, 57 Iowa, 672; *Missouri Pac. R. Co. v. Wilson*, 28 Kan. 455; *Wallace v. St. Louis & C. R. Co.*, 74 Mo. 594; *Hippin v. Wilmington & C. R. Co.*, 75 N. C. 626; *Bemis v. Conn. & C. R. Co.*, 42 Vt. 375; *Washington v. Baltimore & C. R. Co.*, 17 W. Va. 190; *Stucke v. Milwaukee & C. R. Co.*, 9 Wis. 202.

Failure to give the statutory signals, held not ground for recovery, where no danger was apparent until accident was inevitable, and it took place beyond the crossing. *Southern R. Co. v. New*, 105 Ga. 481.

Circumstances may require signals and slackening of speed, but not when it would be useless or injure train. *Searles v. Milwaukee & C. R. Co.*, 35 Iowa, 490.

Dogs held within protection of a statute requiring whistles to animals on the track. *Fink v. Evans*, 95 Tenn. 413.

Failure to give the statutory signals, not ground for recovery, where there was no danger apparent until accident became unavoidable. *Mohr & C. Co. v. Thompson*, 101 Tenn. 197.

Defendant was not *per se* free from negligence in failing to give stock alarm, to frighten cattle off the track, 100 to 150 feet away when discovered. *Galveston & C. R. Co. v. Dyer*, (Tex. Civ. App.) 38 S. W. Rep. 218.

(e). TRAIN SHOULD BE AT ONCE STOPPED.

When cattle are seen the train should be at once stopped. *Savannah & C. R. Co. v. Jarvis*, 95 Ala. 149.

If necessary train should be stopped, and burden is on company to show compliance. Under Ala. Code, sec. 1144. *Kansas City & C. R. Co. v. Watson*, 91 Ala. 483.

By statute in Tennessee this is imperative and no excuse is received. *Nashville & C. R. Co. v. Thomas*, 5 Heisk. 262.

But, see, *Richmond v. Sacramento Valley R. Co.*, 18 Cal. 351; *Newman v.*

\* NOTE.—As to crossing signals, see "Crossings," *ante*, p. 779.

*Vicksburg &c. R. Co.*, 64 Miss. 115; *Holder v. Chicago &c. R. Co.*, 11 Lea, (Tenn.) 176.

Mere failure to stop does not show negligence where the engineer used proper efforts and judgment. *Hot Springs &c. R. Co. v. Newman*, 36 Ark. 607.

*Pittsburg &c. R. Co. v. Stuart*, 71 Ind. 504.

Failure to stop in time to avoid apparent danger was negligence, where there was plenty of opportunity to do so. *Potter Co. v. New York &c. R. Co.*, 22 Misc. 10.

Engineer was negligent in failing to have his engine in such control, on seeing a colt running on the track ahead, as to prevent injury on its getting caught in cattle guard. *Atchison &c. R. Co. v. Bartlett*, 2 Kan. App. 167.

(f). COMPANY NOT LIABLE FOR FAILURE TO STOP.

But company is not liable for failure to stop train, if the cattle came suddenly upon track and so near as to make stopping impossible before hitting them, without negligence in keeping outlook for them. *Kansas City &c. R. Co. v. Watson*, 91 Ala. 483.

*Little Rock &c. R. Co. v. Holland*, 40 Ark. 336; *St. Louis &c. R. Co. v. Bashan*, 47 id. 321; *Chicago &c. R. Co. v. Bradfield*, 63 Ill. 220; *Durham v. Wilmington &c. R. Co.*, 82 N. Car. 352; *East Tenn. &c. R. Co. v. Scales*, 2 Lea, (Tenn.) 688; *Louisville &c. R. Co. v. Brinckerhoff*, 119 Ala. 606; *Mobile &c. R. Co. v. Weems*, 74 Miss. 513; *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. App. 228; *Lovejoy v. Chesapeake &c. R. Co.*, 41 W. Va. 693.

(g). ON ACCOUNT OF DARKNESS OR FOG.

Or if, on account of the darkness, fog or storm, they were not discovered in due time to stop. *Tonawanda R. Co. v. Munger*, 49 Am. Dec. note, page 267.

Citing *St. Louis &c. R. Co. v. Vincent*, 36 Ark. 451; *Michigan &c. R. Co. v. Fisher*, 27 Ind. 96; *Durham v. Wilmington &c. R. Co.*, 82 N. Car. 352. See, also, *Vincent v. Chicago &c. R. Co.*, 29 Iowa, 592; *Central R. Co. v. Bryant*, 89 Ga. 457. And see 78 Ga. 603.

It is negligent to run a train at night at such speed, that it cannot be stopped within the distance at which cattle on the track can be discovered by means of its headlight. *Louisville &c. R. Co. v. Kelton*, 112 Ala. 533.

And the fact that a dense fog somewhat shortened that distance, did not excuse defendant, where the train could not have been stopped in time; even under ordinary circumstances. *Alabama Midland R. Co. v. McGill*, 121 Ala. 230.

Engineer was not negligent, where the train could not be stopped within 400 yards, though he could see but 100, where he was keeping a lookout; and when he saw the horse he gave the alarm and set the brakes. *Kansas City &c. R. Co. v. King*, 66 Ark. 439.

Failure to attempt to stop, where an animal when seen, was only 150 feet ahead, was not negligence, where the train was going about 50 miles per hour in the dark. *Illinois C. R. Co. v. Greaves*, 75 Miss. 360.

Failure to signal at a crossing gives no recovery for injury not due to that cause. *St. Louis &c. R. Co. v. Zachary*, (Ind. Terr.) 53 S. W. Rep. 327.

#### (h). SAFETY OF PASSENGERS IS PARAMOUNT.

Train need not be stopped, if it would endanger train, as the safety of passengers is paramount. And, indeed, the speed of train may be increased if the safety of the train demand. *Cleveland v. Chicago &c. R. Co.*, 35 Iowa, 220.

*Baltimore &c. R. Co. v. Lamborn*, 12 Md. 257; *Chicago &c. R. Co. v. Jones*, 59 Miss. 465; *Owens v. Hannibal &c. R. Co.*, 58 Mo. 386; *O'Connor v. Chicago &c. R. Co.*, 27 Minn. 166.

Safety of train is paramount to that of cattle on track. *Parker v. Dubuque &c. R. Co.*, 34 Iowa, 399; *Bellefontaine &c. R. Co. v. Schruyhart*, 10 Oh. St. 116; *Pittsburg &c. R. Co. v. Maurer*, 21 id. 421; *Bemis v. Conn. &c. R. Co.*, 42 Vt. 375.

As to trespassing cattle, engine need not be reversed, if it would result in injury to train, or to the detriment of the company. *Sandham v. R. Co.*, 38 Iowa, 88; *Proctor v. R. Co.*, 72 N. C. 579; *Texas R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

Engine need not be reversed if it will endanger life, but mere injury to machinery will not excuse. *East Tennessee &c. R. Co. v. Selcer*, 7 Lea, (Tenn.) 557.

Nor need such acts be done as would interrupt time appointments. Wharton on Negligence, sec. 894.

Citing 1 Redf. on R. 498; *Keech v. R. Co.*, 17 Md. 92; *Fisher v. Farmers' L. Co.*, 21 Wis. 73.

The only duty owing to trespassing cattle, is that which is consistent with the safety of the defendant and its patrons. Need not reduce speed if it would jeopardize passengers. *Denver &c. R. Co. v. Divebliss*, 13 Colo. App. 304.

Where an engineer is unable to stop in time to avoid injury, it is proper for him to increase his speed so as to prevent the derailment of the train, though it decreases the cattle's chances of escape. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

No liability for failure to attempt to stop train, where accident could not thereby have been averted. *Kirk v. Norfolk &c. R. Co.*, 41 W. Va. 722; s. c., 32 L. R. A. 416.

#### (i). SPEED OF TRAIN.

A failure to diminish the speed of train, or even stop train, when necessary to prevent injury to cattle, may constitute negligence. *Searles v. Milwaukee &c. R. Co.*, 35 Iowa, 490.

*Aycock v. Wilmington &c. R. Co.*, 6 Jones L. 231; *Zeigler v. North Eastern R. Co.*, 7 S. C. 402; *Bemis v. Connecticut R. Co.*, 42 Vt. 375.

It is sometimes held that train should not be run at such rate of speed as to prevent stopping to save cattle on track. *Memphis &c. R. Co. v. Lyon*, 62 Ala. 71; *Central &c. R. Co. v. Ingram*, 98 id. 395; *Rockford &c. R. Co. v. Rafferty*, 73 Ill. 58; *Bullington v. Newport News &c. R. Co.*, 32 Va. 346.

The requirements of the statute are not full measure of care required of a company running at full speed on a part of the road frequented by cattle. The train struck a cow causing derailment and injury to plaintiff, a passenger.

It is gross negligence for the defendant to run over any part of their road known to be frequented by cattle, at full speed, unless that part of the track is properly guarded from that invasion. Plaintiff was a passenger and was injured by the train colliding with a cow. *Brown v. Central R. Co.*, 34 N. Y. 404.

**From opinion.**—"The statute has imperatively required certain things to be done; but such requirements are by no means the measure of the defendant's care or conduct in the transportation of passengers. These requirements the road must comply with; but it cannot, therefore, neglect other necessary and proper precautions. The defendant here was bound to exercise all the care and skill which human prudence and foresight could suggest. This language is broad and comprehensive, but it is the language of the law. (*Bowen v. The New York Central Railroad Company*, 18 N. Y. 408.) This care extends to all measures necessary and proper to secure the safety of the train and passengers, as well as to the management of the train itself."

If the train be running at a speed forbidden by statute or ordinance, the company is doing an unlawful act, and if it in any part caused the injury the company may be liable, as in any other case where injury results from an unlawful act. *Fritz v. First Div. &c. R. Co.*, 22 Minn. 404; *T. P. & W. R. Co. v. Dealon*, 63 Ill. 91; *C. B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Houston &c. R. Co. v. Terry*, 42 Tex. 451.

*Cleve. R. Co. v. Ahrens*, 44 Ill. App. 434; *Miller v. R. Co.*, 59 Iowa, 707; *Story v. Chicago R. Co.*, 79 id. 402; distinguishing *Monahan v. R. Co.*, 45 id. 523.

The fact that a cow was running at large and strayed on the track at the crossing does not excuse the defendant if the guards were so far beyond the limits of the highway as to allow the cows to get on the track. The rate of speed in such case is not relevant and evidence thereof should be excluded. *White v. U. & B. R. Co.*, 15 Hun, 333.

A company is not obliged to moderate the speed of its trains to protect cattle that may come upon its tracks, without fault on its part. *Toledo &c. R. Co. v. Barlow*, 71 Ill. 640.

A panel of a fence was taken down by some one, not in the employ of the defendant, a few hours before the accident happened, and in the night the plaintiff's horse got on the track. The jury found the defendant not negligent in the matter of repairing the fence. The engineer saw the horse on the track off and on for half a mile and did not reduce the speed. Held, that there was no duty to do so, if he did not act wantonly. *Boyle v. N. Y., L. E. & W. R. Co.*, 39 Hun, 171; *aff'd*, 115 N. Y. 636.

But proper brakes. *Partley v. Georgia &c. R. Co.*, 60 Ga. 182.

See *Seawell v. Raleigh &c. R. Co.*, 106 N. Car. 272.

A railroad does not owe the duty of exercising "every effort" to avoid injury. *Savannah &c. R. Co. v. Wideman*, 99 Ga. 245.

(l). BRAKES MUST BE APPLIED.

Brakes must be applied. *Nashville &c. R. Co. v. Thomas*, 5 Heisk. (Ky.) 262.

(m). SUFFICIENT EQUIPMENT OF MEN NECESSARY.

Sufficient equipment of men to handle trains is necessary. *Parker v. Dubuque &c. R. Co.*, 43 Iowa, 399.

*Joyner v. South Car. &c. R. Co.*, 26 S. Car. 47.

But only ordinary prudence therefor is required. *Cantrell v. Kansas &c. R. Co.*, 69 Miss. 435.

(n). INSUFFICIENCY OF LOCOMOTIVE DOES NOT ESTABLISH NEGLIGENCE.

Insufficiency of locomotive to control train does not establish negligence. *Central &c. R. Co. v. Rockafellow*, 17 Ill. 541.

(o). SUBSTANCES ON RIGHT OF WAY ATTRACTIVE TO CATTLE DOES.

Substances on right of way attracting cattle have been held sufficient to establish negligence, if injury resulted to cattle therefrom.

*Salt*.—*Crafton v. Hannibal &c. R. Co.*, 55 Mo. 580; *Kirk v. Norfolk &c. R. Co.*, 41 W. Va. 722; s. c. 32 L. R. A., 416.

*Cotton Seed*.—*Little Rock &c. R. Co. v. Dick*, 52 Ark. 402.

*Molasses*.—Attracting hogs killed by train negligently started. *Page v. North Carolina &c. R. Co.*, 71 N. Car. 222.

## XII. Cattle Near Track.

Company is liable for negligent failure to avoid injury to cattle in such proximity to track as to be likely to incur injury therefrom, and care should be taken to discover them and drive them away. *South & North Ala. &c. R. Co. v. Jones*, 56 Ala. 507.

*Missouri Pac. &c. R. Co. v. Gedney*, 44 Kan. 329; *Snowden v. Norfolk &c. R. Co.*, 95 N. Car. 93.

An animal grazing 25 yards from the track, does not raise the duty to whistle to frighten it away. *Chattanooga &c. R. Co. v. Daniel*, 122 Ala. 362.

But where a cow feeding with head towards and 10 feet from the track, with a cut ahead and escape to the sides cut off by a fence and an em-

bankment, the circumstances require caution. *Chattanooga Southern R. Co. v. Wilson*, 124 Ala. 444.

Defendant was negligent in not seeing horse by the track in daylight, where track was straight for two miles in either direction. *Kansas City &c. R. Co. v. Henson*, (Ala.) 31 South. Rep. 590.

A statute imposing the duty to keep a constant lookout "for persons and property on the track," applies to animals so close to it as to be within the range of vision while looking along it. *St. Louis &c. R. Co. v. Russell*, 64 Ark. 236.

Engineer need not stop on seeing cattle in a pasture. *Peoria R. Co. v. Champ*, 75 Ill. 577.

Although horses may be approaching the track, no duty of care arises until danger is apparent. Engineer not required to anticipate that they will break into a run and cross his track. *Wabash R. Co. v. Arvig*, 66 Ill. App. 146.

Train need not be stopped for cattle seen running along the track, and which turn suddenly thereon too near train to prevent timely stopping. *East Tennessee &c. R. Co. v. Baylis*, 77 Ind. 429.

A statute requiring the ringing of signals at a crossing held applicable to an animal upon the highway approaching it. *Pittsburg &c. R. Co. v. Shaw*, 15 Ind. App. 173.

There was no apparent danger, where a horse 80 yards ahead, stood on the highway 18 feet from the track, with its head pointing from the train, and no necessity for blowing warning whistle. *Louisville &c. R. Co. v. Bowen*, (Ky.) 39 S. W. Rep. 31.

Otherwise where they were seen running diagonally toward the train. *Kean v. Chenault*, (Ky.) 41 S. W. Rep. 24.

The negligence of a motorman was such as to permit recovery, where, after seeing a dog on the track in time to stop, he continues at excessive speed; not stopping even after killing it. *Smith v. St. Paul City R. Co.*, 79 Minn. 254.

An engineer was not negligent in assuming that a horse drinking at a pond 10 or 12 feet below and 12 feet away from the track, would not run up the embankment and upon it. *Yazoo &c. R. Co. v. Whittington*, 74 Miss. 410.

See, also, *Railroad Co. v. Brumfield*, 64 Miss. 637; *Railroad Co. v. Thornton*, 65 id. 256.

Or where stock are grazing 30 or 45 feet from the track. *Yazoo &c. R. Co. v. Wright*, 78 Miss. 125.

Failure to stop a train, unless the circumstances suggest danger, is not negligence. *Yazoo &c. R. Co. v. Brunfield*, 64 Miss. 637; *Sloop v. St. Louis &c. R. Co.*, 22 Mo. App. 593.

The presence of a cow feeding alongside the track, does not raise the duty of taking precautions, where there is no apparent danger. *Wasson v. McCook*, 80 Mo. App. 483.

While an engineer is not bound to presume that cattle quietly feeding near the track will suddenly go upon it, if he sees them actually do so, he is bound to use every means available to secure their safety, consistent with that of the train. *Bunnell v. Rio Grande &c. R. Co.*, 13 Utah, 314.

That horses near the track are uneasy is not such an apparent danger as to make a motorman negligent in failing to slow up or stop, where, up to the last moment, the driver had control of them. *Flaherty v. Harrison*, 98 Wis. 559.

### **XIII. Injury from Fright, Excavations, or Structure and not from Actual Collision with Cars.**

Company was liable for failure to fence a deep rock cut into which cattle fell from adjoining lot.

*Graham v. D. & H. C. Co.*, 46 Hun, 386; distinguishing *Knight v. N. Y. &c. R. Co.*, 99 N. Y. 25; *Lowerey v. St. Louis &c. R. Co.*, 40 Mo. App. 514; *Meeker v. Northern Pacific R. Co.*, 21 Or. 513 (neglect to fence); *Knight v. N. Y., L. E. & W. R. Co.*, 30 Hun, 415.

Where an engineer had reason to believe a mule would leave the track before reaching a distant culvert, he was not liable for moving along behind it. *St. Louis &c. R. Co. v. Bragg*, 66 Ark. 248.

Railroad company was not liable, where it had discontinued the use of its bridge and properly guarded it to prevent passage, but plaintiff's horse, in fright, broke past the guard and was injured on the bridge by work incident to its repair. *St. Louis &c. R. Co. v. Scott*, 68 Ark. 415.

A railroad company is not liable for injury resulting to an animal from fright, unless actually struck by train. *Louisville &c. R. Co. v. Thomas*, 106 Ind. 10.

*Lafferty v. Hannibal &c. R. Co.*, 44 Mo. 291; *Burlington &c. R. Co. v. Shoemaker*, 18 Neb. 389.

The liability of the railroad company does not depend upon the cattle having been struck by the train.

*Young v. St. Louis &c. R. Co.*, 44 Iowa, 172 (there was negligence in fencing). *Schertz v. Indianapolis &c. R. Co.*, 107 Ill. 577 (neglect to fence).

Defendant was not chargeable with negligence in running a horse upon a bridge, where train was stopped one-half mile from the bridge and a man sent ahead to assist in turning it off, and thereafter, carefully continued to within one-quarter of a mile of the bridge and stopped. *Barnhart v. Chicago &c. R. Co.*, 97 Iowa, 654.

So, if it had been shown that animals were driven by fright into cattle guards. *Moon v. Burlington &c. R. Co.*, 72 Iowa, 75.

Company was liable, when, by fright, horse jumped from trestle, when it could have been prevented by due care. *Newman v. Vicksburgh &c. R. Co.*, 64 Miss. 115.

Engineer was not negligent in failing to stop in starting up a grade, where the dog saw him coming and he tried to scare it off by blowing steam. *Richardson v. Florida &c. R. Co.*, 55 S. C. 334.

Liability for failure to fence arises only from contact with engines or cars, and not from frightening stock so as to cause them to run into a bridge or culvert.

See as holding same doctrine, *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108; *Lafferty v. H. & C. R. Co.*, 44 Mo. 291; *Ohio &c. R. Co. v. Cole*, 41 Ind. 331; *B. P. &c. Co. v. Thomas*, 60 Ind. 108; 1 Redfield on R., sec. 493; Wharton on Neg., p. 757, sec. 828; Hilliard on Torts 385; *Knight v. N. Y. &c. R. Co.*, 99 N. Y. 25, rev'g 30 Hun, 415; *Hyatt v. N. Y. &c. R. Co.*, 64 Hun, 542; *Lowrey v. St. Louis &c. R. Co.*, 40 Mo. App. 514; *Turner v. Thomas*, 71 Mo. 506; *New Orleans &c. R. Co. v. Thornton*, 65 Miss. 256; *Nashville &c. R. Co. v. Saddler*, 91 Tenn. 508; *International &c. R. Co. v. Hughes*, 68 Texas 290.

A statute regulating speed in cities, construed not limited in its application to collision; but to extend to frightening horses. *Illinois C. R. Co. v. Crawford*, 169 Ill. 554; aff'g s. c., 68 Ill. App. 355.

Railway fencing statute, construed to give no remedy, unless damage is done by actual contact with engine or cars. *Stump v. Chicago &c. R. Co.*, 84 Ill. App. 28.

The reverse is held in Nebraska. *Chicago &c. R. Co. v. Cox*, 51 Neb. 479.

Engineer's negligence in continuing his train about 100 yards behind a horse without stopping till it reached a trestle, which it fell through, was for the jury, when it appeared that it could not leave the track without jumping over a ditch two feet deep with a bank one foot above it. *Brinkley v. Wilmington &c. R. Co.*, 126 N. C. 88.

Defendant was not liable, where the train was stopped before the horse reached the trestle. It ran upon the trestle while those in charge of the train were trying to drive it off the track. *Southern R. Co. v. Phillips*, 100 Tenn. 130.

The Tennessee railway fencing act gives no remedy without proof that the damage was done by a "moving train or engine or cars." Recovery was denied for loss of stock falling into an unfenced cut. *Jones v. Nashville &c. R. Co.*, 104 Tenn. 119; *Sinard v. Southern R. Co.*, 101 Tenn. 473.

#### XIV. Barbed Wire Fences.

The use of a twisted ribbon of wire with small saw teeth projecting from its edges at intervals, was held not to be in violation of a statute



forbidding erection of "barbed wire" fence. *Stisser v. New York &c. R. Co.*, 32 App. Div. 98.

Company were held liable for frightening horses so that they ran into barbed wire fence and were injured. *Louisville &c. R. Co. v. Upton*, 18 Ill. App. 605.

*Missouri Pacific &c. R. Co. v. Gill*, 49 Kan. 441.

Company not liable. *St. Louis &c. R. Co. v. Ferguson*, 37 Ark. 16; *Gillman v. Sioux City &c. R. Co.*, 62 Iowa, 299.

Knowledge that an adjoining owner had negligently placed barbed wire on his side of the division fence, did not make it contributory negligence in turning a horse into the lot. *Gooch v. Bowyer*, 62 Mo. App. 206.

A statute, prohibiting the erection of barbed wire fences without a railing on the top thereof along highways, construed not to apply to railroad's right of way. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

Though defendant was not bound to fence, it was liable where a dangerous one of barbed wire on rotten cross ties, ill strung, was permitted to remain. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

In a suit under a statute forbidding erection of barbed wire fences without rail on top. Knowledge that a railroad had fenced in its right of way with defective fence, held not to make it contributory negligence to turn a horse on a highway intersecting it. *Siglin v. Coos Bay Co.*, 35 Or. 79.

## **XV. Rule of Liability Where It Is the Duty of Railway Company to Fence.**

If cattle enter upon the track at a point where it is the duty of the railroad company to fence, and are injured, the company is liable, provided there be no fence at such point, or if a sufficient fence had been once erected and the company did not, in maintaining the same, use the care that a man of ordinary prudence and good business capacity would use under the circumstances. However, the plaintiff's action may, under some circumstances, be defeated, if his own negligence has contributed to the injury.

An agreement on the part of the company to fence makes it liable, although there be no statute requiring it. *Chicago &c. R. Co. v. Barnes*, 116 Ind. 126; *Lee v. Minneapolis &c. R. Co.*, 66 Iowa, 131.

If by statute or contract with the adjoining owner, the company be required to fence its road, and also to maintain such fence, and it fulfill its duty, cattle are trespassers if they enter on the railway track, for the cattle would be, in such case, unlawfully on the track and the rules

heretofore given as to trespassing cattle could be invoked. *Ind. & C. R. Co. v. Irish*, 26 Ind. 268.

*Dennis v. Louisville & C. R. Co.*, 116 Ind. 42; *Jones v. Sheboygan R. Co.*, 42 Wis. 206.

Where a railroad fails to fence in its track, as required by law, whereby a horse strays thereon, it is no defense that it was killed by a train of another company. *Haus v. New York & C. R. Co.*, 11 App. Div. 625.

Failure to fence out children, held not negligence, in the absence of statute. *Western & C. R. Co. v. Rogers*, 104 Ga. 224.

The railroad fencing statute in Idaho held to inure to the benefit of the public in general, and not merely adjoining owners. *Johnson v. Oregon Short-Line R. Co.* (Id.) 63 Pac. Rep. 112.

Where an animal is killed at a place where a railroad is bound to fence and which it has not, it is liable, though the animal entered at a place where the company was not bound to fence. *Wabash R. Co. v. Pickrell*, 72 Ill. App. 601; *Chicago & C. R. Co. v. Blair*, 75 Ill. App. 659.

Where defendant ran over another company's road under a trackage arrangement, it was not relieved from liability for lack of a statutory fence, because it was not the owner of the road. *Pittsburg & C. R. Co. v. Thompson*, 21 Ind. App. 355.

Railway fencing statute, construed to require fencing of track, and not whole right of way. Not liable, where fence prevented cattle getting on track, but permitted them to pass over its right of way onto an adjacent highway, whence they wandered to a crossing and were injured. *Cagwin v. Chicago & C. R. Co.*, 113 Iowa, 175.

A railway fencing statute, imposing liability regardless of negligence, is constitutional. *Louisville & C. R. Co. v. Kice*, (Ky.) 60 S. W. Rep. 705.

See, also, *Railroad Co. v. Belcher*, 89 Ky. 198; *Railway Co. v. Humes*, 115 U. S. 512.

Railroad was not liable for removing cattle guards from points at which it was not bound to maintain them. *McKee v. Cincinnati & C. R. Co.*, 102 Ky. 253.

Failure to comply with railway fencing statute, held to inure to the benefit of a small child straying on the track. *Rosse v. St. Paul & C. R. Co.*, 68 Minn. 216; s. c., 37 L. R. A. 591; *Nickolson v. Northern P. R. Co.*, 80 id. 508.

Railroad held not bound to maintain statutory stock gaps and cattle guards through inclosed land in a stock law district; owners there, being bound to confine their cattle. *Canton & C. R. Co. v. French*, 75 Miss. 939.

Liability under a railway fencing statute for failure to properly fence by leaving a culvert under the roadbed unprotected extends to the in-

jury done to crops of an adjoining owner by the swine of another, though in a county where they are required to be confined. *Kingsbury v. Missouri &c. R. Co.*, 156 Mo. 379.

Liable for the loss of an animal escaping from an adjoining field through defective fence, though not lost through collision with a train. *Boggs v. Missouri &c. R. Co.*, 156 Mo. 389.

Where cattle enter at a point where the track is properly fenced, defendant is not liable for failure to discover them; as no duty arises unless they are actually seen. *Hill v. Missouri &c. R. Co.*, 66 Mo. App. 184.

Where the injury was caused by the failure to comply with such statute, it was immaterial whether the train doing the damage was operated by defendant or its lessee. *Price v. Barnard*, 70 Mo. App. 175; *Sinclair v. Missouri &c. R. Co.*, 70 Mo. App. 588 (licensee).

Liable where stock enter through defective fence, though injured at a crossing, to which it strayed. *Warden v. Missouri &c. R. Co.*, 78 Mo. App. 664.

In the absence of evidence, it will be presumed that animal entered on the track at the place where it was killed. *Ellis v. Mississippi &c. R. Co.*, 89 Mo. App. 241.

Where cattle enter through defective guards, it is immaterial what defendant's duty was at the place at which it was killed. *Sappington v. Chicago &c. R. Co.*, (Mo. App.) 69 S. W. Rep. 32.

Though defendant was not bound to fence, it was liable for maintaining a dangerous one. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

Point of entry and not of injury governs liability, under a railway fencing statute. *Eaton v. McNeil*, 31 Or. 128.

In the absence of statute, there is no duty to fence. *Sinard v. Southern R. Co.*, 101 Tenn. 473.

Proof of negligence is necessary to a recovery for killing stock at a point not required to be fenced. *Missouri &c. R. Co. v. Willis*, (Tex. Civ. App.) 52 S. W. Rep. 625.

Liability under a railway fencing statute, extends to injury to crops. *St. Louis &c. R. Co. v. Blackwell*, (Tex. Civ. App.) 40 S. W. Rep. 860.

Failure to fence at a point required by statute, did not make defendant liable, where the horse entered at a place not so required. *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. App. 228.

See, also, *Houston &c. R. Co. v. Huffhines*, (Tex. Civ. App.) 39 S. W. Rep. 625.

The Virginia railway fencing statute, construed to be for the protection of stock only, and not to inure to the benefit of railway employes. *Newson v. Norfolk &c. R. Co.*, 81 Fed. Rep. 133; aff'g s. c., 78 Fed. Rep. 94; s. c., 35 L. R. A. 135.

Failure to fence must be the proximate cause of the accident. *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23; *Sutton v. Chicago &c. R. Co.*, 98 Wis. 157.

No recovery where the fence would have been burned by a fire occurring just before the accident, had it been built. *Cook v. Minneapolis &c. R. Co.*, 98 Wis. 624; s. c., 40 L. R. A. 457.

(a). FAILURE TO FENCE MAKES COMPANY LIABLE FOR INJURY CAUSED THEREBY.

Failure of company to fence when required by statute makes the company liable for injury caused thereby. This generally does not involve the question of the company's negligence, but creates an absolute liability. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Hance v. Cayuga &c. R. Co.*, 26 N. Y. 428; *Shepherd v. Buffalo &c. R. Co.*, 35 id. 641; *Tracey v. Troy &c. R. Co.*, 38 id. 433; *Kelver v. N. Y. &c. R. Co.*, 126 id. 365; *McCoy v. Cal. Pac. R. Co.*, 40 Cal. 532; *Bulkley v. N. Y. &c. R. Co.*, 27 Conn. 480; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Toledo &c. R. Co. v. Cory*, 139 id. 218; *Toledo &c. R. Co. v. Loben*, 71 Ill. 191; *Toledo &c. R. Co. v. Wickery*, 44 id. 76; *Hopkins v. Kansas &c. R. Co.*, 18 Kan. 462.

So held as to cattle guards. *Gorman v. Pacific &c. R. Co.*, 26 Mo. 441; *Carey v. St. Louis &c. R. Co.*, 60 id. 213; *Gillum v. Sioux City R. Co.*, 26 Minn. 268; *Smith v. Eastern R. Co.*, 35 N. H. 356; *Union Pacific R. Co. v. High*, 14 Neb. 14; *Eaton v. Oregon &c. R. Co.*, 19 Ore. 371; *Johnson v. Baltimore &c. R. Co.*, 25 W. Va. 570; *Veerhusen v. Chicago &c. R. Co.*, 53 Wis. 689.

Proof of killing of stock by railroad raised presumption of negligence. *Western &c. R. Co. v. Robinson*, 114 Ga. 159.

Illinois Laws 1879, page 224: "And when such fences \* \* \* are not made as aforesaid, or when such fences \* \* \* are not kept in good repair such railroad corporation shall be liable for all damages which may be done by the agents, engines or cars of such corporation to such cattle, horses, sheep, hogs or other stock thereon; but when such fences and guards have been duly made and kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently and willfully done." *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108.

Statutory direction to securely fence the right of way, requires erection and maintenance of sufficient cattle guards. *New York &c. R. Co. v. Zumbaugh*, 17 Ind. App. 171.

Statute does not impose abstract obligation to fence, yet on failure so to do, statute fixes absolute liability for injuries in operation of road by reason of want of fence. *Welsh v. Chicago &c. R. Co.*, 53 Iowa, 632; *Krebs v. Minneapolis &c. R. Co.*, 64 id. 670, as to cattle running at large.

No liability for failure to erect statutory fence unless injury is caused thereby. *Norman v. Chicago &c. R. Co.*, 110 Iowa, 283.

Citing *Small v. Railroad Co.*, 50 Iowa, 340; *Manwell v. Railway Co.*, 80 id. 662; *Croddy v. Railway Co.*, 91 id. 898.

Where public interest in a highway crossing renders the statutory requirements to fence in its right of way improper at that point, a railroad must comply with the intent of the statute as far as possible by the erection of other guards or barriers. And the burden is on the company to show justification for not fencing. *Chicago &c. R. Co. v. Green*, 4 Kan. App. 133.

Statutory presumption of negligence overcome by uncontradicted testimony of employes, that the accident was unavoidable by ordinary care. *McGhee v. Guyn*, 98 Ky. 209.

As to notice required before railroad company can be held for injuries from lack of cattle guards, see *Younger v. Louisville &c. R. Co.*, (Ky.) 41 S. W. Rep. 25.

Where evidence shows that a horse was injured, either by being struck by a train or by running over an embankment, plaintiff cannot recover. *Southern R. Co. v. Forsythe*, (Ky.) 64 S. W. Rep. 506.

The imposition of duty to fence, held an exercise of the police power of the state for protection of persons as well as property. *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

Where defect existed in original construction, company is not entitled to notice. *McMillan v. Chicago &c. R. Co.*, 70 Mo. App. 568.

Where accident happens through failure to erect statutory fence, a railroad cannot excuse itself on the ground, that it used even the greatest diligence in the management of its train in trying to avoid injury to cattle on the track by reason thereof. *Cincinnati &c. R. Co. v. Stonecipher*, 95 Tenn. 311.

See, also, *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

Railroad company must replace fences torn down in constructing the road. *Chicago &c. R. Co. v. Yarrowborough*, (Tex. Civ. App.) 35 S. W. Rep. 422.

Plaintiff cannot recover where there was no evidence that the mule killed was killed by defendant's train. *Henry v. Missouri &c. R. Co.*, (Tex. Civ. App.) 65 S. W. Rep. 644.

Freedom from negligence in running the train was immaterial in action under fencing statute. *Norfolk &c. R. Co. v. Johnson*, 91 Va. 661.

#### (b). COMPANY'S LIABILITY FOR NEGLIGENCE IN MAINTAINING FENCE.

When a sufficient fence has been erected it is the company's duty to use the care stated in the main rule in maintaining it; that is, it is only liable for negligence. *Chicago &c. R. Co. v. Taylor*, 8 Ill. App. 108.

*Toledo &c. R. Co. v. Nelson*, 77 Ill. 160 (gates); *Pittsburg &c. R. Co. v. Eby*, 55 Ind. 567 (cattle guards); *Lemmon v. Chicago &c. R. Co.*, 32 Iowa, 151; *Gould v. Bangor &c. R. Co.*, 82 Maine 122; *Grand Rapids &c. R. Co. v. Monroe*, 47 Mich.

152; *Case v. St. Louis &c. R. Co.*, 75 Mo. 668; *Wait v. Burlington &c. R. Co.*, 61 Vt. 268 (Cattle guards).

After fence has been constructed company is only bound to use reasonable care and diligence in maintaining same, and it is not therefore liable for injury when cattle came on track through a break in the fence caused by a heavy wind, freshet or fire, without showing that the company was negligent in regard to the strength of the fence, or in the length of time taken to repair or rebuild it, or that the injury was due to the willfulness or negligence of company or its servants.

MICHIGAN.—Company must fence under Howell's General Statute, sec. 3377 (Laws 1872, page 72).

*Robinson v. Grand Trunk R. Co.*, 32 Mich. 332; *Stephenson v. Grand Trunk R. Co.*, 34 id. 323; *Grand Rapids &c. R. Co. v. Judson*, id. 506; *Toledo &c. R. Co. v. Eder*, 45 id. 329; *Grand Rapids &c. R. Co. v. Monroe*, 47 id. 152. But see *Tracey v. Troy &c. R. Co.*, 38 N. Y. 433.

Hence, the inquiry would be whether the company had notice or knowledge, or in the exercise of the requisite care should have had knowledge that the fence had become insufficient. *Hodge v. N. Y. &c. R. Co.*, 27 Hun, 394.

*McGuire v. Ogdensburgh &c. R. Co.*, 63 Hun, 632; *Indianapolis &c. R. Co. v. Hall*, 88 Ill. 368; *Cleveland &c. R. Co. v. Brown*, 45 Ind. 90; *Davis v. Chicago &c. R. Co.*, 40 Iowa, 292; *Brentner v. Chicago &c. R. Co.*, 58 id. 625; *Barkow v. Chicago &c. R. Co.*, 30 Minn. 18; *Chullock v. Hannibal R. Co.*, 77 Mo. 591; *Vineyard v. St. Louis &c. R. Co.*, 80 id. 92; *King v. Chicago &c. R. Co.*, 90 id. 520; *Goddard v. Chicago &c. R. Co.*, 54 Wis. 548.

After due discovery of defect, not caused by its negligence, company has reasonable time to repair. *Murray v. N. Y. &c. R. Co.*, 3 Abb. Ct. App. Dec. 339.

*Indianapolis &c. R. Co. v. Truitt*, 24 Ind. 162; *Robinson v. Grand Trunk R. Co.*, 32 Mich. 322.

Constructive knowledge of defect will be inferred, as in other cases, from length of time sufficient to enable company to have discovered the defect, had it used proper care. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Ohio &c. R. Co. v. Clutter*, 82 Ill. 123; *Laney v. Kansas City &c. R. Co.*, 83 Mo. 466.

Unless the company has actual or constructive notice of defect in fences, or is guilty of negligence in not making proper examination for the purpose of repairing if necessary, it is not liable for cattle injured on the tracks. *Hodge v. N. Y. &c. R. Co.*, 27 Hun, 394.

Where the horses of an adjoining owner go upon the defendant's tracks through bars, the plaintiff must show that the defendant had actual notice that the bars were down, or that the bars had been down such a length of time that such notice might be presumed. *Hungerford v. S. B. & N. Y. R. Co.*, 46 Hun, 339.

Citing *Wheeler v. The Erie R. Co.*, 2 *Thomp. & Cook* 634; *Hodge v. N. Y. C. &c. R. Co.*, 27 *Hun*, 394; *Olmstead v. Watertown &c. R. Co.*, cited in *Sherman v. Western Trans. Co.*, 62 *Barb.* 158. See, also, *McDowell v. N. Y. Cent. R. Co.*, 37 *Barb.* 196.

Company is liable if it does not seasonably repair same. (*Gates*).

*Spinner v. N. Y. &c. R. Co.*, 67 *N. Y.* 153; *Brady v. Rensselaer &c. R. Co.*, 1 *Hun*, 378. But, see, *Bowman v. Troy &c. R. Co.*, 37 *Barb.* 516; *Louisville &c. R. Co. v. Shelton*, 43 *Ill. App.* 220; *Chicago &c. R. Co. v. Magee*, 60 *Ill.* 529; *Ill. Cent. R. Co. v. Swearingen*, 47 *id.* 206.

Company should keep such force as may discover breaks and openings in fence and close them within a reasonable time. Neglect for a week creates liability. *Chicago R. Co. v. Harris*, 54 *Ill.* 528.

*Hammond v. Chicago &c. R. Co.*, 43 *Iowa*, 168; *Bell v. Chicago &c. R. Co.*, 64 *id.* 321; *Morrison v. Kansas City &c. R. Co.*, 27 *Mo. App.* 418; *Ridenor v. Wabash &c. R. Co.*, 81 *Mo.* 227.

Company is not liable when some one not in its employ took down fence a few hours before passage of train. *Boyle v. N. Y., L. E. &c. R. Co.*, 39 *Hun*, 171.

In some jurisdictions the company is liable for failure to maintain fences, irrespective of any negligence on its part. *Atchison &c. R. Co. v. Betts*, 10 *Col.* 431. (Liable absolutely for killing domestic animal).

*Lake Erie &c. R. Co. v. Fishback*, 5 *Ind. App.* 403; *Grand Rapids &c. R. Co. v. Jones*, 81 *Ind.* 523 (railroad is not securely fenced in absence of suitable cattle pits): *Smith v. Eastern &c. R. Co.*, 35 *N. H.* 356, (also destruction of cattle, without fault of owner, is *prima facie* evidence of company's negligence): *Pittsburg &c. R. Co. v. Smith*, 38 *Oh. St.* 410; *Brown v. Milwaukee &c. R. Co.*, 21 *Wis.* 39. But, see, *contra*, *Curry v. Chicago &c. R. Co.*, 43 *Wis.* 665, reversing former decision.

Where there was a good and lawful fence, defendant was not liable, in the absence of proof of negligence in the management of its trains. *Atchison &c. R. Co. v. Cahill*, 11 *Colo. App.* 245.

Where it appeared from the evidence, that defendant was not negligent in the maintenance of its stock gap, it was not liable for death of a mule in passing over it. *Southern R. Co. v. Watson*, 114 *Ga.* 174.

Maintenance in reasonable repair only requires reasonable inspection. *Peirce v. Rabberman*, 77 *Ill. App.* 619.

Less than 24 hours, is not sufficient to charge defendant with notice of the necessity for repair. To charge the company, it must appear that the animals escaped through the defective fence. *Cleveland &c. R. Co. v. Dugan*, 18 *Ind. App.* 435.

Failure to repair, held not negligent, where there was no obligation to maintain. *Chicago &c. R. Co. v. Woodsworth* (*Ind. Terr.*) 35 *S. W. Rep.* 238.

Sectionmen were not negligent, where, having closed a gate in the fence

at 3.30 p. m., they failed to return, though a short distance to inspect, before leaving for the night, where plaintiff had himself, in the meantime, left it open. *Harding v. Chicago &c. R. Co.*, 100 Iowa, 677.

Defendant was liable, where, except for its defective cattle guard, a horse would not have escaped from its right of way on to a highway where it was killed. *Riley v. Chicago &c. R. Co.*, 104 Iowa, 235.

Cattle guard was held defective, where it had been allowed to become so full of sand that cattle could walk across it. *Pothast v. Chicago &c. R. Co.*, 110 Iowa, 458.

The duty to repair fences includes gates therein. *Missouri &c. R. Co. v. Pfrang*, 7 Kan. App. 1.

Allowing weeds to overgrow a cattle guard so that cattle cannot detect its presence, is negligence. *Louisville &c. R. Co. v. Bezuchamp*, (Ky.) 55 S. W. Rep. 716.

Railroad is bound to keep in repair the cattle guards connecting division fences of adjoining owners. *Fortune v. Chesapeake &c. R. Co.*, (Ky.) 58 S. W. Rep. 711.

The duty to repair fences, extends to gates therein for private crossings. *Freet v. Kansas City &c. R. Co.*, 63 Mo. App. 548.

Railroad must have notice of the defective condition of a fence, a sufficient time to enable it to repair. *Dietrich v. Hannibal &c. R. Co.*, 89 Mo. App. 36; or the defect must have existed for a long enough time to charge it with notice. *Schlotzhauer v. Missouri &c. R. Co.*, 89 Mo. App. 65.

The question of whether a fence has been out of repair a sufficient time to impute notice, is for the jury. *Hendrickson v. Philadelphia &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 232.

Mere suffering a line ditch, substituted for a fence, to become filled with refuse from the railroad, did not make defendant liable, where it did not willfully cause such result. *Brooks v. Pennsylvania R. Co.*, 2 Pa. Super. Ct. 581.

Railroad is bound to exercise ordinary care to keep its fence, including gates therein, in good repair. *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

Negligence is basis of recovery where company is not required to fence. *Gulf &c. R. Co. v. Blankenbeckler*, 13 Tex. Civ. App. 249.

Where a railroad has complied with the statute as to the erection of its fence and the construction of its crossings, it is not liable, in the absence of proof of negligence in the management of its trains. *Galveston &c. R. Co. v. Dyer*, (Tex. Civ. App.) 38 S. W. Rep. 218.

See, also, *San Antonio &c. R. Co. v. Robinson*, 17 Tex. Civ. App. 400.



Especially at a private crossing, constructed at the request of the adjoining owner. *Gulf &c. R. Co. v. Mitchell*, 18 Tex. Civ. App. 380.

Or where the railroad makes all substantial repairs in the gate in such a crossing; the adjoining owner assuming the repair of all defects too trivial to mention and which may be made practically without labor or expense. *St. Louis &c. R. Co. v. Adams*, (Tex. Civ. App.) 58 S. W. Rep. 1035.

## XVI. Contributory Negligence.

(a). WHEN COMPANY FAILS TO ERECT FENCE, ACTION IS NOT USUALLY DEFEATED BY NEGLIGENT ACT OF OWNER.

The purpose of the statute is to protect the train as well as the landowner, or even the public, and when the company has failed to erect a fence, it is often, if not usually, held that the action is not defeated by any negligent act of the plaintiff, adjoining landowner, not indicating such reckless indifference to the injury as to be tantamount to a consent thereto. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42.

*Bradley v. Buffalo &c. R. Co.*, 34 N. Y. 427; *Brady v. Rensselaer &c. R. Co.*, 1 Hun, 378; *Louisville &c. R. Co. v. Whitesell*, 68 Ind. 297.

*Krebs v. Minneapolis &c. R. Co.*, 64 Iowa, 670; *Davidson v. Central &c. R. Co.*, 75 id. 22; *Holland v. West End &c. R. Co.*, 16 Mo. App. 172; *Burlington &c. R. Co. v. Franzen*, 15 Neb. 365; *Mead v. Burlington &c. R. Co.*, 52 Vt. 278; *Heller v. Abbott*, 79 Wis. 409.

When company has failed to fence, contributory negligence establishes no defense.

*Flint &c. R. Co. v. Lull*, 28 Mich. 510; *Indianapolis &c. R. Co. v. Townsend*, 10 Ind. 38; *Indiana Cent. R. Co. v. Leamon*, 18 id. 175; *McCall v. Chamberlain*, 13 Wis. 637; *Horn v. Atlantic &c. R. Co.*, 35 N. H. 169; *Indianapolis &c. R. Co. v. Parker*, 29 Ind. 472; *La Flamme v. Detroit &c. R. Co.*, 109 Mich. 509.

But where it is a common law suit and not founded on the statute as to fencing, contributory negligence is a defense. *L. S. & M. S. R. Co. v. Miller*, 25 Mich. 274.

In some instances the statute itself states what contributory negligence shall defeat the statutory action. *Nashville &c. R. Co. v. Spence*, 99 Tenn. 218.

## CATTLE RUNNING AT LARGE.

Usually the company is liable, although the cattle be wrongfully running at large, in case defendant's neglect to build fences, as required, contributed to the accident.

*Rogers v. Newberryport &c. R. Co.*, 1 Allen 16; *Corwin v. N. Y. & Erie R. Co.*, 13 N. Y. 42; *Shepard v. Buffalo &c. R. Co.*, 35 id. 641; *Spinner v. N. Y. &c. R.*

Co., 67 N. Y. 153; *Rabberman v. Hunt*, 88 Ill. App. 625; *Neversorry v. Duluth &c. R. Co.*; 115 Mich. 146; *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370; *Harwood v. Bennington &c. R. Co.*, 67 Vt. 664; *Quimby v. Boston &c. R. Co.*, 71 id. 301; *Herrell v. Chicago &c. R. Co.*, (Wis.) 90 N. W. Rep. 1071.

The reverse is held in New Hampshire. *Hill v. Concord &c. R. Co.*, 67 N. H. 449.

A boy left a cow in an open lot adjoining the defendant's track near crossing, where the fences were temporarily and necessarily down to repair roadway. Cow strayed on track and was killed. Defendant liable. *Brady v. R. & S. R. Co.*, 1 Hun, 378.

Distinguishing. *Bowman v. Troy &c. R. Co.*, 37 Barb. 516, and following *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 49; *Bradley v. N. Y. &c. R. Co.*, 34 id. 432.

*Cairo &c. R. Co. v. Woolsey*, 85 Ill. 370; (question was for jury) *Spence v. Chicago &c. R. Co.*, 25 Iowa, 139; *Fritz v. Milwaukee &c. R. Co.*, 34 id. 337; *Welsh v. Chicago &c. R. Co.*, 53 id. 632; *Krebs v. Minneapolis &c. R. Co.*, 64 id. 670; *Flint &c. R. Co. v. Low*, 28 Mich. 510; *Gillam v. Sioux City R. Co.*, 26 Minn. 268; *Bowman v. Chicago &c. R. Co.*, 85 Mo. 533; *Chicago &c. R. Co. v. Sims*, 17 Neb. 365; *Cressey v. Northern R. Co.*, 59 N. H. 564; *F. &c. R. Co. v. Lull*, 28 Mich. 510.

But it has been frequently held that the negligence of the adjoining owner of the cattle will defeat his recovery.

*Baltimore &c. R. Co. v. Wood*, 47 Oh. St. 431, 436; *Central Branch &c. R. Co. v. Lea*, 20 Kan. 353; *Kansas &c. R. Co. v. Landis*, 24 id. 293, distinguishing *Central R. Co. v. Lea*, 20 id. 353; *Illinois &c. R. Co. v. Middleworth*, 43 Ill. 64.

*Moser v. St. Paul &c. R. Co.*, 42 Minn. 480; citing *Johnson v. R. Co.*, 29 id. 425; *Watier v. R. Co.*, 31 id. 91.

When cow was illegally at large and road was not properly fenced, there was no recovery. *Branch R. Co. v. Lea*, 20 Kan. 353. Citing *P. P. &c. R. Co. v. Champ*, 75 Ill. 577 (no fence and horse at large); *Perkins v. East. R. Co.*, 29 Me. 307 (no fence and cow wrongfully in adjoining close); *Jackson v. R. & B. R. Co.*, 25 Vt. 150 (no fence and trespassing cattle).

In an action against a railroad for injury occasioned by failure to erect or to maintain fences on the line of its road as in other actions of negligence, contributory negligence of plaintiff is a defense. *Curry v. Chicago &c. R. Co.*, 43 Wis. 665, overruling, or limiting *Brown v. R. Co.*, 21 Wis. 39; *Lika v. R. Co.*, 21 id. 370; *Schmidt v. R. Co.*, 23 id. 186.

See *McCandless v. Chicago &c. R. Co.*, 45 Wis. 540; *Goddard v. Chicago &c. R. Co.*, 54 id. 548.

Contrary doctrine was held where gate was left open in *Lander v. R. Co.*, 33 Wis. 640; *Pitzner v. Shinnick*, 39 id. 129; *Jones v. R. Co.*, 42 id. 306.

Reckless indifference on the part of owner of cattle to their injury will prevent his recovery. *Ind. &c. R. Co. v. McKinney*, 24 Ind. 283.

*Welty v. Ind. &c. R. Co.*, 105 Ind. 55; *Moody v. Minneapolis &c. R. Co.*, 77 Iowa, 29; *Missouri &c. R. Co. v. Roads*, 33 Kan. 640; *Spence v. Chicago &c. R. Co.*, 25 Ill. 139. See *Louisville &c. R. Co. v. Cahill*, 83 id. 640; *Dickey v. Northern P. R. Co.*, 19 Wash. 350; *La Flamme v. Detroit &c. R. Co.*, 109 Mich. 509.

Where one habitually turns cattle upon the railroad's right of way, there is no liability. *Fort Wayne &c. R. Co. v. Woodward*, 112 Ind. 118.

*Welty v. Indianapolis &c. R. Co.*, 105 Ind. 55; *Louisville &c. R. Co. v. Goodbar*, 102 id. 596; *Bond v. Evansville R. Co.*, 100 id. 301; *Penn. R. Co. v. Dunlap*, 112 id. 93; see, also, *Sherman v. Anderson*, 27 Kan. 333; *Cincinnati &c. R. Co. v. Waterson*, 4 Oh. St. 424; *Logansport &c. R. Co. v. Caldwell*, 38 Ill. 280; *Chicago &c. R. Co. v. Seirer*, 60 id. 295.

But may use his lot although he knows that there is no fence. *McCoy v. California &c. R. Co.*, 40 Cal. 532; *Wilder v. Maine &c. R. Co.*, 65 Me. 332.

(b). IF SUFFICIENT FENCE HAD BEEN ONCE ERECTED ACTION IS DEFEATED BY NEGLIGENT OWNER OF CATTLE.

If, however, a sufficient fence has been once erected, the action may be defeated by the negligence of the owner of cattle, if it contribute to the injury.

It was the duty of the defendant to maintain fences, gates, &c., yet, if the adjoining proprietor had knowledge of the defective fences, it was his duty to give the defendant notice, and it was for the jury to say who was negligent. The gate got out of repair and the owner patched it up and left his cattle to be protected by it. The question of the negligence of the parties was for the jury. *Poler v. N. Y. Cent. R. Co.*, 16 N. Y. 476; see, *Shanchan v. N. Y. &c. R. Co.*, 10 Abb. Pr. (N. Y.) 588.

*Cleveland &c. R. Co. v. Ducharme*, 49 Ill. App. 520; *Toledo &c. R. Co. v. Thomas*, 18 Ind. 215; *Welty v. Ind. &c. R. Co.*, 105 id. 55; *Louisville &c. R. Co. v. Stounnd*, 126 id. 35; *Grove v. Burlington &c. R. Co.*, 75 Iowa, 163; *Fisher v. Farmers' &c. Co.*, 21 Wis. 73; *Martin v. Stewart*, 73 id. 553.

But it is not contributory negligence for owner to use adjoining field, when he knows fence is absent or defective. *Shepard v. Buffalo &c. R. Co.*, 36 N. Y. 641.

*Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42, 49, 54; *Cook v. Champlain Truss Co.*, 1 Denio, 91, 101; *Brady v. Rensselaer &c. R. Co.*, 1 Hun, 378; *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209; *Rogers v. Newburyport R. Co.*, 1 Allen, 16; *McCoy v. California &c. R. Co.*, 40 Cal. 532; *Bellefontaine &c. R. Co. v. Reed*, 33 Ind. 476; *Wilder v. Maine &c. R. Co.*, 65 Me. 332; *F. & P. &c. R. Co. v. Lull*, 28 Mich. 510; *Cressey v. Northern R.*, 59 N. H. 564; *Kerwhaker v. C. C. &c. R. Co.*, 3 Oh. St. 172; *Pittsburg &c. R. Co. v. Smith*, 38 id. 410; *Cleveland &c. R. Co. v. Scudder*, 40 id. St. 173; *Mead v. Burlington &c. R. Co.*, 52 Vt. 278.

A tenant was not permitted to recover for cattle escaping to right of way through panel of fence chopped down by son of landlord. *Best v. Ulster &c. R. Co.*, 35 App. Div. 623.

Bars left open. *Illinois &c. R. Co. v. Arnold*, 47 Ill. 173.

The owner nailed on a defective board, leaving the fence still defective, and gave the company no notice, but continued to use the field. The

question of owner's negligence should have been submitted to the jury. *Chicago &c. R. Co. v. Seirer*, 60 Ill. 295.

Where one sees the gate of his neighbor open, the latch insecure, a board off the fence, or any other defect which can be at once remedied without any considerable cost or labor, and his own stock is liable by reason thereof to escape from his premises and receive injury, it is his duty to protect himself against the threatened danger by closing the open gate, securing the defective fastening, nailing on a loose board, or otherwise securing himself against loss. *Chicago &c. R. Co. v. Buck*, 14 Ill. App. 394.

Where owner knowingly permits cattle to go, or drives them, on track company is not liable. *Fort Wayne &c. R. Co. v. Woodward*, 112 Ind. 118.

*Connyers v. Sioux City R. Co.*, 78 Iowa, 410; *Forbes v. Atlantic &c. R. Co.*, 78 N. C. 454; *Louisville &c. R. Co. v. Ballard*, 2 Metc. (Ky.) 177.

If animal was killed at a place where company was bound to fence, and had not securely fenced, contributory negligence is no defense. *Baltimore &c. R. Co. v. Evarts*, 112 Ind. 533.

*Jebb v. Chicago &c. R. Co.*, 67 Mich. 160.

Owner may by his conduct in leaving open a gate release company from liability for injury resulting therefrom even to tenant occupying land jointly with owner, and knowing of owner's conduct. *Manwell v. Burlington &c. R. Co.*, 80 Iowa, 662.

The fact of insecure inclosure, by reason of which animals escaped to and were killed on the track will not excuse company's negligence. *Leavenworth &c. R. Co. v. Forbes*, 37 Kas. 445.

*Missouri Pac. R. Co. v. Roads*, 33 Kas. 640; *Missouri Pac. R. Co. v. Bradshaw*, 33 id. 533; *A. T. &c. R. Co. v. Shaft*, id. 527.

Plaintiff was not negligent *per se*, where the gate in defendant's fence was defective, because he used it a short time before the accident without complaint. *Missouri &c. R. Co. v. Pfrang*, 7 Kan. App. 1.

Plaintiff with knowledge that there were no gates, turned his sheep into his field and they were killed on track, defendant was liable. *Horn v. Atlantic &c. R. Co.*, 35 N. H. 167.

But see *contra*, *Joliet &c. R. Co. v. Jones*, 20 Ill. 221.

That defendant was negligent in not fencing and the owner of cattle was not negligent in preventing their escape, did not permit recovery, where they were at large in violation of an ordinance. *Evans v. Sherman &c. R. Co.*, 14 Tex. Civ. App. 437.

Plaintiff is not negligent in turning his cattle into a pasture, though he knows that his adjoining corn field is unprotected by reason of a defective cattle guard. *St. Louis &c. R. Co. v. Blackwell*, (Tex. Civ. App.) 40 S. W. Rep. 860.

The owner allowed a colt to run where he knew fence was defective

and there was nothing to prevent his going on the t  
recover. *Martin v. Stewart*, 73 Wis. 553.

Plaintiff is negligent, where he turns cattle into a field which were burned by a forest fire, and permitted access to a defective railroad fence. *McCann v. Chicago & C. R.*

## XVII. Rights of Others than Adjoining

The statutes as to fencing are not so especially for adjoining owners as to exclude actions by the owner trespassing or otherwise, have entered upon the track ing land, or the highway.

A railroad company is liable for injury to cattle on private fences even if such cattle do not belong to adjoining landowner if it does not appear how or where the cattle got on the track, if they were not lawfully on the highway or adjacent grounds, if they got on the track through a defective fence on to the track, the company is liable. *People v. N. Y. & Erie R. Co.*, 13 N. Y. 42.

Disapproving contrary doctrine in *Brooks v. N. Y. C. & c. R. Marsh v. N. Y. & c. R. Co.*, 14 id. 364, and following *Faucett v. Co.*, 2 Eng. L. & E. R. 289, and distinguishing *Ricketta v. Railw. S. P. Tracey v. Troy & c. R. Co.*, 38 N. Y. 433; *Browne v. Pro 12 Gray*, 55; *Chicago & c. R. Co. v. Harris*, 54 Ill. 528; *Ind. & 24 Ind. 222*; *Missouri & c. R. Co. v. Roads*, 33 Kas. 640; *Wa R. Co.*, 31 Minn. 91; *Sawyer v. Vermont & c. R. Co.*, 105 Ma *Missouri Pac. R. Co.*, 9 Mo. App. 588; *Summers v. Hannibal 41*; *Kinion v. Kansas City & c. R. Co.*, 39 id. 574; *Giles v. Bo N. H. 552*; *Pittsburg & c. R. Co. v. Howard*, 40 Oh. St. 6; *Mead, 90 Pa. St. 454*; *Morse v. Rutland & c. R. Co.*, 27 Vt. 49; & c. R. Co., 43 Wis. 665.

See *Brady v. Rensselaer R. Co.*, 1 Hun, 378; *Crawford v. N.* 108; *Leggett v. Rome &c. R. Co.*, 41 id. 80; see *Illinois &c. R* 126 Ill. 233.

When the defendant had duly constructed and maintained ca not bound to keep them free from snow as against the owner of allowed to go on the track; otherwise, if the cattle be lawfull; *Hance v. Cayuga & Susquehanna R. Co.*, 26 N. Y. 428.

An employé of company may recover when injured by a wreck entering the track through a defective fence. *Donnegan v. E.* 468, overruling *Langlois v. B. & C. R. Co.*, 19 Barb. 364.

Negligence of the owner in permitting cattle to stray upon other adjoining the track, or to run in the highway crossing the fence if the company neglects fences and cattle guards. *Rhode Co.*, 5 Hun, 344.

Even though they be straying on highway, and come upon t  
Rensselaer &c. R. Co., 8 Barb. 390; Dunkirk &c. R. Co. v. Mea  
See Chapin v. Sullivan &c. R. Co., 39 N. H. 53.

*Contra*, *Eames v. Salem &c. R. Co.*, 98 Mass. 560; *Clark v. Chicago &c. Co.*, 62 Mich. 358; *Ellis v. Pacific &c. R. Co.*, 55 Mo. 278.

Duty to keep gates and bars closed, applied in a case where horses escaped from their own pastures and strayed to one, a half mile distant, adjoining the track, where they entered the right of way, through bars left down all winter. *Connolly v. Central Vermont R. Co.*, 4 App. Div. 221; s. c., *aff'd*, 158 N. Y. 675.

Horses allowed to run at large in the night time when no legal right to do so existed, were injured on the railroad track. No liability. *Van Horn v. B. C. &c. Co.*, 59 Iowa, 33.

See, also, *Halloran v. R. Co.*, 2 E. D. Smith, 257; *Bowman v. R. Co.*, 37 Barb. 37; *Kuhn v. R. Co.*, 42 Iowa, 420.

Owners of cattle trespassing on the land of an adjoining owner, can not recover for violation of fencing statute, where such adjoining owner cannot. *Rouse v. Osborne*, 3 Kan. App. 139.

The failure to fence improved property adjoining the track as required by statute, held not to inure to the benefit of cattle trespassing thereon. *Allen v. Boston &c. R. Co.*, 87 Me. 326.

Insufficiency of statutory railway fence erected by land owner under agreement with company, gives him no right of action, but imposes liability to third parties for loss of stock, though trespassing on his land. *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

The owner of land adjoining an adjoining owner, held not entitled to the benefit of a fencing statute, where his animals were not on the latter's land by lease or license. *Geiser v. St. Louis &c. R. Co.*, 61 Mo. App. 459.

Otherwise, where they were. *Payne v. Current River R. Co.*, 75 Mo. App. 14.

If the animal were a trespasser, no recovery. *Bradenburg v. St. Louis &c. R. Co.*, 44 Mo. App. 224; *Johnson v. Mo. Pac. &c. R. Co.*, 80 Mo. 620.

The N. H. statute is only for protection of adjoining land-owner. *Woolsen v. North. R. Co.*, 19 N. H. 267; *Towns v. Cheshire R. Co.*, 21 id. 363; *Giles v. Boston &c. R. Co.*, 55 id. 552; *Casista v. Boston &c. R. Co.*, 69 id. 649.

Tenant held entitled to same rights as landlord under a fencing statute. *Greer v. Nashville &c. R. Co.*, 104 Tenn. 242.

But trespasser not entitled to same rights as owner.

As Tex. R. S. Art. 4427 providing for openings in inclosures of adjoining owners is for their protection only, and not the public at large, a third person, trespassing on such, cannot complain that the opening was not provided with a cattle guard such as are required at highway crossings. *Missouri &c. R. Co. v. Hanacek*, 93 Tex. 446.

Although company has omitted to fence road as required by statute it is not liable for cattle of third person strayed and injured thereon in absence of negligence. *Morse v. Rutland &c. R. Co.*, 27 Vt. 49; *Jackson v. Rutland &c. R. Co.*, 25 id. 150.

**XVIII. Agreement of Adjoining Owner to Fence or Waive Fence.**

Where the adjoining owner conveyed the land for the road through his farm and was bound by his covenant with the defendant to erect and maintain fences, yet the plaintiff, whose cattle, straying, passed over such land upon the railroad and were injured, was not bound to such covenant, although such covenant would have estopped the owner under the same circumstances. *Corwin v. New York & Erie R. Co.*, 13 N. Y. 42.

The acts of 1850 and 1854 relating to fences were for the protection of the traveling public and adjoining owners and the defendant was liable for cattle killed although the plaintiff was liable, to build the fence, under covenant of his grantor which ran with the land. But in this case there was no covenant on part of land owner to build fence, but a release of the railroad to build fence, and this was not held to be within the provision of the act which requires "an owner of land adjoining any railroad who or whose grantor has received a specific sum for fencing along the line of land taken for the purpose of said railroad, and who has agreed to build a lawful fence on the line of said railroad, to build and maintain" the same; and, in case of neglect, the railroad may build and maintain it at his expense. (1 Statute at Large by Edmunds, sec. 9, Laws of 1854.) The railroad act of 1850 and the act as amended in 1854, section 8, makes the railroad company liable for damages done to cattle, etc., so long as the fences, etc., shall not be made and when not in good order." But even then it would have been no defense. *Shepard v. Buffalo, New York & Erie R. Co.*, 35 N. Y. 641.

*Cincinnati &c. R. Co. v. Ridge*, 54 Ind. 39; *Indianapolis &c. R. Co. v. Thomas*, 84 id. 194; *Warren v. Keokuk &c. R. Co.*, 41 Iowa, 484; *Berry v. St. Louis &c. R. Co.*, 65 Mo. 172; *Gill v. Atlantic &c. R. Co.*, 27 Oh. St. 240; *Jeffersonville &c. R. Co. v. Nichols*, 30 Ind. 321; and see *Hunt v. Lake Shore &c. R. Co.*, 112 id. 69; *Baltimore &c. R. Co. v. Wood*, 47 Oh. St. 431.

Where lessor was bound to maintain fence to prevent cattle trespassing, so was his tenant, and no recovery could be had unless tenant was free from fault in this regard. *Baynes v. Chastain*, 68 Ind. 376.

*Twoksbury v. Bucklin*, 7 N. H. 518 (occupier and not owner of close must keep fence in repair).

But one using the land of an adjoining owner is subject to the defense that negligence of such owner contributed to the injury of cattle on his land. *McCoy v. Southern Pacific R. Co.*, 94 Cal. 568; *Manwell v. Burlington &c. R. Co.*, 80 Iowa, 662; *Indiana &c. R. Co. v. Adkins*, 23 Ind. 340; but, see, *Indiana &c. R. Co. v. Thomas*, 84 id. 194.

Where the owner agrees to erect a fence and does not do so, tenant with full knowledge of the agreement and the condition of the fence was negligent in placing his cattle in the adjoining land and did not recover. *Corwin v. N. Y. &c. R. Co.*, 13 N. Y. 42, 49.

*Pohler v. N. Y. &c. R. Co.*, 16 N. Y. 476; *Tracy v. Troy &c. R. Co.*, 38 id. 433; *Diamond &c. Brick Co. v. N. Y. &c. R. Co.*, 55 Hun, 605; *Duffy v. N. Y. &c. R. Co.*, 2 Hilt. 496; *St. Louis &c. R. Co. v. Washburn*, 97 Ill. 253; *Gorman v. Pacific R. Co.*, 26 Mo. 441; but, see, *Shepard v. Buffalo &c. R. Co.*, 35 N. Y. 641; *Pitts-*

burg &c. R. Co. v. Allen, 40 Oh. St. 206; see Potter v. N. Y. &c. R. Co., 60 Hun, 313 (*post*, 557).

But this did not apply to a tenant who had not such knowledge. *Thomas v. Hannibal &c. R. Co.*, 82 Mo. 538.

A person succeeding to the enjoyment of land by lease or otherwise, is entitled to same and no greater protection than owner. *French v. Western &c. R. Co.*, 72 Hun, 469.

*Warren v. Keokuk &c. R. Co.*, 41 Iowa, 484.

Where owner of land had agreed to fence, tenants were estopped to claims for loss. *Smith v. Barre*, 64 Vt. 21; *Veerhusen v. Chicago &c. R. Co.*, 53 Wis. 689.

Where it is the duty of the owner to fence and he fails, whereby cattle escape, the company is not liable for its failure to erect cattle guards. *Talmadge v. Rensselaer &c. R. Co.*, 13 Barb. 493.

*Warren v. Keokuk &c. R. Co.*, 41 Iowa, 484; *Pittsburg &c. R. Co. v. Smith*, 26 Oh. St. 124.

So, where in appraising land, compensation has been made for building a fence. *Georgia &c. R. Co. v. Anderson*, 33 Ga. 110; *Toledo &c. R. Co. v. Pense*, 71 Ill. 174.

If the adjoining land owner waive the fence and injury happen to his cattle thereby, he cannot recover. *Enright v. San Francisco &c. R. Co.*, 33 Cal. 230.

Nor can a third person whose cattle trespassing thereby come upon a railroad track. *Tower v. Providence R. Co.*, 2 R. I. 404.

Where the adjoining land-owner has agreed to construct or maintain a fence, he cannot recover for any injury to cattle arising from his failure to so do. *Bond v. Evansville &c. R. Co.*, 100 Ind. 301.

*Pittsburg &c. R. Co. v. Smith*, 26 Oh. St. 124; *Ellis v. Pacific &c. R. Co.*, 48 Mo. 231.

Plaintiff cannot complain that a fence is defective, where he has himself constructed it for the defendant. *Rabbermann v. Pierce*, 77 Ill. App. 405; *Neversorry v. Duluth &c. R. Co.*, 115 Mich. 146.

Where, in conveying the right of way the grantor required that the railroad should not fence without his permission, he cannot complain of the death of stock, after denying the request for such permission. *San Antonio &c. R. Co. v. Adams*, (Tex. Civ. App.) 45 S. W. Rep. 844.

**From opinion.**—"The sole object of the statute is to protect owners of stock and to make the owners of railroads responsible for the value of animals killed upon an unfenced track. *Ward v. Bommer*, 80 Tex. 168. Since the provision is for his benefit it would seem to follow that a particular owner by a valid contract can free the company from the necessity of fencing as a condition of its immunity from liability. Thus, a particular land owner might undoubtedly make a contract with the company, valid between themselves binding him to maintain a fence through his enclosure and in case of his failure to comply with it, he could not hold the other party liable because of absence of a fence.



The authorities elsewhere thoroughly sustain this proposition. It would seem to be also true that a contract between them, dispensing with the necessity of a fence through such an enclosure, should be clearly effectual and only the parties to it are concerned. *Hurd v. Railway Co.*, 25 Vt. 116; *Whittier v. Railway Co.*, 24 Minn. 394; id. 26 id. 484; *Eames v. Railroad Co.*, 105 Mass. 193; *Warren v. Railway Co.*, 41 Iowa, 484. In some states the fencing statutes are considered to have been enacted for the protection of the public, generally, and full effect is consequently not given to such agreements as is done elsewhere. *Railway Co. v. Ridge*, 54 Ind. 39; *Railway Co. v. Johnson*, 59 Ind. 188; *Railway Co. v. Mailen*, 12 Ind. 10; *Shepard v. Railway Co.*, 35 N. Y. 641. But even in these states, it is recognized that when he has agreed to keep up the fence and fails to do so, he cannot recover for stock killed without proof of negligence and we cannot see why an agreement that there should be no fence ought not to have like effect."

### XIX. Gates, &c.—Who Must Keep Shut.\*

The gate of the adjoining proprietor was used by the public to get to the freight depot; the defendant knew of this use and acquiesced in it; it knew that it was often open and was *prima facie* liable for its being open. The rule requiring fences allows no exception for openings or gates for the use of the corporation or public, but only for the adjoining owners. *Spinner v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 153; 2 Hun, 421.

If the gate, for the convenience of the adjoining owner, is left open by the company's servants or patrons, the company is liable for damages therefrom. *Semble* if left open by adjoining owner. *Spinner v. N. Y. C. & H. R. Co.*, 6 Hun, 600; s. c., 2 id. 421, *aff'd* 67 N. Y. 153.

Where gates are put in for the accommodation of the adjoining owner, he must keep them closed. *Diamond Brick Co. v. N. Y. &c. R. Co.*, 55 Hun, 605.

*Indianapolis &c. R. Co. v. Adkins*, 23 Ind. 340; *Louisville &c. R. Co. v. Goodbar*, 102 id. 596; *Jeffersonville &c. R. Co. v. Dunlap*, 112 id. 93.

Where a gate has been properly built for an owner of land adjoining a railroad, the company need not, as regards such owner, close the same, although it has notice that it is open; nor is it liable to the owner of a horse which, pastured in such adjoining land by a third party, strayed through the gate and was killed. The plaintiff pastured its horse on land-owner's lot adjoining railway. *The Diamond Brick Co. v. N. Y. C. & H. R. R. Co.*, 58 Hun, 396.

Plaintiff cannot recover for damages resulting from the failure of those in charge of his cattle to close the gate at a farm crossing after using it. *Ranney v. Chicago &c. R. Co.*, 59 Ill. App. 130.

Plaintiff's negligence, in permitting an animal to escape from one

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\* *NOTE*.—A gate being part of the railway fence, must be properly constructed and maintained in reasonable repair. See *ante*, p. 1035.

field to another, did not prevent recovery for defendant's negligence, in leaving a farm crossing gate broken down and out of repair for months at a time. *Lake Erie &c. R. Co. v. Beam*, 60 Ill. App. 68.

Railroad company bound only to use ordinary care to keep gates at farm crossings closed. Defendant held not liable for killing horses that had come on right of way through open gate, which was seen closed ten days before, and there was no evidence as to how long it had been open, and everything possible was done to prevent the accident after the animals were discovered. *Chicago &c. R. Co. v. Patterson*, 72 Ill. App. 428.

So, where gate is left open by landowner. *Indianapolis &c. R. Co. v. Shimer*, 17 Ind. 295.

See *Hook v. Worcester &c. R. Co.*, 58 N. H. 257.

Owner of cattle is not guilty of contributory negligence where he goes out of the state, leaving cattle in pasture, and the gates were left open by third person. *Toledo &c. R. Co. v. Milligan*, 52 Ind. 512.

Where gates are maintained for the convenience of the adjoining owner, yet company must keep the gates closed against third persons. *Wabash &c. R. Co. v. Williamson*, 104 Ind. 154.

But, see, *Hunt v. Lake Shore &c. R. Co.*, 112 Ind. 69.

But company is not obliged to keep gates closed, unless there be a contract or statute requiring it. *Cranville &c. R. Co. v. Mosier*, 114 Ind. 447.

*Bars.*—See *Illinois &c. R. Co. v. Arnold*, 47 Ill. 173; *Perry v. Dubuque &c. R. Co.*, 36 Iowa, 102.

If the gates at a farm crossing were left open by the landowner or by a wrongdoer other than the railroad company, that is a matter of defense. *Chicago &c. R. Co. v. Barnes*, 116 Ind. 126.

Where gate to private crossing is left open, without defendant's fault, by third person, company is not liable. *Perry v. Dubuque &c. R. Co.*, 36 Iowa, 102.

*Davenport v. Chicago &c. R. Co.*, 76 Mo. 399; *Johnson v. Mo. Pac. R. Co.*, 80 id. 620.

Where a gate is broken by a horse, it is not a willful act of the owner, within the meaning of a railway fencing statute, imposing liability for loss of stock from its violation unless caused by willful act of owner. *Enix v. Iowa C. R. Co.*, 114 Iowa, 508.

Third person is entitled to no greater protection as regards gates than adjoining owner. *Adams v. Atchison &c. R. Co.*, 46 Kas. 161.

*Diamond Brick Co. v. N. Y. C. &c. R. Co.*, 58 Hun, 396.

In any case, it must be shown that the injury arose without the owner's fault. *Kelliher v. Connecticut &c. R. Co.*, 107 Mass. 411.

Where it is the company's duty to erect and maintain liable for any injury resulting from its neglect in leaving  
*Lemon v. Chicago &c. R. Co.*, 59 Mich. 618.

*Chicago R. Co. v. Harris*, 54 Ill. 528.

It is the duty of the adjoining owner to keep the gate crossing closed. *Swanson v. Chicago &c. R. Co.*, 79 Minn. 1. R. A. 625.

Defendant was not liable, where it had, a short time before, closed the latch of the gate at a farm crossing separating the tracks. *Mooers v. Northern P. R. Co.*, 80 Minn. 24.

A gate, as part of the railway fence, must be maintained in good condition. *Hill v. Missouri P. R. Co.*, 66 Mo. App. 183.

Where the owner agrees to maintain a gate, defendant is under the duty of refraining from willfulness or gross negligence in its trains. *Lake Erie &c. R. Co. v. Weisel*, 55 O. 1.

No liability where a stranger leaves a gate open, and the owner had not had notice within a reasonable time to enable it to close. *Nashville &c. R. Co.*, 104 Tenn. 242.

Company held liable for injury to stock of third party crossing private crossing gate, left open by adjoining land owner. *R. Co. v. Wesendorf*, (Tex. Civ. App.) 39 S. W. Rep. 138. *&c. R. Co. v. Richmond*, 67 id. 1029. But see *Houston &c. Hollingsworth*, 68 id. 724.

Defendant was responsible, where it exercised control and assumed the duty of keeping it closed. *Missouri &c. R. Co. v. Low*, (Tex. Civ. App.) 39 S. W. Rep. 1000.

The duty of seeing that a gate at a private crossing is kept closed rests upon the railroad. *San Antonio &c. R. Co. v. R. Co.* Civ. App. 400.

The railroad completes its duty, under the railway act, by properly erecting and keeping in repair, fences. *Missouri &c. R. Co. v. Hanacik*, 23 Tex. Civ. App. 394.

And so, defendant is not liable, where the gate is left open to the third person. Burden on plaintiff, to show negligence. *R. Co. v. Adams*, (Tex. Civ. App.) 58 S. W. Rep. 1035. *&c. R. Co. v. Erwin*, 67 id. 466.

Where such a crossing is required to be left open, by plaintiff's demand, defendant is not liable. *Missouri &c. R. Co. v. C.* (Tex. Civ. App.) 60 S. W. Rep. 55.

No recovery where plaintiff's son, at night, left the gate open, he went into the pasture to find the cows, though no re-

due and he did not know of the special. *Clark v. Oregon Short-Line R. Co.*, 20 Utah, 401.

See, also, *Richardson v. Chicago &c. R. Co.*, 56 Wis. 347.

A statute making a person, willfully leaving a gate open after using it, liable for the consequences, held not to make land owner liable for death of a horse that entered on right of way through a farm crossing, the gate of which, had shortly before been broken down by his runaway horses. *Oeflein v. Zautcke*, 92 Wis. 176.

A railway sectionman, under no duty to close gates, was allowed to recover for loss of his stock entering the right of way through a gate he knew to be open. *May v. Chicago &c. R. Co.*, 102 Wis. 673.

It was held not contributory negligence, while horses were grazing 70 rods away, to leave a gate to a pasture a mile and a half from a railroad crossing, open for half an hour with knowledge that the cattle guards at the crossing were defective. *Herrell v. Chicago &c. R. Co.*, (Wis.) 90 N. W. Rep. 1071.

## XX. In What Places Company Must Fence.

Railroad companies are required to erect and maintain fences on the sides of their roads, and to construct cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs, from getting on such railroad track.

The fact that the road crossing is at or near the depot, and that, to make such cattle guard there, would inconvenience the company, will not excuse them from complying with the positive requirements of the statute. \**Bradley v. The Buffalo, New York & Erie R. Co.*, 34 N. Y. 427; *Tracey v. Troy & Boston R. Co.*, 38 id. 433.

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\*NOTE.—The present law in New York is as follows: Sec. 4. "Sec. 32. FENCES. FARM-CROSSINGS AND CATTLE-GUARDS.—Every railroad corporation, and any lessee or other person in possession of its roads; shall, before the lines are opened for use, and so soon as it has acquired the right of way for its roadway, erect and thereafter maintain on the sides of its road, fences of the length and strength of a lawful division fence, with openings or gates or bars therein, at the farm crossings, for the use of the owner, and occupants of the adjoining land and shall also construct, where not already done, and hereafter maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs, from going upon its railroad. So long as such fences are not made or not in good repair, the corporation, its lessee or other person in possession of its road, shall be liable for all damages done by their agents or engines, or cars, to any domestic animals thereon, but when made and in good repair, they shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section, but barbed wire shall not be used in constructing the same, and no railroad need be fenced, when not necessary to prevent horses, cattle, sheep and hogs, from going upon its track from the adjoining land. Every adjoining land owner who, or whose grantor has received compensation for fencing the line of land taken for a railroad and has agreed to build and maintain a lawful fence along such line shall build and maintain such fence; and if such owner, his heir or assign, shall not build such fence, or if built shall neglect to maintain the same, during the period of thirty days after he has been notified so to do by the railroad corporation, such corporation may thereafter build and maintain such fence, and may recover of the person neglecting to build and maintain it, the expense thereof." Sec. 32, chap. 535, L. of N. Y. 1890, as amended by chap. 367, L. 1891.

Plaintiffs' agent drove a team to the mill and left it standing unattended at the platform and partly on the strip. The horses escaped, ran upon the railroad tracks, and were killed by a passing train. Under the exception contained in the statute which declares that "no railroad corporation shall be required to fence the sides of its road except when such fence is necessary to protect horses, cattle, sheep and hogs, from going on to the track of the railroad from the lands adjoining the same," defendant was not required to fence its road at the point in question. *Dolan v. N. D. & C. R. Co.*, 120 N. Y. 571.

The provision of the General Railroad Act requiring the erection and maintenance of fences along the sides of its tracks, imposes the duty upon every company to so fence its road unless a natural or artificial barrier exists which will prevent animals from reaching the track.

The defendant was one of five railroad companies whose tracks ran parallel for some distance with only sufficient separation to permit the passage of trains. The defendant's tracks were in the center. No fences had been built along the exterior of the outer tracks and there was no natural or artificial barrier.

The plaintiff's cattle strayed from the adjoining farm over to the defendant's tracks and were killed. The defendant was liable. The fact that fences would be dangerous to passengers of passing trains was no defense. *Kelver v. N. Y. C. & St. L. R. Co.*, 126 N. Y. 365, following *Shepard v. Buffalo & C. R. Co.*, 35 id. 641.

The defendant's railway passed in a deep rock cut adjoining land where the plaintiff's horse was pasturing. No fence at the top of the cut, whereby the horse fell into the cut and was killed. Defendant liable. *Graham v. President & C. D. & H. C. Co.*, 46 Hun, 386.

Distinguishing *Knight v. N. Y. & C. R. Co.*, 99 N. Y. 25.

**From opinion.**—"The plaintiffs, in a proper case, could invoke the aid of equity to enforce its performance (*Jones v. Seligman*, 81 N. Y. 190), or obtain mandamus (*People ex rel. Garbutt v. R. & S. L. R. R. Co.*, 76 id. 294), or maintain their action for damages if their freehold was rendered less valuable, or they were deprived of its use, because of defendant's neglect to maintain the fences. *Thomas v. Utica & B. R. R. Co.*, 97 N. Y. 245; *Leggett v. Rome, W. & O. R. R. Co.*, 41 Hun, 80. These various remedies imply that the plaintiffs as adjoining owners, are entitled to full protection to both their land and cattle from any injury resulting from neglect to maintain fences."

Defendant leased lands of its own adjoining its tracks, and it was under no obligation to fence such lands against the dangers of its railroad. The lessee was bound to take and use lands as he found them. There seems to be no American case in point, and the English authorities, under a statute similar to our own, are against the proposition. *Roberts v. Great Western Ry. Co.*, 4 C. B. (N. S.) 504; *Marfall v. South Wales*

R. Co., 8 id. 525; 2 Sher. & Redf. on Neg. 434; *Potter v. N. Y. C. & H. R. R. Co.*, 60 Hun, 313.

But see *Klock v. N. Y. Cent. & R. Co.*, 62 Hun, 291, where in a similar case, the defendant claimed that it was not obliged to fence additional land bought of plaintiff, and bounded by the Mohawk river; but the court held that the question was one of fact for the jury.

A colt in a pasture separated from the defendant's railroad by a river not fordable at that point, escaped from the pasture, crossed at a ford one-half mile below and finally came to the platform used for loading cars, passed through an opening required to be left unfenced for the convenience of shippers, and reached the track, went down it a distance of 500 feet to the bridge and was found dead on the bridge. Along the tracks for this distance or 500 feet, and about 100 feet in breadth, there was no fence on the river side, as that side was used for storing logs. Held that the place through which the colt passed was required for the approach of teams to the loading platform and that it was not the duty of the defendant to fence it. *Hyatt v. N. Y., L. E. & W. R. Co.*, 64 Hun, 542.

Citing *Dolan v. N. D. & C. R. Co.*, 120 N. Y. 591.

Where the side tracks were not a part of depot yards, or within the corporate limits of a town, railroad company was required to fence. *Toledo & C. R. Co. v. Franklin*, 159 Ill. 99.

Whether the convenience of the public requires a track to be unfenced, held a question of fact. Company was held not justified in omitting to erect a fence at a point 900 feet from its station in a village. *Cleveland & C. R. Co. v. Green*, 65 Ill. App. 414.

Beyond limits of station grounds, track must be protected by fence and cattle guards. *Terre Haute & C. R. Co. v. McCullough*, 65 Ill. App. 444.

So, exemption by reason of public convenience as to one side of its track, does not relieve railroad from its duty as to the other. *Cleveland & C. R. Co. v. Capoot*, 69 Ill. App. 163.

That a railroad overlaps a highway, does not relieve it of its statutory duty to fence, where there is room to do so. *Lake Erie & C. R. Co. v. Rooker*, 13 Ind. App. 600.

Defendant was "operating" its road without the statutory fences, where it carried material thereon for the purpose of its further extension. *Chicago & C. R. Co. v. Totten*, 1 Kan. App. 558.

That freshets may at times wash parts of a fence away, does not relieve a railway company of the duty of attempting to maintain one. *Wichita & C. R. Co. v. Hart*, 7 Kan. App. 554.

Where a village lot has a house and other buildings thereon it is improved land within a statute requiring a fence where road passes through "inclosed or improved land," though a portion on one side of the road is unimproved. *Osborne v. Canadian P. R. Co.*, 87 Me. 303.

Fences and cattle guards are required in incorporated cities and villages. *Croft v. Chicago &c. R. Co.*, 72 Minn. 47.

Where defendant fenced within its yard limit and put in a guard it was liable for failure to maintain it. *Hathaway v. Detroit &c. R. Co.*, 124 Mich. 610.

Failure to erect a fence and cattle guards at a distance of 1,500 feet from a switch yard was not excused by the fact that the track was crossed by a number of streets. *Nickolson v. Northern P. R. Co.*, 80 Minn. 508.

Defendant had burden of showing it could not maintain a fence at a given point without jeopardizing the lives of its employes. *Spooner v. St. Louis &c. R. Co.*, 66 Mo. App. 32.

That the adjoining premises are properly fenced, does not relieve a railroad from also fencing off a portion of its right of way, which it permits the public to use as a road. *Jones v. St. Louis &c. R. Co.*, 65 Mo. App. 442.

Whether a railroad was bound to fence at a given point, is a question of law for the court, and not of fact for the jury. *Fraysher v. Mississippi &c. R. Co.*, 66 Mo. App. 573.

Railroad must fence at such places about a station as may be fenced without danger or inconvenience to its employes or patrons. *Southern &c. R. Co. v. McKay*, (Tex. Civ. App.) 47 S. W. Rep. 479.

Must fence along a public highway. *Gulf &c. R. Co. v. Cole*, (Tex. Civ. App.) 35 S. W. Rep. 525.

It being the statutory duty of a railroad company to make farm crossing without request, due diligence after request was made was held not a proper issue. *San Antonio &c. R. Co. v. Grier*, 20 Tex. Civ. App. 138.

Where a railroad track is 2 feet 2 inches above the street level, a question of whether it is "approximately even" therewith, under a statute requiring such tracks to be fenced, held to be for the jury. *Baltimore &c. R. Co. v. Cumberland*, 176 U. S. 232; aff'g s. c., 12 App. D. C. 598.

Statutory duty to construct cattle guards "wherever a fence may be necessary or proper," construed to extend to private crossings. *Russell v. Louisville &c. R. Co.*, 93 Va. 322.

It was a question of fact for the jury, whether an unfenced switch, adjacent to a highway, where stock was unloaded, 1400 feet from a depot, was within depot grounds. *Grosse v. Chicago &c. R. Co.*, 91 Wis. 482.

#### IN WHAT PLACES COMPANY IS NOT REQUIRED TO FENCE.

As to places where railway company need not fence. *Brady v. Rensselaer &c. R. Co.*, 1 Hun. 378.

*Evansville &c. R. Co. v. Willis*, 93 Ala. 507; *Chicago &c. R. Co. v. Engel*, 58 Ill. 381; *Davis v. Burlington &c. R. Co.*, 26 Iowa, 549; *Long v. Central Iowa R.*

Co., 64 id. 657; *Peyton v. Chicago &c. R. Co.*, 70 id. 522; *Indianapolis &c. R. Co. v. Crandall*, 58 id. 365; *Indianapolis &c. R. Co. v. Quick*, 109 id. 295; *Cox v. Minneapolis &c. R. Co.*, 41 Minn. 101; *Hooper v. Chicago &c. R. Co.*, 37 id. 52; *Roberts v. Quincy &c. R. Co.*, 43 Mo. App. 287.

No duty to fence in the vicinity of the station or at places required to be kept open for convenience of the public or safety of its employes. *Cleveland &c. R. Co. v. Umphenour*, 63 Ill. App. 642; *Terre Haute &c. R. Co. v. Grissom*, 60 id. 114.

In an action for value of stock killed by train at a shed in violation of a city ordinance, the *de facto* limits of the city govern, and the question of its *de jure* limits cannot be raised. *Cleveland &c. R. Co. v. Dunn*, 63 Ill. App. 531.

Where an injury arose at a point where the company is not required to fence, the rules of liability would not be affected by the statute requiring fencing at that place, but would depend upon principles of law applicable if no statute existed. *Louisville &c. R. Co. v. Quade*, 101 Ind. 364.

*Pennsylvania &c. R. Co. v. Mitchell*, 124 Ind. 473; *Nance v. St. Louis &c. R. Co.*, 79 Mo. 196.

Whether cattle guards can be maintained without danger to employes is a question of fact for the jury. *Chicago &c. R. Co. v. Clonch*, 2 Kan. App. 728.

A triangle adjacent to the track at the intersection of cross roads, where stops are made when necessary for passengers and freight traffic, held depot grounds that need not be fenced, though no building or agent is maintained. *Schneekloth v. Chicago &c. R. Co.*, 108 Mich. 1.

A point a mile from the depot, in a well settled district, held to be within depot grounds. *Rabidon v. Chicago &c. R. Co.*, 115 Mich. 390; s. c., 39 L. R. A. 405.

No fence required at a loading place in a timber district a mile and a half from any station. *Cornell v. Manistee &c. R. Co.*, 117 Mich. 238.

A statute requiring a fence "on each side," construed to mean on the extreme limits of the right of way. *Gould v. Great Northern R. Co.*, 63 Minn. 37; s. c., 30 L. R. A. 590.

Statutory duty to fence at farm crossings, applies only to such as exist by the intersection of parcels of land owned at the time of its construction, and not such as arise by reason of subsequent acquisition. *Stump v. Missouri &c. R. Co.*, 61 Mo. App. 357.

No duty to fence at a switching point which would jeopardize employes. *Schafer v. St. Louis &c. R. Co.*, 65 Mo. App. 201.

A railroad is exempted as to fencing at a public crossing, whether



*de facto* or *de jure*. *Giltz v. St. Louis &c. R. Co.*, 65 Mo. App. 445; *Jackson v. Kansas City R. Co.*, 66 Mo. App. 506.

For example, one in use by the public ten years though still unrecognized by the county court. *Carter v. Kansas City &c. R. Co.*, 69 Mo. App. 295.

Not required within switch limits, where it endangers lives and limbs of switchmen. *Ellis v. Mississippi &c. R. Co.*, 89 Mo. App. 241.

The reasonableness of switch limits and depot grounds, is for the jury. *Riley v. St. Louis &c. R. Co.*, 89 Mo. App. 375.

Necessary use of station yard, held sufficient excuse for omission of cattle guards at crossing within yard limits. *Pierce v. Andrews*, 13 Oh. C. C. 513.

A statute prohibiting the obstruction of private ways construed to relieve a railroad company from liability for failure to fence them. *Mobile &c. R. Co. v. Thompson*, 101 Tenn. 197.

Public necessity requires that railways should not be fenced along streets of a town, depots and contiguous grounds. *International &c. R. Co. v. Dunham*, 68 Tex. 231.

*International &c. R. Co. v. Cocke*, 64 Tex. 151; *R. Co. v. Schriener*, 6 Ind. 141; *R. Co. v. Rowland*, 50 id. 353; *R. Co. v. Kinney*, 8 id. 402; *Davis v. R. Co.*, 26 Iowa, 554; *Soward v. R. Co.*, 30 id. 552; *Soward v. R. Co.*, 33 id. 387; *Davis v. R. Co.*, 45 Mo. 473. See, also, *R. Co. v. Lull*, 28 Mich. 510; *Moses v. Southern &c. R. Co.*, 18 Ore. 385; *Galena &c. R. Co. v. Griffin*, 31 Ill. 303.

Statutory fence not required within switch limits. *Gulf &c. R. Co. v. Blankenbeckler*, 13 Tex. Civ. App. 249.

For example along a spur switch used by the public to load and unload merchandise. *Missouri &c. R. Co. v. Willis*, 17 Tex. Civ. 228.

Portions of a city, which are regularly platted and partially occupied by dwellings, are not required to be fenced, and stock owner must show negligence. *San Antonio &c. R. Co. v. Yeager*, (Tex. Civ. App.) 43 S. W. Rep. 25.

Otherwise at such places about a station as may be fenced without danger or inconvenience to its employes or patrons. *Southern &c. R. Co. v. McKay*, (Tex. Civ. App.) 47 S. W. Rep. 479.

Statute requiring railway fences through enclosed lands, construed to include lands uninclosed with a fence, though insufficient to turn stock. *Kimball v. Carter*, 95 Va. 77; s. c., 38 L. R. A. 570.

A side track without depot building, where stops are regularly made for passenger and freight traffic, may be left unfenced for a reasonable distance. *Mills &c. Co. v. Chicago &c. R. Co.*, 94 Wis. 336.

But good faith in laying out depot grounds, does not relieve the company of liability for failure to fence beyond limits required by reasonable necessity for station purposes. *Cole v. Duluth &c. R. Co.*, 104 Wis. 460.

A gate, with fastening lengthened out with a piece wire to make it reach the gate post, held defective. *St. Louis &c. R. Co. v. Kinman*, 9 Kan. App. 633.

Statutory cattle guards on division fences, are required to extend across entire right of way. *Grace v. Gulf &c. R. Co.*, (Miss.) 25 South. Rep. 875.

Railroad company's duty to provide statutory cattle guards held complied with if they are ordinarily sufficient for the purpose. Defectiveness of cattle guards for two months is sufficient to impute notice. *Sappington v. Chicago &c. R. Co.*, (Mo. App.) 69 S. W. Rep. 32.

A gate must be up to the same standard of efficiency in turning stock as the fence. *Mobile &c. R. Co. v. Tiernan*, 102 Tenn. 704.

A fence, inclosing an adjoining field, is not a compliance with the statute. *Louisville &c. R. Co. v. Patton*, 104 Tenn. 40.

## ELECTRICAL APPLIANCES—INJURIES FROM.

The liability of a person using electrical appliances to one injured by the same depends primarily upon the question whether the former owes a duty to the latter to protect him therefrom, and this would be determined by the usual rules applicable to injuries arising under similar conditions from other causes. If it be established that such duty exist, the degree of care, required in the discharge thereof, would be such as a man of ordinary prudence would observe under the circumstances in view of the relation of the parties and the diligence exacted by such relation, the dangerous nature of the agency used, the time and place of such use and the probability of injury therefrom.

A person using electricity in a manner or form that may be dangerous to others, towards whom such obligation to use care exists, should employ such skill and knowledge as are ordinarily possessed and exercised by those experienced in the nature of the element, and the probable consequences of its application for a particular purpose. *Ennis v. Gray*, 87 Hun, 355; *Giraudi v. Electric I. Co.*, 107 Cal. 120; *Godfrey v. The Streator R. Co.*, 56 Ill. App. 378; *Larson v. Central R. Co.*, 56 Ill. App. 263.

These cases, except the first, state that very great care is required in stringing electric wires on roofs (*Giraudi case*) and over streets for railway purposes (*Godfrey and Larson cases*.)

Injuries to persons using buildings from electric wires strung in or on the same. *Ennis v. Gray*, 87 Hun, 355; *Giraudi v. Elec. Imp. Co.*, 107 Cal. 120; 28 L. R. Ann. 596; *McMullan v. Edison Elec. I. Co.*, 13 Misc. 392; 68 N. Y. S. R. 126; *Clements v. Louisiana Elec. L. Co.*, 44 La. 692; 11 South, 51; *Sullivan v. Boston & A. R. Co.*, 156 Mass. 378; *Hector v. Boston E. L. Co.*, 161 id. 558.

Injury to telephone wires by electric wires. Relative rights of companies. *Central Pa. T. S. Co. v. Wilkesbarre & W. S. R. Co.*, 11 Pa. County Court, 417; 1 Pa. Dist. R. 628; 6 Kulp. 383; *Hudson R. T. Co. v. Watervliet T. & R. Co.*, 61 Hun, 140; 135 N. Y. 393. See 121 N. Y. 397; *Cincinnati I. R. Co. v. City & S. T. Association*, 48 Oh. St. 390; *State, Wis. T. Co. v. Janesville St. R. Co.*, 87 Wis. 72; *Cumberland T. & T. Co. v. United Elec. R. Co.*, 93 Tenn. 492; 42 Fed. Rep. 273; *National Telephone Co. v. Baker*, 68 L. T. Rep. (N. S.) 283; 47 Albany L. J. 411; *Rutland E. L. Co. v. Marble City E. L. Co.*, 65 Vt. 377.

See *Taggart v. Street R. Co.*, 16 R. I. 668; *Nebraska Tel. Co. v. York Gas & E. L. Co.*, 27 Nebraska, 284; *Thompson Elect. SS.* 36, 39, 43; *Keasby Electric Wires*, 35.

See notes of cases, N. Y. Law Journal, vol. 14, pp. 1336, 1400.

Owner of telegraph pole was held not liable to pedestrian struck by defective insulator thrown from an arm, in the exclusive use of a licensee, by a third person while adjusting wire. *Quill v. Empire State Teleg. & C. Co.*, 159 N. Y. 1; rev'g s. c., 92 Hun, 539.

Electric wires not properly insulated are a public nuisance. *U. S. I. Co. v. Grant*, 55 Hun, 222.

Evidence of defective insulation and wiring which might have transmitted current to lamp which caused the accident, was held sufficient to

carry case to the jury. *Harroun v. Brush Electric Light Co.*, 12 App. Div. 126; appeal dismissed, 152 N. Y. 212; s. c., 38 L. R. A. 615.

The doctrine of *res ipsa loquitur* was applied, where the span wire of a trolley line, strung close to an electric light wire, burned, broke and injured a pedestrian. *Jones v. Union R. Co.*, 18 App. Div. 267.

Defendant's electric wire, carrying a deadly current, came in contact with an iron brace supporting the arm of a telegraph pole, and, through the worn insulation, communicated to it a charge which threw a line-man to the ground. Negligence and contributory negligence were for the jury. *Dwyer v. Buffalo General Electric Co.*, 20 App. Div. 184.

Evidence that defendant used a device which shut off the current the moment a wire broke and fell to the ground, was not sufficient to rebut the presumption of negligence arising from the fall of a wire which communicated two shocks to plaintiff. *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74; s. c., aff'd, 165 N. Y. 624.

City held liable for death of pedestrian caused by the loose end of a broken uninsulated wire of an abandoned patrol system hanging over a trolley wire into the street. Other fatalities had been caused by it and it was being removed at the time. *Twist v. Rochester*, 37 App. Div. 307; s. c. aff'd, 165 N. Y. 619.

Stringing an electric light wire on an elevated railway structure within eighteen inches of the stairway, was held negligent. In absence of proof of right of defendant to so use the structure, the fact that plaintiff was trespassing was no defence. *Wittleder v. Citizen's &c. Illum. Co.*, 47 App. Div. 410; s. c., aff'd, 50 id. 478.

Electric light company was held liable for death caused by shock received from awning frame in an attempt to extinguish a fire in the awning set by electricity communicated to the frame from feed wires of a disconnected lamp left so that the wind rubbed them against the supporting rod of the lamp, connected with the frame, and wore away the insulation. *Caglione v. Mt. Morris &c. Light Co.*, 56 App. Div. 191.

It was negligent to string a high current wire so that an ordinary wind could force it into contact with telegraph wires; not negligence, in one handling the latter, to fail to test for high voltage, in absence of knowledge that they had become so charged. *Payne v. Electric Illum. &c. Co.*, 64 App. Div. 477.

Trolley company held liable to employé of lessee of wiring privileges on its system for injury from shock received from one of the lessee's wires charged from lessor's wire at a point where insulation had been worn by contact with an iron brace, which had lasted a year. *Wagner v. Brooklyn &c. R. Co.*, 69 App. Div. 349.

*Res ipsa loquitur*, applied, where pedestrian received a shock from step-

ping on a trolley car rail while crossing street. *Braham v. Nassau &c. R. Co.*, 72 App. Div. 456.

So, of a slot rail of an under-trolley. Defendant is entitled to a reasonable time to repair after notice of defect, actual or constructive. *Ludwig v. Metropolitan Street R. Co.*, 75 N. Y. Supp. 667.

Telephone company held not liable, where a chimney to which its wire was attached fell when the wire was struck by a derrick. *Leeds v. New York &c. R. Co.*, 32 Misc. 671.

It was negligence on the part of a telephone company to allow an insecurely fastened telephone wire to remain suspended across a dangerously charged trolley wire. *McKay v. Southern &c. Teleph. Co.*, 111 Ala. 337; s. c., 31 L. R. A. 589.

See, also, *Jones v. Finch*, 128 Ala. 217.

It is not necessary that there be actual contact where the wires are near enough to transmit a dangerous current. While the trolley company is not an insurer, it must use such care to prevent the escape of such a dangerous current as is commensurate with the great danger in such a case. *City &c. Street R. Co. v. Conery*, 61 Ark. 381; s. c., 31 L. R. A. 570.

Liability for injury to pedestrian in street from fall of brick, loosened by telephone wire fastened to chimney, was held to be determined by lack of care in making and maintaining the fastening, and not by the fact that it was of a dangerous character. *Southwestern Teleg. &c. Co. v. Beatty*, 63 Ark. 65.

Liability for violation of ordinance in stringing wires to a building was not altered by the fact that their position was changed by the breaking of an insulator. *Wales v. Pacific &c. Motor Co.*, 130 Cal. 521.

The care required in maintaining electric wires in streets is commensurate with the danger involved. *Denver &c. Electric Co. v. Simpson*, 21 Colo. 371; s. c., 31 L. R. A. 566.

An electric light company, furnishing power for light, was held not liable for damage from defective wiring done by another. *National Fire Ins. Co. v. Denver &c. Electric Co.*, (Colo. App.) 63 Pac. Rep. 949.

Doctrine of *res ipsa loquitur*, applied, where boy of twelve was shocked while attempting to replace an insulator on an uninsulated wire, fastened to a house fourteen inches below a bath room window. *Walters v. Denver &c. Light Co.*, (Colo. App.) 68 Pac. Rep. 117.

A telephone lineman, with knowledge that a telephone wire on the same pole with trolley wires might become charged through guy wires, and supplied with a tester, was negligent in failing to test. *Bergin v. Southern &c. Teleg. Co.*, 70 Conn. 54; s. c., 39 L. R. A. 192.

It was negligence, for trolley to fail to stop a contact of its wire with

a telephone wire, though caused by another's negligence. *Atalanta &c. Street R. Co. v. Owings*, 97 Ga. 663; s. c., 33 L. R. A. 798.

Both a telegraph company and an electric railway company are negligent, where snow has so weighed down their respective wires that they come in contact with one another, some having fallen and lain across the street for 13 days. *Western &c. Teleg. Co. v. Griffith*, 111 Ga. 551.

Company is not negligent, where, after discovering the dangerous sagging of a wire with reasonable promptness, it takes immediate steps to remedy it.

Notice to a motorman of the sagging of an electric wire so as to endanger travelers, is not notice to the company. *Read v. City &c. R. Co.*, 115 Ga. 366.

Pedestrian slipped on a defective sidewalk and fell against a live wire. An unsatisfied judgment against the electrical company for the injury did not bar action against the city. *Roodhouse v. Christian*, 158 Ill. 137; aff'g s. c., 55 Ill. App. 107.

Company operating street cars with electricity must use such high care as is commensurate with the danger.

Permitting an electric wire to hang in the street where people are passing raises a presumption of negligence. *Larson v. Central R. Co.*, 56 Ill. App. 263.

Trolley company, held not liable to telephone lineman shocked by a telephone wire he was stringing over the trolley system, when it came in contact with an uninsulated feed wire placed out of danger to pedestrians. *Calumet Street R. Co. v. Grosse*, 70 Ill. App. 381.

The escape of electricity injuring a passenger on a street car is *prima facie* evidence of negligence. *Eickhof v. Chicago &c. Street R. Co.*, 77 Ill. App. 196.

Electric light companies are charged with a very high degree of care and skill in delivering electricity. *Alton R. &c. Co. v. Foulds*, 81 Ill. App. 322.

The degree of care is commensurate to the dangers to be avoided. *Economy Light &c. Co. v. Stephen*, 87 Ill. App. 220; s. c. aff'd, 187 Ill. 137.

Failure to use insulation prescribed by ordinance is negligence. *Knowlton v. Des Moines &c. Light Co.*, (Iowa) 90 N. W. 818.

That an electric light wire lay upon the street in a broken and dangerous condition three weeks was sufficient to charge the company with knowledge and liability for failure to repair. *Kansas City v. File*, 60 Kan. 157.

An electric light company, permitting a house owner to string a telephone wire on its poles, was held not liable to one injured in the street by the fall of the telephone wire, which had set fire to the house when

charged from an uninsulated wire of the light company. *Consolidated Electric &c. Co. v. Koepp*, (Kan.) 68 Pac. Rep. 608; s. c., 64 Kan. 735.

Duty to use the highest degree of care, imposed upon an electric light company. Plaintiff not *per se* negligent, upon seeing a live burning wire likely to set a building afire, in trying to remove it with a wooden bat. *Leavenworth Coal Co. v. Ratchford*, 5 Kan. App. 150.

Perfect insulation of live wire is required at points where persons go for work or pleasure. Painter was justified in relying upon appearance of proper insulation of wire strung along face of building. *McLaughlin v. Louisville &c. Light Co.*, 100 Ky. 173; s. c., 34 L. R. A. 812.

Charge requiring highest degree of care exercised by prudent persons, held insufficient. Perfect protection is required at such points. *Oversill v. Louisville Light Co.*, (Ky.) 47 S. W. Rep. 442.

See, also, *Schweitzer v. Louisville &c. Light Co.*, (Ky.) 52 S. W. Rep. 830; *O'Donnell v. Louisville &c. Light Co.*, 55 id. 202.

A gas company supplying a current was held liable for neglect of the company it supplied, to properly insulate its wires before turning on the current. *Thomas v. Maysville Gas Co.*, (Ky.) 56 S. W. Rep. 153.

Electric street railway was negligent in placing one of its guy wires in dangerous proximity to the cars of an adjoining steam railroad. *Ersler v. New Orleans &c. Co.*, 49 La. Ann. 86.

*Res ipsa loquitur*, applied to injury to pedestrian from broken telephone wire hanging over trolley feed wire into street. Evidence of such condition for two weeks, held sufficient to charge defendant with notice. *Western &c. Teleg. Co. v. Nelson*, 82 Md. 293; s. c., 31 L. R. A. 572.

Electric light company, held liable for the defective insulation of a high tension wire, where it entered a house above the roof of a projecting window. *Brown v. Edison &c. Illum. Co.*, 90 Md. 400; s. c., 46 L. R. A. 745.

Recovery not allowed where a mother placed her infant child within reach of a wire which she knew was or might be dangerous. *Cumberland v. Lottig*, (Md.) 51 Atl. Rep. 841.

Injury from electric wires to employes of other electrical companies is the course of their duties. *Illingsworth v. Boston E. L. Co.*, 161 Mass. 583; *Hector v. Boston E. L. Co.*, id. 558.

Electric light company held liable for injury to tinsmith from defective insulation of wires strung along face of building. *Griffin v. United Light Co.*, 164 Mass. 492; s. c., 32 L. R. A. 400.

*Reagan v. Boston &c. Light Co.*, 167 Mass. 406.

But not to a telephone lineman, who, without permission, attempted to string a telephone wire on a standard belonging to the light company on a roof. *Hector v. Boston &c. Light Co.*, 174 Mass. 212.

Cutting wires. When cutting electric wires is to  
*Union St. R. Co. v. Michigan Central R. Co.*, 91 Mich

Duty of electrical company to its employes while  
*Kraatz v. Brush Electric L. Co.*, (Mich.) 3 Am. R. & C

Electric light company, held not liable for death of  
 private premises in spite of warning sign of danger at  
 contact with a guy wire from a wire pole that had become  
 the company's knowledge. *McCaughna v. Owosso*  
 (Mich.) 89 N. W. Rep. 73.

Verdict for plaintiff sustained, where he was injured  
 escape of electricity while sitting in wagon near an electric  
*Shultz v. Faribault & Co. Electric Co.*, 82 Minn. 100.

That a wire carrying a deadly current over a street  
 thereon, is *prima facie* evidence of negligence. *Ganno*  
*light Co.*, 145 Mo. 502.

A bright boy of seventeen was negligent *per se* in a  
 up an electric light wire with no other insulation than  
 handkerchief. *Frauenthal v. Laclede Gaslight Co.*, 67

Boy of seventeen was not chargeable with negligence  
 handled a wire, knowing it was charged with electricity.  
 ings, where others had handled it in his presence only  
 before with impunity. *South Omaha Waterworks Co*  
 Neb. 710.

Electric light company, held liable for death of patient  
 contact with reel used to raise and lower electric light  
 of pole within easy reach. *Suburban Electric Co. v. New*  
 658; s. c., 32 L. R. A. 700.

The escape of electricity from a street railway to a house  
 is *prima facie* evidence of negligence. *Trenton & Co. R.*  
 N. J. L. 219; s. c., 38 L. R. A. 637.

Reasonable care, required to insulate electric light  
 shaft. *Anderson v. Jersey City & Co. Light Co.*, 63 N. J.

But, where plaintiff, simply to assure a fellow workman  
 liberately touches it, he cannot recover. *Anderson v.*  
*Light Co.*, 64 N. J. L. 664.

Recovery was denied to a lineman, who, after a broken  
 wire was tested and found dead, attempted to handle it  
 and was killed by a current turned into the wire by the  
 the power house, of a fuse that had burned out when the  
*Newark Electric & Co. v. McGilvery*, 62 N. J. L. 45  
 id. 591.

That an electric light wire was trailing broken on



*prima facie* evidence of negligence. *Newark Electric &c. Co. v. Ruddy*, 62 N. J. L. 505.

An electric light company and a telegraph company are each bound to see that the uninsulated wire of one does not come in contact with the other so as to allow the insulation to wear off and the current to be transmitted from one to the other. *Hamilton v. Bordentown &c. Light Co.*, (N. J. L.) 52 Atl. Rep. 290.

Injury from wires hanging or lying in the street. *Haines v. Raleigh Gas Co.*, 114 N. C. 203; 19 S. E. 344; *Block v. Milwaukee St. R. Co.*, 89 Wis. 371; *Godfrey v. Streator R. Co.*, 56 Ill. App. 378; *W. U. T. Co. v. Thorn*, 64 Fed. Rep. 287; *Light Co. v. Orr*, 59 Ark. 215; *City Elec. Street R. Co. v. Connery*, 33 S. W. R. 426; *State ex rel. Wis. Tel. Co. v. Janesville St. R. Co.*, 87 Wis. 72; *Cook v. Wilmington City E. Co.*, 9 Houst. 306.

Failure to comply with ordinance requiring insulation of wires is *prima facie* evidence of negligence. *Mitchell v. Raleigh E. Co.*, 129 N. C. 166; s. c., 55 L. R. A. 398.

Highest degree of care, required to protect live wires in places where people are apt to come in contact with them. *Perham v. Portland &c. Electric Co.*, 33 Or. 451; s. c., 40 L. R. A. 799.

Reasonable care in repairing defect does not necessarily require sufficient force to promptly replace many wires that had been blown down in an unusual storm. *Boyd v. Portland &c. Electric Co.*, 37 Or. 567.

It was for the jury to say whether a boy of 11 was negligent in not seeing a suspended wire where he bent his head to keep the wind out of his face. He did not know of its presence though he saw a suspended wire at a pole 150 feet away the evening before. *Boyd v. Portland &c. Electric Co.*, (Or.) 68 Pac. Rep. 810.

It was for the jury to say whether defendant was negligent, where its wires were inspected every other day and, on the night of the storm when the accident occurred, were tested every half hour, and the most approved appliances failed to disclose a break. The wire had been down an hour. *Chaparon v. Portland &c. Electric Co.*, (Or.) 67 Pac. Rep. 928.

Electric light company, held liable for death of policeman killed by a live wire in the street while trying to move it out of the way of pedestrians with his mace. *Dillon v. Allegheny &c. Light Co.*, 179 Pa. St. 482.

Injury to persons on the street from wires. *Cook v. Wilmington City Electric Co.*, 9 Houst. 306.

The breaking of a trolley wire held not *prima facie* evidence of negli-

gence, where it frightened but did not touch plaintiff's horse. *Kepner v. Harrisburg T. Co.*, 183 Pa. St. 24.

Flames and sparks emitted from a point in defendant's wire, where insulation had been rubbed off by contact with a guy wire, for months, was sufficient to charge it with notice thereof. *Turton v. Powelton Electric Co.*, 185 Pa. St. 406.

Recovery denied to one, who, simply to show the safety of a wire screen he was told was charged with electricity, deliberately touched it. *Wood v. Diamond Electric Co.*, 185 Pa. St. 529.

As to liability of city for live wires in the street, see *Mooney v. Luzerne*, 186 Pa. St. 161.

In the absence of notice of the defective insulation of the wire on a house or the cause thereof, no recovery was allowed for death caused thereby. *Smith v. East End &c. Light Co.*, 198 Pa. St. 19.

Highest degree of care, required to protect dangerous wires, where people may be lawfully in proximity to them. *Weil v. Edison &c. Light Co.*, 200 Pa. St. 540.

Girl of eleven climbed out of a window in her house and went upon the jet of the adjoining house where she came in contact with wires of the tenant thereof. She was not allowed to recover from the company furnishing the current. *Keefe v. Narragansett &c. Lighting Co.*, 21 R. I. 575.

Falling of telephone wire on trolley wire and injury to horse therefrom. Electric R. Co. and Telephone Co. were both liable. *Electric R. Co. v. Shelton*, 89 Tenn. 423. See similar accident. *Block v. Milwaukee St. R. Co.*, 89 Wis. 371; *Godfery v. The Streator R. Co.*, 56 Ill. App. 378.

Where wires were 16 feet above the pavement, the fact that they were only two feet from a wooden awning without a railing and not used as a resort, was not negligence, there being no reason to apprehend any one would have occasion to go there. *Brush Electric &c. Co. v. Lefevre*, 93 Tex. 604; s. c., 49 L. R. A. 771.

An electric street railway is not an insurer of the safety of those using the street. *Citizen's R. Co. v. Gifford*, 19 Tex. Civ. App. 631.

In an action for injury by electric guy wire, the proper guide for the jury was declared to be the simple standard of ordinary care. *Honey Grove v. Lamaster*, (Tex. Civ. App.) 50 S. W. Rep. 1053.

Violation of ordinance as to insulation was held the proximate cause of shock received while taking down a dead wire charged by falling against a live one with defective insulation. *San Antonio Gas &c. Co. v. Speegle*, (Tex. Civ. App.) 60 S. W. Rep. 884.

Placing a heavily charged wire so near as to charge another running

near the sidewalk was proximate cause of injury to pedestrian. *International Light &c. Co. v. Maxwell*, (Tex. Civ. App.) 65 S. W. Rep. 78.

Defendant was negligent in allowing a wire to hang from one of its poles within reach of the sidewalk for two weeks, charged by another wire in contact with its live wire where the insulation was worn. *Wehner v. Lagerfelt*, (Tex. Civ. App.) 66 S. W. Rep. 221.

Negligence to string a heavily charged uninsulated electric light wire over an awning on which parties were apt to go to repair, paint, &c. *Rucker v. Sherman Oil &c. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 818.

Electric light company was held liable for death of lineman, due to defective insulation of its wires, while stringing wires of another company on poles used by them in common. *Newark Electric &c. Co. v. Garden*, 78 Fed. Rep. 74; s. c., 37 L. R. A. 725.

Brakeman knowing that his cars passed beneath a trolley wire, which crossed the track and sagged within a few feet thereof, was not allowed to recover for shock received. His ignorance of the danger of contact did not excuse his negligence in failing to avoid it. *Danville Street Car Co. v. Watkins*, 97 Va. 713.

A lineman, knowing that a wire might be charged, was negligent in not employing the testing apparatus with which he was provided. *Anderson v. Inland Teleg. &c. Co.*, 19 Wash. 575.

The presumption of negligence arising from the breaking and falling of an electric wire is met by proof that it was due to an accident, which no reasonable human care could have prevented. *Snyder v. Wheeling Electrical Co.*, 43 W. Va. 661; s. c., 39 L. R. A. 499.

See, also, *Huber v. La Crosse City R. Co.*, 92 Wis. 636; s. c., 31 L. R. A. 583.

## ELEVATORS.

Defendants operated a cotton mill, to the management of which they gave no personal attention, but intrusted it entirely to a general agent, who had full power. In the mill was an elevator, used by the employés in passing from one floor to another. This elevator became out of repair and unsafe, of which said agent had notice. He neglected to repair, and plaintiff, an employé, using the elevator in the course of her work, was injured by its fall. Held, that the defendants were liable. *Corcoran v. Holbrook*, 59 N. Y. 517, aff'g judg't for pl'ff, and rev'g order general term.

Section 16, chapter 625 of the Laws of 1871, amended by section 5, chapter 547 of the Laws of 1874, provides that doors on elevators shall be kept closed "by the occupant, etc., of the building having the use and control of the same." Where there are several occupants, the one whose use requires the operation and whose disuse permits closing the doors, must do so, so that it must appear by evidence who used it last to enable one injured to recover. *Harris v. Perry*, 89 N. Y. 308, rev'g 23 Hun, 244, and judg't for pl'ff.

By the negligence of the engineer, the platform of a grain elevator was raised until it struck against a beam; the rope broke and it fell, injuring the plaintiff, an employé on it. The apparatus was usual and the makers were experienced. There had been no previous trouble and there was no liability. *Stringham v. Hilton*, 111 N. Y. 188, rev'g judg't for pl'ff.

Citing *McCoaker v. L. I. R. Co.*, 84 N. Y. 77.

In *Stringham v. Stewart*, 100 N. Y. 516, judgment of general term affirming nonsuit was reversed upon the ground that by admission on the trial the elevator was not sufficient to carry passengers, that it was operated by a negligent system and that if the engineer was negligent, so was the defendant, and that case should have been submitted to the jury.

The omission of the owner of a building in the city of New York to comply with chapter 547 of the Laws of 1874, that hoisting elevator shafts shall have railings and trap door is *prima facie* evidence of negligence. The plaintiff went in the wrong door on his own business and did not look to see anything. Under the law, the owner of the elevator must not wait for the superintendent of buildings to prescribe plans but must procure them from him. For the jury. *McRickard v. Flint*, 114 N. Y. 222; aff'g 13 Daly, 641, and judg't for pl'ff, s. c., 97 N. Y. 641.

An elevator in a building need not be approached with caution as a place of danger, and if the door be opened by an attendant, one may enter without stopping to look or listen or examine.

A boy, not shown to have been in defendant's service, opened the door, but, the elevator not being in place, caused the plaintiff to fall. Judgment for plaintiff affirmed. *Tousey v. Roberts*, 114 N. Y. 312, aff'g 21 J. & S. 446, and judg't for pl'ff.

An employé, coming up from the hold of a vessel in an elevator, was caught between the elevator and the combing of the hatch. There was room enough for him to stand on the elevator without exposure to danger and the evidence did not permit the inference that he used proper precautions. It was error to charge that the jury could assume in the absence of evidence, that he received his injury in the performance of his duty and had not omitted the precautions which a prudent man would take in the absence of known danger. *Riordan v. Ocean S. S. Co.*, 124 N. Y. 655, aff'g order general term, rev'g judg't for pl'ff.

Distinguishing *Galvin v. Mayor*, 112 N. Y. 223.

The omission of safety appliance upon a freight elevator, never carrying passengers, from the well of which the master excludes his servants, is not negligence.

A part of an elevator fell and wedged the platform of the elevator against the walls, so as to stop it. This had happened before, but the difficulty could have been removed without danger to anybody by reversing the movement of the cable. From neglect to do this, the platform fell and a part of the apparatus shot out of the well and injured the plaintiff who was at work on one of the floors. Held that the defendant was not negligent and that the proximate cause of the injury to the plaintiff was the negligence of the engineer, a co-servant. *Kern v. De C. & D. S. R. Co.*, 125 N. Y. 50, rev'g judg't for pl'ff.

There was evidence that the drum of the elevator would hold the chain if wound tight, but that through the improper revolving of the drum the chains wound loosely and thus got off the shaft, causing the elevator to tip and an employé was thereby thrown down the elevator hole. Elevator had been in use six years and was properly inspected by owner and manufacturer, in the absence of notice of defect. The master was liable. *Hart v. Naumburg*, 123 N. Y. 641; rev'g s. c., 50 Hun. 392.

Passenger in an elevator without doors, grasped the grating enclosing the shaft and was drawn between the elevator and the side of the shaft. Nonsuit was sustained. *McGrell v. Buffalo &c. Build. Co.*, 153 N. Y. 265; rev'g s. c., 90 Hun. 30.

From opinion.—“While it was the defendant's duty to provide a safe and suitable car, appliances and other machinery for the operation of its elevator and for the accommodation of its passengers and to exercise strict diligence in that respect, still the law did not impose upon defendant the duty of providing for their absolute safety, so that they should encounter no possible danger or meet with no casualty in the use of the appliances provided. (*Dougan v. Champlain*

Transportation Co., 56 N. Y. 1; Crocheron v. N. S. S. I. F. Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306; Loftus v. 84 N. Y. 455; Laffin v. Buffalo & S. W. R. Co., 106 N. Y. 13; York C. & H. R. R. Co., 106 N. Y. 678; Frobisher v. Fifth A. Co., 151 N. Y. 431)." "It is said that the foregoing authorities apply to the case, but that the defendant was bound to exercise care and diligence and was liable for the slightest neglect which and foresight might have guarded. It may be that, as to the compliances with which the elevator is moved and controlled in descent, an owner is bound to use the utmost care as to any defect liable to occasion great danger or loss of life, and that he is, in respect to the same rule that applies to a railroad company in regard to engine and other similar machinery, but, as to the surrounding structures forming a part of the elevator plant, where less danger is apprehended, we think the rule is less strict and the doctrine of *res ipsa loquitur* applies. In the latter case, the rule is satisfied with that degree of care a reasonably prudent man would exercise. This is considered in cases to which we have already referred. The requirement of the degree of care is dependent, not so much upon the actual apprehension upon the consequences likely to result from a defect in the machinery. In cases where less serious results are to be expected and danger is not to be apprehended, if due and proper care is observed, the owner is responsible only for the want of ordinary care. (Kelly v. Manhattan R. Co., 112 N. Y. 443; Miller v. N. Y. 199, 211.) In this case no such serious results were to be apprehended from any defect or insufficiency of the bars or grating, and, besides, the rule of due and proper care on the part of the passenger riding in the elevator, in the absence of danger of such an accident could have been apprehended and guarded against, would have occurred. Hence the defendant is responsible only for the want of ordinary and reasonable care."

Owner had provided a chain fastened on one end and attached to a staple as a guard to protect parties from falling into a fall shaft. The chain was a sufficient compliance with a statement of "a substantial railing," and owner was not liable for an accident caused by tenant leaving chain down. *Malloy v. New York*, 156 N. Y. 205; s. c., 41 L. R. A. 487; rev'g s. c., 13 Misc. 2d 100.

*Res ipsa loquitur*, applied to fall of an elevator in an apartment building. Owner of such building held not a common carrier of passengers, but employer of employés of tenants, and his duty confined to reasonable care. *Manice*, 166 N. Y. 188; rev'g s. c., 47 App. Div. 70.

**From opinion.**—"In determining the correctness of the rule in a trial court," (that governing common carriers of passengers), "the parties, which I think not controlling on the application of *res ipsa loquitur*, is of vital importance. Doubtless no distinction exists between vertical transportation and horizontal transportation or along the surface of the earth. If the relationship between the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in

the defendant was not a common carrier and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as owner of the property, is deemed to have extended to all, who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering. (2 *Sherman & Redfield*, sec. 704; *Beck v. Carter*, 68 N. Y. 283). But 'the measure of his duty is reasonable prudence and care.' (*Larkin v. O'Neill*, 119 N. Y. 221; *Hart v. Grennell*, 122 N. Y. 371). If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator no doubt involves danger, and, if accident occurs, it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings."

Plaintiff, at dusk, entered an unfinished building, with which he was familiar, to get his pay. To get to the office he crossed over an elevator standing at the floor. On his return, he fell into the shaft, the elevator having in the meantime been removed. Judgment for plaintiff was reversed. *Kennedy v. Friederich*, 168 N. Y. 379; rev'g s. c., 45 App. Div. 631.

An employé unnecessarily crossed the bottom of an elevator shaft and was struck by a piece of iron negligently allowed to fall from the elevator. Verdict for plaintiff was set aside. *Burk v. Edison &c. Electric Co.*, 89 Hun, 498.

An elevator was of a plan approved by long use; its selection was carefully considered by the defendant and was placed in the building by manufacturers of large experience and high reputation; it was made of the best material and had been in daily and successful use without accident or interruption or reasonably caused apprehension of defect. It suddenly fell and injured the plaintiff, who was defendant's employé. No liability. *Kaye v. Rob Roy Hosiery Co.*, 51 Hun, 519, rev'g judgt for pl'ff.

Two of the defendant's employés were on a freight elevator on which persons were, by a sign at the entrance, forbidden to ride. The men tried to start the elevator but this was prevented by a brick wedged between the side of the elevator and the wall; the plaintiff told his companions to remove it, and, this being done, by reason of the slack in the rope occasioned by the effort to start it, the elevator fell eight feet and the plaintiff was injured. The device known as a clutch would have prevented the falling. The defendants were tenants and the accident happened on the first day of their possession. The two defendants were not negligent in not observing the absence of the clutch. The plaintiff.

being three years in this country, was considered able to read the notice as to the use of the elevator where the accident occurred. *Hanson v. Schneider and others*, 58 Hun, 60, aff'g judg't for def't on nonsuit.

The deceased, working at the bottom of an elevator shaft, put his head into the shaft in an effort to load a heavy grindstone upon the elevator platform and was struck by an oil barrel standing in the upper room of the mill which was upset by the jarring of the machinery and fell into and through the shaft. There were not self-closing doors to the shaft as required by ch. 462, L. 1887. The failure to furnish the doors was *prima facie* evidence of negligence, and the alleged contributory negligence of the workmen, in not placing a bar which would have prevented the barrel from falling, should have been submitted to the jury, as well as the question whether the deceased had knowledge of the danger likely to arise from the barrel. The act of leaving the barrel where it was, was an act of the master's and affected the safety of the place. *Freeman v. Glens Falls Paper Mill Co.*, 61 Hun, 125, rev'g judg't for def't on nonsuit.

Hoisting a sale in an elevator by signals to engineer, if manufacturers and engineer regard that as the safest, is not negligent. *Murphy v. Hays*, 68 Hun, 450.

Boy leaned against chain across entrance to shaft of elevator, on which he had no right to ride, and was injured by the chain giving way; boy was negligent and could not recover although the hook that fastened the chain was defective. *Knox v. Hall Steam Power Co.*, 69 Hun, 231, rev'g judg't for pl'ff.

It was the duty of plaintiff's intestate to place a barrier to close the entrance to the shaft of an elevator on upper floor; he did not do so, whereupon several empty barrels, temporarily placed on such floor, were disturbed by the jarring of the mill machinery, rolled into the shaft and fell upon deceased while he was loading the elevator on the lower floor. Verdict for defendant sustained. Section 8, chapter 462, Laws of 1887, requiring defendant to maintain a trap or automatic door at elevator opening, did not release plaintiff from showing that there was no contributory negligence on the part of the deceased. It was also held that the deceased, having full knowledge of appliances, assumed the risk. *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun, 530, aff'g judg't for def't; aff'd, 142 N. Y. 639.

While an elevator, below the level of the floor, was stopped for repairs, the door to the shaft was left open, and a man was stationed there to pass in tools and to guard the doorway, when a mail carrier, on his rounds, rushed to the shaft door, crowded past the man, fell down the shaft and was injured. The man at the shaft gave no warning and made



no resistance against the passage of the deceased, and it did not appear that he had any means of knowing why the man was stationed there. The question was for the jury. *Morrison v. Met. Tel. Co.*, 69 Hun, 100, rev'g nonsuit. The plaintiff thereafter recovered and the judg't was aff'd, 72 Hun, 194; aff'd, 144 N. Y. 703.

Boy of eight, negligent *per se* in putting his head over the gate of the elevator and into the descending car in spite of warning. *Guichard v. New*, 9 App. Div. 485.

That there existed defects in an elevator apparatus of which the owner knew but which took no part in the accident did not affect his responsibility. *Sellers v. Dempsey*, 26 App. Div. 22.

Ashman, in replacing emptied barrels back on an elevator, running from the cellar to the sidewalk, put one foot on the platform thereof when a cable gave way. *Res ipsa loquitur* held to apply, and the duty of ordinary care as to elevators, to embrace reasonable inspection. *Kennedy v. McAllaster*, 31 App. Div. 453.

Negligence was for the jury, where operator, by a second pull of the controlling cable, shut off the power and released the car, which fell and injured plaintiff riding on the car to assist operator in storing goods delivered by the former. *Miller v. Brewster*, 32 App. Div. 559.

Whether the use of elevator shaft door, shutting automatically, and uncontrollable when released by operator by taking his foot from a button in car floor, is negligence, is for the jury. *Auld v. Manhattan Life Ins. Co.*, 34 App. Div. 491; s. c. aff'd, 165 N. Y. 610.

Not negligence *per se* to lean against a substantial wooden bar used as a guard to an elevator shaft without knowledge that it was insecure. *Weiss v. Jenkins*, 39 App. Div. 567.

An elevator loaded with passengers was stuck between two floors by a cloth tangled in the machinery. The engineer, in manipulating the cables in an attempt to extricate it, slipped the governing cable from its pulley and the car fell. It was not error to charge that defendant's duty was the "highest degree of care and skill." *Savage v. Bauland Co.*, 42 App. Div. 285.

From opinion.—"In the case at bar, the danger to be apprehended, if control of the car was lost, was great. The car was heavily laden with human beings and was suspended between the second and third floors above the basement. If it fell and the safety appliances failed to work, there was every reason to believe that many of the passengers would be seriously injured, and the degree of care which the defendant was bound to exercise was measured by the danger which was to be apprehended from the circumstances as they were disclosed to the defendant. We are of opinion that the evidence was sufficient to justify the conclusion of the jury, if the rule of law laid down was correct; and upon this point we are satisfied that the learned trial court was not in error. The defendant

could not permit the elevator car to get beyond its control means and the opportunity to prevent it, under the circumstances and rely upon its safety appliances to protect the persons on these passengers a higher duty than trying experiments; every precaution reasonably possible, and, having failed in answer in damages to those who have suffered through its

Where it appeared that the elevator shaft was so close to the elevator rope which started the car could be reached by the operator was negligent in leaving the car while passing it. *Ingraffia v. Samuels*, 71 App. Div. 14.

The burden imposed by the application of the rule of law to the unexplained fall of an elevator was removed by the fact that the elevator, purchased by a reputable maker, was in charge of a competent operator, properly inspected and worked properly, and the accident. *Hubener v. Heide*, 73 App. Div. 200.

Owner of manufacturing establishment need only exercise due care for the shaft under N. Y. L. 1887, chap. 462, sec. 8, and chap. 409, after inspection has disclosed that it is not a life and limb. *Boehm v. Mace* (C. P.) 28 Abb. Ne. N. Y. Supp. 106.

The owner of an elevator is not bound to so provide for passengers that they shall encounter no possible danger or no casualty in the use of the elevator, and although the elevator has been constructed, with reasonable expense, so that an accident, even a seemingly and apparently impossible accident could not happen, this will not render the owner liable. *Egan v. Berlin Association* (C. P.) 31 N. Y. S. R., 545; 10 N. Y. Supp.

Where, if the plaintiff had looked, he would have discovered the condition of a hoistway no recovery was allowed. *Mattison*, 10 Daly, 336.

Elevator man unloading a vessel should keep machinery in a safe and secure condition and operate the same in a safe manner. Employés engaged in sweeping the floors of the vessel. (Sup. Ct.) 28 N. Y. S. R., 184; 18 N. Y. Supp. 616.

Owner is not liable to employé for a contractor injured while operating by defendant's employé, without her knowledge, unless another proper elevator had been furnished. *F. 47 N. Y. S. R.*, 40; 19 N. Y. Supp. 353.

Boy 15 years of age was standing beneath elevator when it fell; it fell by the breaking of the rope which was so close to the boy that inspection would have shown its defective condition. *Krey v. Schlussner*, 42 N. Y. S. R., 917.

A person stepped into the well of an elevator, the door being open and the elevator boy nodding beside it. For jury. *Davidson v. Sloan*, 49 N. Y. Super. Ct. 304.

A blind man, by mistake, entered a door and fell down a hatchway. He could not recover without proving negligence. *Osherbank v. Gardiner*, 49 Sup. Ct. 263.

Elevator to floor, occupied by different tenants, was left open whereby injury ensued. Action against a tenant, in the absence of proof, that he left it open or used it exclusively, was not maintained. *Donnelly v. Jenkins*, 9 Daly 41.

A boy sent to help load an elevator undertook to ride thereafter upon it with its load, and, on account of his heel projecting over the platform, he was injured. The elevator was solely for hoisting freight and was in good repair and had been in use for eight years without accident. The complaint should have been dismissed. *Hochmann v. Moss Engraving Co.*, 4 Misc. 160, rev'g non-suit.

Where the elevator had been built fourteen years and out of use for a year, it was not error to charge that ordinary care might involve unusual inspection. *Stott v. Churchill*, 15 Misc. 80; s. c. aff'd, 157 N. Y. 692.

Owner was not liable for defect in piston rod, not discoverable in a reasonable and careful search according to the best known practicable tests. *Treadwell v. Whittier*, 80 Cal. 574.

A plaintiff, a customer, injured through the fall of an hydraulic elevator, operated by defendants in their store, in which he was being carried as a passenger, need only prove that he sustained injury by the breaking of the machinery, and that such machinery was under control and management of defendants, in order to raise a presumption of negligence.

Defendant was to be treated as carrier of passengers, with same duties and responsibilities as to care and diligence as other carriers of passengers, by stage coach or railway, and must use utmost care and diligence of very cautious persons, as far as human care and foresight can go, and is liable for slightest neglect. *Treadwell v. Whittier*, 80 Cal. 574.

To same effect is *Goodsell v. Taylor*, 41 Minn. 207.

Ordinance requiring elevator shafts to be protected, held valid and admissible on question of negligence. *Shayer v. Lowell*, 134 Cal. 357.

See, also, *Browne v. Siegel, Cooper & Co.*, 90 Ill. App. 49; s. c. aff'd, 191 Ill. 226.

Man put his head through opening in door to elevator shaft and was

killed. No recovery on account of contributory negligence. *Mau v. Morse*, 3 Colo. App. 359.

Owner was not liable for injury to tenant attempting to operate defective elevator, though forbidden to do so. *Dashiell v. Washington Market Co.*, 10 App. D. C. 81.

See, also, *Hansen v. State &c. Build. Co.*, 100 Iowa, 672.

Where fire patrol, breaking in building at time of fire, was injured by fall of a weight on elevator. *Gibson v. Leonard*, 37 Ill. App. 344; 143 Ill. 182.

Where children are allowed to be about the premises, an owner is bound to protect them by guarding the shaft, as a moving elevator is an attraction to children. *Siddall v. Jansen*, 168 Ill. 43; rev'g s. c., 67 Ill. App. 102.

The rules applicable to carriers of passengers in general, apply to passenger elevators. *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222; aff'g s. c., 70 Ill. App. 166.

Cables pulled out at the same time defective safety apparatus failed. Both were the proximate cause of fall of elevator. *McGregor v. Reid &c. Co.*, 178 Ill. 464; rev'g s. c., 76 Ill. App. 610.

See, also, *Western &c. Teleg. Co. v. Woods*, 88 Ill. App. 375; *Springer v. Ford*, id. 529; *Field v. French*, 80 id. 78.

The care required in their operation, is the highest degree that is practically consistent with their efficient use. There is no analogy between the case of an elevator approaching a landing and a railroad crossing. The passenger may enter without stopping to look and listen or make examination when the door is thrown open. *Chicago &c. Build. Co. v. Nelson*, 98 Ill. App. 189; s. c. aff'd, 197 Ill. 334.

Owner of factory must keep guard or barrier around an elevator shaft, as regards persons rightfully entering building. *Gibson v. Sziepienski*, 37 Ill. App. 601.

Ordinary care, the rule applied to freight elevators. *Springer v. Ford*, 88 Ill. App. 579.

Plaintiff, attempting to force door open and board an elevator in motion, was denied recovery. *Green v. Young Men's &c. Asso.*, 65 Ill. App. 459.

It was negligence to leave the door to a passenger elevator shaft open and unguarded. *Haymarket Theatre Co. v. Rosenberg*, 77 Ill. App. 183.

See, also, *Colorado &c. Inv. Co. v. Rees*, 21 Colo. 435; *Rosenbaum v. Shoffner*, 98 Tenn. 624.

The liability of the constructor of an elevator in store runs to the proprietor only and not to his customers. *Field v. French*, 80 Ill. App. 78.

That an elevator started up while a passenger was in the act of alighting was *prima facie* evidence of negligence. *Franklin Printing &c. Co. v. Behrens*, 80 Ill. App. 313.

*Hartford Deposit Co. v. Sollitt*, 172 Ill. 222.

Absence of safety appliances on elevator used for passengers held evidence of negligence. *Morris v. O'Brien*, 81 Ill. App. 202.

Safety appliances need not be provided for freight elevators not intended to carry passengers. Ordinary care, the measure of duty on such elevators used to carry employes to and from work. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642.

Negligence to leave door to elevator well open when hallway leading thereto was dark. *People's Bank v. Morgotofski*, 75 Md. 432.

Action by servant to recover for injury by fall of an elevator, upon which plaintiff was ascending. Question whether any precautions to prevent men from injury on the elevator were required and whether defendant's direction to foreman to warn men against it was sufficient, was for the jury. *Avilla v. Nash*, 117 Mass. 318.

A policeman, entering an open door of a building at night, fell down an elevator which was without statutory railing, and recovered. *Parker v. Barnhard*, 135 Mass. 116.

A hotel proprietor was not liable for injury to a passenger by the fall of an elevator with proper safety appliances and operated with care. *Shaddock v. Rand*, 142 Mass. 83.

In such cases, even where statute prescribes precautions, the plaintiff must show authority to be on the premises and that he was exercising care and that the defendant did not. *Gordon v. Cummings*, 152 Mass. 513.

Boy on errand to a building entered an elevator, although on previous occasions warned not to do so and although confronted by notice in elevator "This elevator is for freight only and not for passengers," and, operating it himself, went up to room above where he left elevator; after five minutes he came back in a hurry and opened the elevator well, heard some one speak to him, turned around quickly toward the speaker, did not look at the well or see it, but supposing elevator was there tried to step on it. Elevator had been lowered and boy fell. Boy was negligent and did not recover. *Patterson v. Hemenway*, 148 Mass. 94.

Employe riding on an elevator, against rules and without knowledge of owner that elevator was so used, cannot recover. *McCarthy v. Foster*, 156 Mass. 511.

When the statute provides as to elevators that some device, approved by the inspector of factories, shall be provided that will be "securely held in the event of accident" does not require a device that will always

surely and securely hold the car, but a device to be approved by the inspector. *Bourgo v. White*, 159 Mass. 216.

It was *per se* negligent to put one's head into the shaft to shout for the elevator. *Ramsdell v. Jordan*, 168 Mass. 505.

Owner was not liable to stranger, who, ignorant of the use of elevators, and without any implied invitation, fell into the well through an open elevator door. *McCarvel v. Sawyer*, 173 Mass. 540.

*Res ipsa loquitur*, held not to apply where passenger was injured by the sudden starting of elevator, due to fall of operator when his stool was jerked from under him by the janitor who was riding in the car. *Gibson v. International Trust Co.*, 177 Mass. 100.

Where a freight elevator is marked "danger," one seeking to enter without permission, cannot complain that the shaft was not guarded. *Bennett v. Butterfield*, 112 Mich. 96.

Owner of freight elevator knowing of actual defects, must notify one invited to ride. *Hall v. Murdock*, 114 Mich. 233.

Lessor, retaining control over an elevator and bound to keep it in repair, is liable for failure to do so without notice. Lessee is not chargeable with notice of certain defects by the fact that he has knowledge of other defects which would not cause the injury. *Olson v. Schultz*, 67 Minn. 494; s. c., 36 L. R. A. 790.

Statute, imposing the duty of guarding wheel holes and elevator wells, construed to devolve upon the owner of the building before leasing it. *Tredt v. Wheeler*, 70 Minn. 161.

Negligence, in allowing a 15-year-old boy to operate a shaky unclosed elevator in shafts with niches at landings large enough to admit a man's body, was for the jury. *Lee v. Knapp & Co.*, 137 Mo. 385.

Rules regulating degree of care required of common carriers of passengers, applied to operators of elevators. *Lee v. Knapp & Co.*, 155 Mo. 610.

Employé, aged ten, slipped while opening elevator door, when door could safely have been opened, negligence was not inferable from this nor from the fact that another boy of twelve years was operating the elevator. *Smillie v. St. Bernard & c. Stove*, 47 Mo. App. 402.

It was negligence, after leaving an elevator for a few minutes, to walk backwards into the shaft without looking to see if the elevator was there still. *Smith v. Van Sciver*, 58 N. J. L. 190.

Boy of 16 or 17, familiar with the surroundings and knowing that the shaft guard had been temporarily removed, was *per se* negligent in putting his head into the elevator shaft to see if his employer was there. *Knapp v. Jones*, 50 Neb. 490.

Where a boy, after his legitimate use of an elevator is finished, re-

mains in it for amusement he is a trespasser, and cannot complain of injury, in the absence of willfulness. *Hinds v. Breckenridge Co.*, 16 Oh. C. C. 12.

An elevator in a store, necessarily used by delivery boys about their duty, must be kept in a condition of reasonable safety. *Strawbridge v. Bradford*, 128 Pa. St. 200.

The same degree of care is required of a carrier of passengers by an elevator as of other carriers of passengers. *Riland v. Hirshler*, 1 Pa. Super. Ct. 384.

One employed to load, ride on, and unload an elevator is not *per se* negligent in assuming that it is safe. *Mulvey v. Rhode Island &c. Works*, 14 R. I. 204.

Fall of an elevator is *prima facie* evidence of negligence. *Ellis v. Waldron*, (R. I.) 188; 33 Atl. Rep. 869.

Operator of an elevator from a cellar to the sidewalk is negligent in not protecting those passing on the street by guarding the opening. *Par-tucket v. Bray*, 20 R. I. 17.

Lessor not liable for injuries on elevator under sole control of lessee. *Hanson v. Beckwith*, 20 R. I. 165; s. c., 38 L. R. A. 716.

Opening the door before reaching the floor was not an invitation to alight before the elevator had reached it and stopped. *Bullock v. Butler Exch. Co.*, (R. I.) 46 Atl. Rep. 273.

The same degree of care is required of a carrier of passengers by an elevator as of other carriers. *Southern Build. &c. Asso. v. Lawson*, 97 Tenn. 367.

Leaving a shaft, in close proximity to where a customer is obliged to inspect goods, without a guard was negligence. *Rosenbaum v. Shoffner*, 98 Tenn. 624.

Landlord who runs an elevator for the use of his tenants and their visitors, becomes a common carrier, and is charged with the highest degree of care which human foresight can suggest, both as to the machinery and the conduct of his servants. *Marker v. Mitchell*, 54 Fed. Rep. 637.

Operator, after opening door, told intending passenger to "wait a minute," and attempted to close it again while he brought car up even with floor. The passenger, by stumbling against him, started the car and was thrown into the well. Negligence was for the jury. *Oberndorfer v. Pabst*, 100 Wis. 505.

## ESTOPPEL.

The negligence of one who, by mistake, pays another a sum of money to which he is not entitled does not prevent an action to recover it. *Lawrence v. American National Bank*, 54 N. Y. 432.

*The Kingston Bank v. Eltinge &c.*, 40 N. Y. 391; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 237; *The Union National Bank of Troy v. Sixth National Bank, &c.*, 43 id. 452; *Duncan v. Berlin &c.*, 46 id. 685; *Waite v. Leggett*, 7 Cow. 195; *Kelley v. Solari*, 9 M. & W. 54; *Marriott v. Hampton*, 2 Smith's Leading Cases, 403, notes.

A bank is not bound to know the handwriting or the genuineness of the filling up of a check drawn upon and paid by it, but is legally concluded only as to the signature of the drawer and its own certification. *Price v. Neal*, 3 Burr. 1355; *Nat'l Park Bank &c. v. Ninth Nat'l Bank &c.* 46 N. Y. 77; *Mather v. Lord Naidstone*, 18 C. B. 273.

When, therefore, a bank has paid by mistake to a bona fide holder a certified check, which, after certification, had been fraudulently altered by raising the amount, it can recover back the sum thus paid, unless such holder has suffered loss in consequence of a mistake. A mistake, in recognizing a forged instrument as genuine is binding only when the forgery is such that it ought to have been detected by a bare inspection of the instrument, without reference to anything outside of it, not even to the memory of the party as to the obligations he has issued. Where there is an alteration in the body of an instrument, the recognition of the altered instrument as genuine is only binding upon the party who made the body of the instrument, as well as the signature thereto. *National Bank of Commerce in New York v. National Mechanics' Banking Association &c.*, 55 N. Y. 211.

Although a party paying forged paper without an opportunity of inspection may recover the money back, yet he must, when such opportunity occurs, make the inspection and use diligence to advise the person receiving the money of the forgery, or be liable for the damage. *Allen v. Fourth National Bank*, 59 N. Y. 12.

*Distinguishing Price v. Neal*, 3 Burr. 1354; *Goddard v. Merchant's Bank*, 4 N. Y. 147.

A person wrongfully obtained a draft and had it certified, then raised it and changed the date. The drawee's agent, the paying teller, after payment on the draft had been stopped by the drawee, told the plaintiff, who was about to take it, that the certification was correct. Defendant was liable. *Clews v. Bank of N. Y. N. B. Association*, 114 N. Y. 70; demurrer to complaint overruled, 8 Daly 476; judgment for plaintiff on verdict reversed 89 N. Y. 418; nonsuit reversed, 105 id. 398; judgment for plaintiff affirmed 114 id. 70.



*Distinguishing Security National Bank v. National Bank*, 67 N. Y. 458, which was not for negligence but on contract of certification.

See *Bills, Notes, &c.*, p. 166.

A bank depositor is not estopped by the retention of the account stated by the bank from showing that some of the checks paid by it were forged, where the delay is accounted for by showing that in the ordinary course of business the book and vouchers were given to the depositor's bookkeeper, who had forged the checks, and that he availed himself of this opportunity to conceal the forgery.

To constitute negligence on the part of the depositor in such a case it must be shown that the agent was untrustworthy, and that his principal had some notice thereof or that the acts or omissions were out of the usual course of business. *Wachsman v. The Columbia Bank of the City of New York*, 8 Misc. 280.

Neglect on the part of the owner of personal property contributing to its loss will not bar an action against an innocent purchaser for conversion, unless negligence amount to consent to the theft. *Pease v. Smith*, 61 N. Y. 477.

See *Hills v. Snell*, 104 Mass. 173; *Stricksaul v. Barrett*, 20 Pick. 415.

Where a surgeon was sued for negligence in his professional duties, a judgment in his favor of the value of the services in which the negligence was alleged to have occurred was held a bar to the second action, although the plaintiff in the second action had, in the first, confessed judgment without trial. *Gates v. Preston*, 41 N. Y. 113.

It was held that a judgment in an action to recover for freight was a bar to an action by the owner of the goods on account of the destruction of the same during the course of carriage. *Dunham v. Power*, 77 N. Y. 76.

See this doctrine affirmed in *White v. Merritt*, 7 N. Y. 352; *Davis v. Talcott*, 12 id. 184; *Schwinger v. Raymond*, 83 id. 193; *Blair v. Bartlett*, 75 id. 150.

This doctrine seems to be disputed, as will be seen by reference to *Bigelow on Estoppel* (5th ed.) pp. 177, &c., citing *Ressequie v. Byers*, 52 Wis. 650; *Goble v. Dillon*, 86 Ind. 327; *Sykes v. Bonner*, (Cinn. Sup. Ct. R. 464) involving negligence of a physician; *Bascomb v. Manning*, 52 N. H. 132, and other authorities.

If notice of sale be ambiguous as to the amount of land to be sold (premises described as "farm of 'D.,' containing thirty-one acres") the plaintiff is negligent, if he relies upon it. *Dennerlein v. Dennerlein*, 111 N. Y. 518.

In an action to have a deed set aside as fraudulent, which had been executed by the plaintiffs to one of the defendants, in reliance upon the statement of such defendant and her attorney, that it was a power of

attorney, it was held that the plaintiff's right to relief was not defeated by the omission to read the deed before execution. *Smith v. Smith*, 134 N. Y. 62.

*Albany City Savings Bank v. Burdick*, 87 N. Y. 40.

Agent of debtor, without authority, received part payment on notes in his possession and the principal discovered it, although he kept silent for three years, and in computing the amount due allowed it. The agent received another payment; principal's negligence in not communicating with debtor, and he was bound. *Wardrop v. Dunlop*, 1 Hun, 325.

Defendants, warehousemen, delivered to the owners negotiable warehouse receipts for certain imported goods stored in their warehouse deliverable on payment of charges. The warehouses were designated in the receipt as "free warehouses," meaning that an internal revenue tax on goods stored therein had been paid. The receipts were pledged as security for a loan, believing that the goods were free. In an action to recover the value of the goods it appeared that the warehouses named were bonded warehouses and the defendants refused to deliver the goods without payment of internal revenue tax. Held, that the defendants were responsible to the plaintiff for the goods as free goods, and were properly held liable to persons accepting the receipts. *First National Bank v. Dean*, 137 N. Y. 110.

A warehouseman is not estopped by his bill of lading in regard to an error or misstatement, unless it amount to a representation as to a fact which was, or in the ordinary course of business ought to have been within his knowledge, and which a third person, acting reasonably, would have a right to rely and act upon.

The defendant had a bonded warehouse under the United States government and received in store a number of barrels similar to those in which "Portland Cement" is packed, and having the usual marks thereon; they came from a port from whence such cement is imported, were represented to him to contain, and he in good faith supposed that they did contain, that article, and he issued a warehouse receipt stating the number of barrels, describing them as "Portland Cement" and giving the marks thereon. The receipt was pledged as security for a loan. The barrels did not contain "Portland Cement," but a worthless material. In an action to recover damages, held, that no warranty as to the contents of the barrels could be implied from the language of the receipt, which was merely descriptive, and that the defendant was merely warranted that the number of barrels stated were delivered, that they were marked as stated, and that there was nothing in their appearance which would reasonably lead to any suspicion that the contents

were not what was represented, and an action was not maintainable. *Dean v. Driggs*, 137 N. Y. 274.

Distinguishing *Meyer v. Peck*, 28 N. Y. 590; *Armour v. M. C. R. Co.*, 65 id. 111; *Miller v. H. & St. John R. Co.*, 90 id. 439; *First Nat. Bank v. Dean*, 137 id. 110, citing *Sears v. Windgate*, 3 Allen, 103, 107; *Hastings v. Pepper*, 11 Pick. 41; *Nelson v. Woodruff*, 1 Black. (U. S.) 156, 160; *Warden v. Greer*, 6 Watts. 424; *Hale v. Milldock Co.*, 23 Wis. 276; 29 id. 482.

See *Brook v. Railway Co.*, 108 Pa. St. 529; *R. Co. v. Larned*, 103 Ill. 293; *Savings Bank v. R. Co.*, 20 Kas. 519; see, also, *Williams v. R. Co.*, 93 N. C. 42; *National Bank v. Railroad Co.*, 44 Minn. 224.

See "Agency," p. 7, and cases cited.

Failure to present claim after notice from executor prevents creditor from asserting his claim after distribution. *Miller v. Morton*, 89 Hun, 574.

Plaintiff executing individual note without reading, in belief that it was joint, estopped to deny its true character. *Jaycox v. Trembly*, 42 App. Div. 416.

Owner was not estopped to petition for removal of encroachments, because she did not object while they were building. *Ackerman v. True*, 71 App. Div. 143.

That plaintiff was able and had an opportunity to read the instrument was no defense, where he was induced to rely on misrepresentations as to its contents. *Tillis v. Austin*, 117 Ala. 262.

See, also, "Bills and Notes," ante.

Failure of creditors to interfere in fraudulent attachment suits of other creditors held not to act as an estoppel in suits to compel the latter to account. *Glasser v. Meyrovitz*, 119 Ala. 152.

Where owner allowed railroad to spend large sums upon constructing and improving its road on his land without protest, he was estopped to bring ejectment. *Hendrix v. Southern R. Co.*, 130 Ala. 205.

By allowing her husband to invest her funds in his name, a wife was estopped to set up her rights as against those who gave credit in reliance thereon. *George Taylor Commission Co. v. Bell*, 62 Ark. 26.

While, of two innocent parties, he whose negligence causes loss must suffer, yet, where the plaintiff, though innocent, and not negligent, has not suffered loss, because his consideration was a pre-existing debt, he cannot claim the property of the innocent and negligent party. *Macdonald v. Cool*, 134 Cal. 502.

Where goods levied upon were left in such a condition as to give the custodian the appearance of ownership, the sheriff was estopped to set up his rights as against those who had given money on the faith thereof. *Gottlieb v. Barton*, 13 Colo. App. 147.

Where there is no confusion of the goods and no fraudulent intent,

but a warning that **certain goods** are not a wife's, the husband is not estopped from instituting a suit against the **constable for wrongful levy** by the mere fact that his goods were kept in her store. *Norwalk v. Ireland*, 68 Conn. 1.

By executing a deed in escrow and having it recorded without anything on the record to show its non-delivery, a grantor estops himself from setting up the facts as against an innocent purchaser. *Equitable Mortgage Co. v. Butler*, 105 Ga. 555.

Where the maker of a note signed a renewal thereof, which recited that the fertilizer for which the note was given "had the guaranteed analysis on each sack as required by law" and that he "purchased on his own judgment, waiving all guarantee as to its effect upon the crops," with knowledge that crops had failed under it and without making any inquiry as to the analysis, he was estopped to set up the facts as a defense to the note. *Montford v. Americus Guano Co.*, 108 Ga. 12.

Woman, by letting her property stand in the name of her husband, was estopped to withdraw it as against his creditors, who had given credit on the faith thereof. *Hauk v. Van Ingen*, 196 Ill. 20; aff'g s. c., 97 Ill. App. 642.

By allowing another to appear to be the owner, a party is estopped to assert the truth as against innocent purchasers. *Delfosse v. Metropolitan Nat. Bank*, 98 Ill. App. 123.

Mere consent that husband should have possession of wife's stock of goods were held insufficient to estop her from showing invalidity of unauthorized mortgage by him. *Kiefer v. Klinsick*, 144 Ind. 46.

Obligor must not rely solely on the statements of the other party as to the contents of a contract. If he is negligent in learning its purport, he cannot assert, against an innocent party, that he was induced to sign by fraud or misrepresentation. *McCoy v. Gouvion*, 102 Ky. 386.

See, also, *Engstad v. Syverson*, 72 Minn. 188.

Ability to read a contract and failure to do so precludes objections to it, in the absence of fraudulent inducement to sign. *Bonnot v. Newman*, 108 Iowa, 158.

*James v. Dalbey*, 107 Iowa, 463; *Olsen v. Fish*, 75 Minn. 228.

Where no credit is given husband on appearance of ownership presented by possession of wife's property, she may show her title. *McAdow v. Hassard*, 58 Kan. 171.

Failure to protest against creation of nuisance did not bar suit for damages. *Louisville &c. R. Co. v. Walton*, (Ky.) 67 S. W. Rep. 988.

See, also, *Matthews v. Stillwater Gas. Co.*, 63 Minn. 493.

Owner of stock certificate, purloined and pledged by cashier of bank

where it had been deposited for safe keeping, recovered from pledgee. *O'Herron v. Gray*, 168 Mass. 573.

Owner of a piano leased it to the proprietor of a piano salesroom, who sold it. Owner recovered from purchaser. *Oliver Ditson Co. v. Bates*, (Mass.) 63 N. E. Rep. 908.

Where chattel mortgagee or conditional vendee withholds his mortgage from the record so as not to effect the mortgagor's or vendor's credit, he cannot set up his rights as against creditors' dealing on the faith of the apparent clear title to the goods. *Clark v. Richards Lumber Co.*, 68 Minn. 282.

Stockholder not allowed to set up invalidity of amendment of charter increasing stock, as against creditor relying on increase made pursuant thereto. *Palmer v. Bank of Zumbrota*, 72 Minn. 266.

It is not negligence to have non-negotiable instruments, indorsed in blank, in a drawer where they are accessible. *Young v. Brewster*, 62 Mo. App. 628.

By conferring an apparent title on another, an owner is precluded from asserting his right against one who has dealt on the faith of the appearances. *Walters v. Tielkemeyer*, 72 Mo. App. 371.

Maker of a note for a certain amount was held negligent in allowing the face amount to be reduced to the amount of the intended obligation, by the indorsement in pencil of a credit, which was subsequently erased. *Bank of Billings v. Wade*, 73 Mo. App. 558.

A mortgagor who had the right to collect insurance money was not allowed to defend a suit for the mortgage debt on the ground that the mortgagee had failed to collect it. *Breckinridge v. White*, (Mo. App.) 67 S. W. Rep. 715.

One who assisted a dealer in delivering to a purchaser cattle, among which one of his own had been mixed without his knowledge, was allowed to recover of the purchaser. *Bright v. Miller*, (Mo. App.) 68 S. W. Rep. 1061.

Failure to examine corporate books before giving credit, held not to prevent a creditor from claiming fraudulent overvaluation of property. *Gilkie &c. Co. v. Dawson &c. Gas Co.*, 46 Neb. 333.

Plaintiff is not bound by his representations, where no action in reliance upon them was intended or naturally to be expected. *Laing v. Evans*, (Neb.) 90 N. W. Rep. 246.

See, also, *State v. Bank of Commerce*, 61 Neb. 22.

Where one is requested to sign his name for the purpose of exhibiting his signature, he cannot be charged with negligence in failing to see what else was on the paper he was signing. *Alexander v. Brogley*, 63 N. J. L. 307; aff'g s. c., 62 id. 584.

Maker of a note, concluding that the original payee still owned the note from the fact that he had the interest coupons, which were in fact sent to him by the indorsee for collection of interest, paid the principal of the note to such payee. Indorsee was not estopped to recover from maker. *Hollinshead v. Stuart*, 8 N. D. 35; s. c., 42 L. R. A. 659.

Grantor, who delivered deed in escrow and put grantee in possession, was estopped to set up non-delivery of the deed against innocent purchaser from the grantee, who obtained possession of the deed from the holder and exhibited it as evidence of title. *Shurtz v. Colvin*, 55 Oh. St. 274.

One who innocently believed he had title and induced another to advance money on the faith thereof, was not allowed to assert, against the latter, a subsequently acquired interest. *Keenan v. Van Dusen*, 19 Pa. Co. Ct. 282.

Delivering to another the documentary evidences of title estops the owner to assert his rights against one dealing on the faith of the appearance of title or authority so created. *Adler v. Corning & Co.*, 26 Pitts. L. J. (N. S.) 244.

By permitting the mortgaged property to be sacrificed for less than its market value, a mortgagee lost the right to recover a deficiency. *Island &c. Bank v. Galvin*, 20 R. I. 158.

Where one of two innocent parties must suffer, he whose acts caused the loss should bear it. *Persons v. Van Tassel*, (S. D.) 89 N. W. Rep. 861.

See also *Maher v. Title Guarantee &c. Co.*, 95 Ill. App. 365. *Russell v. American &c., Teleph. Co.*, 180 Mass. 467; *Leonard v. Marshall*, 82 Fed. Rep. 396.

An agent with funds to invest, by an unrecorded assignment gave his principal a mortgage held by him as mortgagee. The land, afterwards acquired by the agent and sold under execution against him, was held to be free from the principal's claim in the hands of the vendee of the execution purchaser. *Persons v. Van Tassel*, (S. D.) 89 N. W. Rep. 861.

Failure to object to proceedings for an extension, by a city, for eight years, held a bar to subsequent action. *State v. Pierre*, (S. D.) 90 N. W. Rep. 1047.

Stockholders, who had received dividends, were not allowed to defend a suit for its debts on the ground that the stock was invalid. *Latimer v. Bard*, 76 Fed. Rep. 536.

Drawer of check accepted payee's statement that the check was lost and paid him the money, whereas plaintiff had received the check for value from the payee with the request not to present it at present. Plaintiff recovered. *Andrus v. Bradley*, 102 Fed. Rep. 54.

Corporate officer, notified that all debts of the corporation had been

paid by stock, and joining in direction for distribution of remaining stock in silence as to a claim of his own against it, was estopped to set it up. *Pyper v. Salt Lake Amusement Asso.*, 20 Utah, 9.

Wife estopped to assert wrongful record of conveyance to husband after silence of four years. *Murphy v. Ganey*, (Utah) 66 Pac. Rep. 190.

Delay of 18 months in having date in recorded deed corrected, estopped owner to assert his rights against subsequent grantee of record. *Mercantile &c. Bank v. Brown*, 96 Va. 614.

Delay of seven months in learning the facts as to performance of conditions of an escrow, estopped owner to assert his rights, as against innocent purchaser from grantee, who surreptitiously obtained and recorded the deed. *McConnell v. Rowland*, 48 W. Va. 276.

Failure to speak does not create an estoppel, where the information is equally open to both parties. *Cawtley v. Morgan*, 51 W. Va. 304.











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